

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35727
Docket No. MW-34916
01-3-98-3-642**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(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. G. W. Babcock as a Class 1 Torsion Beam Operator under date of September 27, 1996 (System Docket MW-4691).**
- (2) As a consequence of the violation referred to in Part (1) above, the disqualification shall be rescinded, the Claimant shall be entitled to Class 1 Operator rights and seniority and he shall be compensated for all wage loss suffered."**

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.

A preliminary issue exists concerning the processing of the present dispute. In particular, the Carrier asserts that the Organization sought to include certain written

correspondence in the record after the Senior Director's denial letter. The Carrier therefore maintains that the claim is procedurally defective because the Organization failed to handle the claim in the usual manner on the property. The Organization denies that any such procedural impropriety occurred.

Arbitral precedent exists that no procedural error occurred. Based on this precedent, a recent Third Division Award 33998 addressed the matter:

"The Carrier also objected to the acceptance as part of the record of correspondence from the Organization written after the Senior Director's denial letter following conference, contending that the record was closed with such letter. This is not the generally accepted view. Rather, the cut-off for exchange of information occurs when a party files a Notice of Intent to file a dispute with the Board."

In the present dispute, the Carrier identified the letter dated December 30, 1997 as improper because the letter postdated the denial letter from the Senior Director. A careful review of the record, however, substantiates that the December 30, 1997 letter predated the Organization's Notice of Intent to file the dispute with the Board. As a result, the procedural argument of the Carrier lacks persuasiveness.

With respect to the merits of the dispute, the record indicates that the parties disagree about the Claimant's status as a Class 1 Torsion Beam Operator. Rule 3 (Selection of Positions) provides, in pertinent part, that:

"Section 2. Qualifications for positions.

In making application for an advertised position or vacancy, or in the exercise of seniority, an employee will be permitted, on written request, or may be required, to give a reasonable, practical demonstration of his qualifications to perform the duties of the position.

* * *

Section 5. Failure to qualify--Advertised position.

An employee failing to qualify for a position within thirty (30) days will not acquire seniority dating on the position for which he failed to qualify and will,

within five (5) working days, return to his former position unless it has been abolished or filled by a senior employee, in which event he may exercise seniority.”

In the present case, the Organization requested and the Carrier approved an additional 30 days for the Claimant to qualify to operate the referenced equipment. The Carrier subsequently failed to disqualify the Claimant within the required additional 30 days. Specifically, the Carrier awarded the Claimant the Class 1 Operator position on April 15, 1996. The Carrier found that the Claimant failed to qualify as of May 14, 1996. In a letter dated May 20, 1996, the Organization requested that the Carrier extend the period for the Claimant to qualify. On June 4, 1996, the Carrier granted the extension for an additional 30 days. In a letter dated September 27, 1996, the Carrier subsequently disqualified the Claimant as of September 16, 1996. This notification therefore did not occur within the required 30 days.

In the absence of timely notification of the disqualification of the Claimant by the Carrier, Rule 3 required the Carrier to deem the Claimant to be qualified for the position. The record omits any basis to ignore, negate, or supersede this requirement under the special circumstances set forth in the record.

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 24th day of October, 2001.