

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34040
Docket No. MW-33983
00-3-97-3-505**

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway Company (former
(Atchison, Topeka and Santa Fe Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly disqualified Mr. J. B. Martin from the Group 17 Specialized Surfacing Gang on November 2, 1995 and failed to provide him with a formal investigation as requested (System File 120-8-9585/01-02-AA ATS).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be reinstated to the Group 17 Specialized Surfacing Gang with seniority and all other rights unimpaired and he shall be compensated for all wage loss suffered beginning November 6, 1995 and continuing.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant was the Foreman on Specialized Surfacing Gang 27403 from May 1 to November 3, 1995. On November 2 the Claimant was advised that effective with the close of business on November 3 he was disqualified as a Foreman and he was, as of November 6, 1995, to exercise his seniority.

On November 20, 1995, the Claimant allegedly faxed a request to a R. Jonto requesting an Investigation. Supposedly, the Claimant also sent one copy of the fax to a Tom Jones by Registered Mail, but there never was any evidence of this.

When the Claimant heard nothing about his request for an Investigation, the Organization filed a claim contending the time had passed under the Rule to grant the Claimant's request for an Investigation, thus the Carrier had no alternative but to return the Claimant to his Foreman's position and pay him the difference from what he was earning on the lower paid job and what he would have earned had he not been disqualified.

The above facts thus became an unresolved claim that has been advanced to the Board for adjudication.

The Specialized Surface Gang is governed by a Special Agreement which clearly states that:

"When the provisions of this Agreement conflict with the rules of the Schedule Agreement, this Agreement shall govern, otherwise, the Schedule Agreement shall apply to its terms."

In dispute is the following language of the Special Agreement applicable to the Special Surfacing Gang:

"During the first one hundred twenty (120) working days, the provisions of Rule 8 will not apply to an employee who is assigned to Specialized Surfacing Gangs. . . ."

Rule 8 is the "Promotions, Assignments and Displacement" Rule and does provide that employees disqualified after a specific number of days may request an Investigation.

As is evident, Rule 8 comes into play only when an individual is disqualified after working 120 days.

As is obvious, May 1 through November 3, 1995, is a period in excess of 120 working days. However, during this period the Claimant was off on vacation for 56 hours and was authorized two days paid bereavement leave, plus there were five travel days.

The Organization argued that the 1.25 multiplier should be used in computing working days because the Claimant's workweek was compressed to four ten hour days, and thus cited Rule 15(m) in support.

Rule 15(m), however, confers only accreditation for vacation purposes. Specifically, it reads as follows:

"Employees of road gangs while assigned to a compressed work week will be credited for vacation qualifying purposes, 1.25 days for each day on which service is performed on a work day during the compressed work week. Employees who observe their vacations while assigned to a compressed work week will be charged with 1.25 days for each work day while on vacation during the compressed work week. (Emphasis added)"

The Carrier's position is that "working days" means days the Claimant actually worked as a Foreman. It was not intended to relate to days the Claimant was paid for not working, such as vacation and bereavement days.

The Board believes the Carrier's position regarding "working days" is better reasoned because an employee cannot gain experience or display his expertise while off on vacation or bereavement leave. This can only be done while on the job.

Thus, pursuant to the explicit provisions of the Agreement pertaining to Specialized Surfacing Gangs, the Carrier can disqualify an employee from a position in the Specialized Surfacing Gang for any reason prior to 120 working days without that individual having recourse to the Investigation procedures. This is a harsh and compassion less application of the Rules. The Board has consistently stated that arbitrators are bound by the Railway Labor Act to interpret and apply contract language. The Act does not permit an arbitrator to indulge by going beyond that

authority, and the Board has no intention to do so here. However, it would not have jeopardized the Carrier's position to simply put in writing why an employee who held a position for six months was suddenly, two days shy of a 120 day working qualification period, disqualified therefrom.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of May, 2000.