

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34983
Docket No. MW-32350
00-3-95-3-193**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly disqualified Mr. M.A. Hovey on July 23, 1993 as a Class 2 Machine operator following his attempt to displace junior Class 2 Machine Operator K. Watson on a backhoe position headquartered at Gang Mills, New York on July 20, 1993 (System Docket MW 3282).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant (a) shall be immediately allowed to displace onto the position in question, (b) shall be compensated eight (8) hours' pay per day at the Class 2 Machine Operator's rate and paid all overtime earned by the junior employee at the time and one-half rate, (c) shall be paid the applicable mileage rate for sixty (60) miles per day and (d) shall be paid for the travel time expended [two (2) hours] each day he was required to travel to his assignment at Hornell as a result of his being improperly disqualified and denied the displacement at Gang Mills, New York beginning July 23, 1993 and continuing until the violation ceases.”**

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 material facts that led to this claim are not in dispute. On July 20, 1993, the Claimant attempted to displace onto a Class 2 Machine (Backhoe) Operator position held by a junior employee. This position was under the supervision of Track Supervisor R. Robertson.

The Claimant presented Supervisor Robertson with an MW200A card that purported to demonstrate that he had been qualified on the backhoe. However, it was not clear to Supervisor Robertson whether the Claimant had been qualified on the backhoe or on the auto-trucks, the machine immediately above backhoe on the MW200A card. Mr. Robertson therefore decided to give the Claimant a test on the backhoe.

During the test, the Claimant changed seven ties in three hours and seven minutes. Supervisor Robertson considered this too slow and he refused to allow the Claimant to displace to the Class 2 Machine Operator position.

A representative of the Organization intervened on the Claimant's behalf and Supervisor Robertson agreed to allow him a second test on the backhoe. This test was conducted on July 22, 1993. Supervisor Robertson concluded that the Claimant's performance was again too slow and he refused to allow him to displace onto the Class 2 Machine Operator's position. The Claimant then displaced to a lower rated Class 3 Machine Operator position an additional 30 miles from his residence.

The Organization submitted a claim on behalf of the Claimant for the earnings of the position he was not allowed to displace to and the travel expenses he incurred as a result of being required to displace to another position farther from his residence. It is the Organization's position that the Claimant was sufficiently qualified to perform all the duties being performed by the junior employee he wished to displace.

According to the Organization, Supervisor Robertson disqualified the Claimant because he held a bias against him.

Rule 3, Section 1, of the BMW-Conrail Agreement provides that seniority shall govern the assignment of employees to positions under the Agreement provided that qualifications are sufficient. Rule 3, Section 2, states that an employee who seeks to exercise his/her seniority may be required to give a reasonable and practical demonstration of his/her qualification to perform the duties of the position.

The Board agrees with the Carrier that it is unclear from the MW200A card that the Claimant proffered Track Supervisor Robertson whether he had been qualified on the "backhoe" or on the "auto-trucks." Therefore, Rule 3, Section 2, gave Supervisor Robertson the right to require the Claimant to give a reasonable and practical demonstration of his qualifications to operate a backhoe.

At issue here is whether the Organization has proven that the Carrier acted in an arbitrary, capricious, unreasonable or discriminatory manner when it disqualified the Claimant from displacing onto a Class 2 Machine Operator's position following two tests administered him on July 20 and 22, 1993. The Organization has not sustained that burden, in the opinion of the Board.

The Organization avers that Track Supervisor Robertson disqualified the Claimant because he was biased against him. It cites two incidents where they had an argument. However, this, by itself, is not evidence of bias. The Organization has not submitted any additional evidence to support its assertion that Supervisor Robertson disqualified the Claimant because of his bias toward him. Moreover, the Claimant did not take any exception to the two tests given him on the backhoe at the time they were administered.

For all the foregoing reasons, the Board finds that the Organization has not demonstrated to our satisfaction that the Carrier was arbitrary, capricious or unreasonable when it disqualified the Claimant from displacing onto a Class 2 Machine Operator's position in July 1993. The claim is denied as a result.

AWARD

Claim denied.

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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 20th day of September, 2000.