

CORRECTED

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35021
Docket No. MW-34957
00-3-98-3-729**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to reinstate Claimant D.D. Murphy to the position of bus driver on SPG Gang 6XC4 following the cancellation of a disciplinary investigation on September 29, 1997 [System File SPG-TC-1158/12(97-2588) CSX].**
- (2) Claimant D.D. Murphy shall ‘*** be reinstated on the bus driver position and made whole for all lost wages (overtime).’ in addition, “This claim is for seventy seven (77) hours, at SPG Class “B” Machine Operator rate of pay, account of the aforementioned rule violations. Please make arrangements for payment and advise me as to the pay period when said payment will be made.”**

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.

This case involves the disqualification of the Claimant from his responsibilities as a Bus Driver. While driving a bus for Gang 6XC4 on August 21, 1997, the Claimant was involved in an accident, for which he received a vehicular citation.

By letter dated September 3, 1997, the Claimant was removed from service as a Bus Driver and was instructed to attend a Hearing concerning his improper operation of the bus. However, the notice was not served in a timely manner and the Claimant was subsequently notified that the Investigation was canceled.

The Claimant was not returned to his former regularly assigned position as a Bus Driver. Instead, he was disqualified from that position. The Organization protested the disqualification, arguing that the cancellation of the disciplinary Investigation resulted in the exoneration of the Claimant. The Organization contends that the Carrier was contractually obligated under Rule 39 to reinstate the Claimant to his Bus Driver position and to compensate him for all wage loss suffered. The Carrier should not now be permitted to assert that the Claimant was disqualified from his regular Bus Driver assignment when in reality the action was disciplinary in nature.

In addition, the Organization argues that, even if the Carrier properly considered this matter as a disqualification, the action was taken without any rational basis. The Carrier has the burden of demonstrating that its action was justified. Here, the Organization contends that the Carrier's reliance on a single traffic citation hardly provides sufficient reason to impose a disqualification upon the Claimant.

The Carrier contends that the mere fact that it initiated and thereafter canceled a disciplinary Investigation in the instant case does not preclude management from also disqualifying an employee where the circumstances so dictate. The Carrier submits that it properly removed the Claimant from the Bus Driver position after he caused an accident while driving a bus full of Carrier employees. The Carrier asserts that, had it allowed the Claimant to continue driving, it would have jeopardized the safety of its employees and the public. The Carrier further argues that the Claimant's disqualification under these circumstances hardly constitutes an irrational or unreasonable decision. Moreover, if the Claimant believed that he was treated unfairly, he could have requested an Unjust Treatment Hearing in accordance with Rule 39, Section 4. Because he did not do so, this claim must be denied.

As a general matter, the Board has repeatedly held that disqualification and discipline differ in form and substance. An employee against whom disciplinary charges are preferred is afforded the protections of Rule 39. These include a fair and impartial Hearing and all the attendant procedural safeguards. Disqualification, on the other hand, is a decision of management based on the employee's fitness and ability to perform the job. As the action pertains to the competence and qualification of the employee, it is considered non-disciplinary in nature. Disqualification determinations do not require a Hearing and may not be disturbed by the Board unless it appears that the decision was arbitrary or capricious. See Second Division Award 11528, Third Division Awards 17293, 20045, 21596 and 29307, as well as Fourth Division Award 3260.

The characterization of the action as "disciplinary" or "non-disciplinary" determines whether the Carrier must comply with the Agreement's Hearing procedures before imposing the measure. In this case, our task in resolving whether the Claimant's removal from his assigned Bus Driver position was disciplinary or non-disciplinary is made easier by the fact that the Carrier concededly cast the action as disciplinary when it initiated a formal Investigation of the matter. Having brought charges against the Claimant under the discipline Rule, the Carrier is estopped from contending that it withheld the Claimant from his Bus Driver assignment as a disqualification.

We reviewed the precedent Awards cited by the Carrier. None of the cited Awards permit the Carrier to pursue both disciplinary and disqualification avenues. While we are cognizant of the Carrier's safety concerns, the fact remains that the Carrier elected to exercise its right to withhold the Claimant from his Bus Driver position under the terms of the disciplinary provisions of Rule 39. As it turned out, the Carrier's charges were untimely initiated and the disciplinary Investigation was canceled. The Carrier was thereby contractually obligated to reinstate the Claimant to his Bus Driver position and to compensate him for lost earnings.

The Carrier also argued that the onus was on the Claimant to file a claim under the provisions of Rule 39, Section 5, which requires the filing of written request by employees who consider themselves to be unjustly treated. That argument was rejected in a similar case in which an employee's "disqualification" was deemed disciplinary in nature. As in Third Division Award 26999, we conclude that the Claimant did not forfeit his right to relief by not requesting an Unjust Treatment Hearing.

The final issue centers on remedy. The Organization seeks a total of 77 hours payment for the Claimant as a result of his improper disqualification. The total number of

hours is based on the amount of overtime allegedly earned by E. B. Capps, the employee who was assigned to the Bus Driver position following the Claimant's disqualification.

The Carrier argues that it has been decided that compensation for time not worked has been at the straight time rate and not the punitive rate. See Third Division Award 13191. It maintains that overtime pay is earned only in instances where work is actually performed. Recent decisions of the Third Division, however, have followed the logic advanced by the Organization, which asserts that the employee should be made whole through compensation at the overtime rate for loss of the overtime work opportunity. See Third Division Awards 31579, 31590 and 33440. Award 33440 involves the same parties as in the instant case and therefore serves as precedent that should be followed when the same issue is presented again.

Accordingly, we find that the Claimant is entitled to be compensated for the actual loss incurred due to the proven Agreement violation. In this case, the Claimant was deprived of overtime pay. Therefore, the measure of his damages is overtime pay for the overtime hours actually worked by E. B. Capps on the Bus Driver position, less any overtime performed by the Claimant during the relevant time period.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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