

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35640
Docket No. MW-35766
01-3-99-3-748**

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The disciplinary disqualification of Track Foreman Rose A. Wimmer on May 29, 1998 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File UJH-02-98/8-00355 CMP).
- (2) The Claimant shall now be allowed “. . . reinstatement of her foreman’s seniority, as well as all wages lost, including, but not limited to straight time, overtime, paid and non-paid allowances and safety incentives, flex time, health & welfare benefits, and any and all other benefits to which entitled, but lost as a result of Carrier’s arbitrary and capricious disqualification of Ms. Wimmer from the position of Section Foreman. We also make claim to payment of interest in a judicial amount with respect to the monetary portion of this claim until final adjudication. ***”

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 facts giving rise to this claim are not in material dispute. The record shows that the Claimant, who had been furloughed from the Track Department and working as a set up Machinist in the Cudahy Shops, returned to the Track Department on April 4, 1998, as an Assistant Foreman on the Pro-switch crew. On April 6, 1998, the Carrier issued bulletins for two Foreman vacancies, one in the Pro-switch crew and the other as Section Foreman at Glendale, Wisconsin. The Claimant had not previously established Foreman seniority, but met the other requisite qualifications to bid, *i.e.*, she was qualified on the Carrier Operating Rules and FRA Track Safety Standards and possessed a valid commercial drivers license. She was the successful bidder on the Glendale Section Foreman vacancy, which had been caused by the medical leave of the former incumbent. Beginning April 22, 1998, she was assigned thereto and awarded the position by Track Department Bulletin SO-124A, dated April 29, 1998. Because the Claimant had no prior Foreman seniority and her assignment was a promotion, she was covered by the provisions of Rules 6 and 7 of the controlling Agreement, reading in pertinent part as follows:

"RULE 6
PROMOTION

- (a) Promotion shall be based on ability and seniority; ability being sufficient, seniority shall prevail, the Management to be the judge, subject to appeal.
- (b) Employees are entitled to promotion only on the district and in the sub- department over which their seniority rights prevail.

RULE 7 - FAILING TO QUALIFY

An employee accepting promotion will be given a fair chance to demonstrate his ability to meet the practical requirements of the position, and failing to qualify within thirty (30) calendar days shall return to his former position.

An employee removed from a position per the above will be given notice in writing of reason for removal. This notice will include advisement that the employee will be entitled to a hearing pursuant to the provisions of Rule 18. An employee who desires a hearing will advise the designated Carrier officer in writing within twenty (20) days of receiving such written notice.

An employee who considers himself unfairly disqualified by the hearing decision shall have the right of appeal. Appeals will be handled in accordance with Rule 47.

An employee promoted to a position for which not yet qualified shall if disqualified return to his former position. In the event his former position has been filled, the employees affected by this return will be governed in the same manner.

If his former position has been abolished or the position was secured by a senior employee through the exercise of seniority in accordance with provisions of Rule 9, the disqualified employee will be governed by provisions of Rule 9."

It is not disputed that after the Claimant had been in the Section Foreman's position at Glendale only 11 work days, the former incumbent of that position, D. Hendricks returned early from his medical leave. Hendricks exercised his greater seniority to displace the Claimant from the Section Foreman job, effective May 11, 1998. The record does not indicate what position she held after that, but it does show that she had a discussion with her immediate supervisor, Track Maintenance Supervisor Poeschel, concerning the consequences of the displacement and consequent curtailment of her Rule 7 qualifying opportunity. Thereafter, under date of May 29, 1998, Poeschel sent the Claimant the following letter:

"This will confirm verbal advice that it has been determined that, at the present time, due to the lack of sufficient time to properly evaluate your job performance, you do not have the required ability and knowledge needed to perform the duties for the position of foreman."

The Claimant made a timely appeal of that decision, claiming unjust treatment and requesting a Hearing in accordance with Rule 18. The Carrier subsequently issued

a determination that the Claimant had not been unjustly treated and that her "disqualification" was in accordance with the requirements of the Agreement. Following a careful review of the uncontested facts and the controlling contract provisions we disagree with the Carrier's determinations. The facts establish not only that the Claimant's trial period under Rule 7 was cut off by her intervening displacement, but also that Poeschel never observed her performance in the Section Foreman job and based his decision that she lacked ability and knowledge entirely on hearsay and prejudgement. These proven violations of the letter and spirit of Rule 7 were compounded by Track Maintenance Supervisor Poeschel's blatant failure to include in the purported "disqualification" notice of May 29, 1998 any mention of the Claimant's entitlement to a Hearing pursuant to the provisions of Rule 18.

We find that notwithstanding the inadequacy of the May 29, 1998 notification in regard to a right to a Rule 18 Hearing, the Claimant's rights thereunder were in fact fully vindicated in the extensive investigation held on the property in this matter. We do hold that she was unfairly treated when Track Supervisor Poeschel declared her "disqualified" from the Glendale Section Foreman position without providing her with a "fair chance to demonstrate [her] ability to meet the practical requirements of the position." The Carrier's purported disqualification of this Claimant on May 29, 1998 was unjust and cannot be condoned precisely because the displacement cut off her qualifying period before her Supervisor ever took any steps to objectively and fairly evaluate her performance. By the same token, however, because of that displacement she never did demonstrate that she was qualified under Rule 7. Therefore, she has no valid claim to a Foreman's seniority date based on that truncated episode and the appropriate remedy for the proven violations is rescission of the May 29, 1998 disqualification letter and expungement of all reference thereto from her personnel file.

AWARD

Claim sustained in accordance with the Findings.

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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 28th day of August, 2001.