Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36562
Docket No. MW-34252
03-3-97-3-837

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier improperly disqualified Mr. T. L. Tate from a traveling mechanic's position on April 21, 1995 (System File T-D-986-H/MWB 95-10-05AC BNR).

2. As a consequence of the violation referred to in Part (1) above, the Claimant shall '... receive his April 12, 1995 Roadway Equipment Repair Subdepartment Rank B, C and D seniority dates, that Claimant be placed upon this Rank B position immediately and that he be made whole for any and all losses he has incurred since his unjust disqualification on April 21, including the differences in rates of pay beginning April 21, between that of Rank B Maintainer and that which he receives until he is placed upon the position. We further request that Claimant receive pay equal to any and all overtime worked by any employe assigned by any means to work this position beginning April 21, 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.

On March 29, 1995, the Carrier advertised a Rank B Traveling Mechanic position, with the following requirements:

> "Applicant must read and understand electric - hydraulic and pneumatic diagrams and schematics on work equipment machines and have working knowledge of gas and diesel engines and hydraulics with sufficient skill to repair. Applicant must also be proficient in electrical and gas welding."

The Claimant was awarded the position on April 12, 1995, with a designated report date of April 24, 1995.

On April 21, 1995, Work Equipment Supervisor D. A. Brady interviewed the Claimant and asked the Claimant several questions concerning the Claimant's knowledge of electrical, hydraulic and pneumatic schematics. According to the Carrier, the Claimant's responses to Brady's questions showed that the Claimant had very little working knowledge about schematics. Brady then required the Claimant to perform various types of welds. According to the Carrier, the Claimant lacked requisite welding skills.

By letter dated April 24, 1995, Work Equipment Supervisor Brady advised the Claimant that "[e]ffective immediately" the Claimant was disqualified from the Rank B Traveling Mechanic's position because "[y]ou have failed to satisfactory [sic] demonstrate sufficient welding skills and skills in reading and understanding schematics diagrams to effectively diagnosis [sic] equipment problems and make adequate equipment repairs."

An Unjust Treatment Hearing was requested and held, which resulted in a determination dated May 30, 1995 that the Claimant did not demonstrate that he was unjustly disqualified. This claim followed.

RULE 23. FAILURE TO QUALIFY provides, in pertinent part:

> "A. Employes awarded bulletined positions, or employes securing positions through exercise of seniority, in a class in which not yet qualified, will not be disqualified for lack of ability to do such work after a period of thirty (30) calendar days thereon. Employes will be given reasonable opportunity in their seniority order to qualify for such work as their seniority may entitle them to, without additional expense to the Company."

In Third Division Award 35808 the Board held:

> "Qualification, fitness and ability to perform a job are determinations to be made by the Carrier, subject only to limited review by the Board as to whether the Carrier was arbitrary in its determination."

Thus, great deference must be given to a carrier's determination that an employee is not qualified to perform the duties of a position.

However, notwithstanding the Carrier's latitude to make determinations concerning qualifications, Rule 23(A) is clear - "[e]mployes will be given reasonable opportunity in their seniority order to qualify for such work. . . ." The Claimant was given no opportunity to qualify for the Traveling Mechanic's position. The Claimant was awarded the position on April 12 with an April 24, 1995 report date. The Claimant was then given a "pre-test" on April 21, 1995 by Work Equipment Supervisor Brady, who determined prior to the Claimant's report date that the Claimant was not qualified for the position. The Claimant was notified that he was disqualified before he was ". . . given reasonable opportunity . . . to qualify. . . ." While great deference must be given to the Carrier's determinations concerning qualifications, the Rule requires that the Claimant be ". . . given a reasonable opportunity . . . to qualify. . . ." The Claimant was not given that opportunity.

This is not a case where the record clearly shows that the employee could never qualify for the position had he been given a reasonable opportunity to do so. While perhaps not possessing all of the skills necessary to do the job prior to commencement of his duties, the record does show that the Claimant was a long time Machine Operator; he performed periodic maintenance on the Carrier's equipment; he observed other Mechanics perform maintenance on equipment; and he had some welding skills. Perhaps after a reasonable period of time, the Claimant would not have been able to demonstrate that he had sufficient skills to perform the job. However, the point here is that Rule 23(A) clearly requires that the Claimant at least ". . . be given reasonable opportunity . . . to qualify. . . ." The Claimant was not afforded that opportunity. In this case, under these facts, we find that it was arbitrary for the Carrier to not give the Claimant that required opportunity. The Carrier therefore violated Rule 23(A).

Awards cited by the Carrier do not change the result. Third Division Awards 33050, 35408, 35808, 35917 and 35991 involved situations where the employees were disqualified after being given some opportunity to demonstrate qualifications in the position. The Claimant was given no such reasonable opportunity, even though Rule 23(A) requires that he be given that opportunity. Another line of Awards cited by the Carrier addresses the ability of a carrier to determine that an employee needs a specific license to perform a job and disqualifies an employee due to lack or loss of a license. See Third Division Awards 32152, 33913, 35561. The Claimant was not disqualified for those reasons.

We do not know if, given a reasonable opportunity, the Claimant would have been able to demonstrate his qualifications for the Rank B Traveling Mechanic position. Therefore, as a remedy, we shall require - as Rule 23(A) clearly requires - that the Claimant ". . . be given reasonable opportunity . . . to qualify . . ." for the Rank B Traveling Mechanic position. Should the Claimant demonstrate those qualifications after being given such reasonable opportunity, the Claimant shall be given the appropriate seniority and made whole. The Board will retain jurisdiction in the event disputes arise concerning the remedy.

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 16th day of June 2003.

Carrier Members Dissent
To Award No. 36562 (MW-34252)
Referee Edwin H. Benn

The Board's Award seems to be based on the erroneous assumption that the qualification period under Rule 23 is some kind of training period. It is not. The parties have no agreement requiring the Carrier to provide apprenticeships or training programs; instead, Rule 23 requires the employee to prove that he/she possesses the ability to handle the job.

Technical jobs, such as Traveling Mechanic, require the employee to bring to the job certain minimum technical qualifications that generally cannot be acquired in the scant maximum of 30 calendar days provided in Rule 23. Those skills are acquired by employees in advance, on their own, from previous job experience, college courses, or any classes that the Carrier may offer. But the period provided by Rule 23 is for *demonstrating* their ability, not for *acquiring* it.

Rule 23 speaks only of a "reasonable opportunity." What is a reasonable opportunity is case specific, and depends on innumerable variables: complexity of the particular job, available hands-on time for the employee to actually perform the work, availability of a supervisor to observe the employee long enough to reach an informed opinion as to the employees competence, etc. Such variables are one reason why, as the Board has noted in this Award: "[G]reat deference must be given to a Carrier's determination that an employee is not qualified to the duties of a position." (Award p. 3).

In this case, the Claimant was, in fact, given a reasonable opportunity. He was given tasks to perform that involve the core skills of the Traveling Mechanic position. And in each of these skills – which involved the ability to understand electrical, hydraulic, and pneumatic schematics and to perform welding – the Claimant was found to perform unsatisfactorily. Claimant admitted that it would take him more than 30 days to attempt to qualify.

The only reason the Board offers for its decision that the Carrier was "arbitrary" in its disqualification, is that these tests of the Claimant occurred before he reported to the position in question. But there is no requirement in Rule 23 that the employee must report to the job site before he demonstrates his proficiency; there is absolutely no contractual bar to the Carrier's testing the Claimant prior to his reporting for duty, thereby avoiding the waste of time and risk to expensive equipment entailed in sending to the field an employee who lacks even the basic technical knowledge required to function on the job.

Besides lacking a sound contractual basis, the Board's Award contravenes precedent arbitration awards on this subject. Almost 20 years ago, the Organization filed a claim opposing disqualification of a Machine Operator where the Carrier had required pre-qualification through a special training course. The Organization used the same Rule 23 rationale as in the current dispute. But Award #7 of Public Law Board 3460, upheld the concept of pre-qualification prior to actually reporting to the job site, so long as the Carrier published that pre-qualification requirement in the bulletin for the position. In the instant

case, there is no dispute that the Carrier did publish the requirements for certain welding ability and for schematics comprehension. Such is cited at page 2 of the Award.

That precedent has been supported in such later on-property NRAB decisions as Third Division Award 32880, which held that Rule 23 did not require the Carrier to allow the employee to qualify on-the-job, where the Carrier required employees to pass a welding course as a prerequisite to assignment to welder positions, and the claimant had not done so.

Likewise, in Award 35408, the Third Division reaffirmed precedent on the issue of prequalification examination, in a case that is remarkably similar to the instant dispute. That claimant, who had served as a Machine Operator for 21 years, was disqualified from a Traveling Mechanic position without an opportunity to actually perform on the job. When the claimant reported for work, his supervisor, after deciding that the Claimant's background indicated inadequate technical experience, administered an oral exam on interpreting schematics, which the Claimant flunked; so the supervisor decided that the Claimant was not fit to assign to work in the field and therefore disqualified him. Once again the Organization relied on Rule 23 and argued that the Claimant was not given *on-the-job* time in which to qualify. But the Third Division rejected the claim, noting:

> **"Although he operated many different kinds of equipment and participated in everyday maintenance while assigned as a Machine Operator, the required knowledge for a Mechanic is substantially different. Rule 23 is not an apprenticeship term for teaching the basics. It is a trial opportunity, and the candidate must possess the fundamental skills at the time the position is awarded. Because the Claimant was unable to demonstrate that he possessed those skills, he was, by definition, unqualified for the position." (Emphasis added)**

See also Award 35917 involving the same parties.

As other Boards have acknowledged, qualification testing prior to assignment in the field, is not inconsistent with Rule 23. The fairness of the examination itself is not really in dispute in this case; nowhere has the Organization suggested that comprehending schematics and welding skills are not core competencies required of a qualified Mechanic. Rather, the Organization was only arguing that the Claimant must be placed into the field for the testing period. But there is no contractual requirement that the employee be sent out into the field, and risk holding up production as he is discovered to be incompetent at the job of repairing large, expensive pieces of equipment that are key to maintaining production. It is the Organization, not the Carrier, who is being arbitrary here.

The Carrier's position that prior examination is a valid alternative to in-the-field proficiency demonstrations is also supported by innumerable arbitration awards on other railroads having rules similar to Rule 23; see for example, Third Division Awards 29863, 30203, 30531.

As found in many previous Awards, the 30-day period provided in Rule 23 applies to a time period for the employee to demonstrate accommodation to the particular job. Rule 23

does not speak to the prerequisite basic skills which may be required for a position; those are left to the Carrier to establish.

The simple fact is that Claimant was admittedly not qualified on April 21, 1995 when he was given a reasonable opportunity to demonstrate his proficiency. At that time Claimant Tate did demonstrate his inability to read schematics and his deficiency in welding. Such was not a "pre-test". The Majority should have followed its own statement and the precedent of Award 35408 noted on page 3. Since it did not, we dissent.

Paul V. Varga

Martin W. Fingerhut

Bjarne R. Henderson

Michael C. Lesnik

7/25/03

LABOR MEMBER'S RESPONSE
TO
CARRIER MEMBERS' DISSENTING OPINION
TO
AWARD 36562, DOCKET MW-34252
(Referee Benn)

The Majority was correct in its ruling in Award 36562 and nothing present in the Carrier's dissent distracts from the correctness and precedential value of this award.

The Minority begins its dissent by asserting that the Board depicted Rule 23 as a training period. Apparently, the Carrier is attempting to cloud the real issue that was decided by the Board, i.e., a reasonable opportunity to qualify. It is crystal clear that the Claimant was not given a reasonable opportunity. The facts of the record show that the Claimant was awarded the position on April 12, 1995 with a report date of April 24, 1995. After an "interview" by the work equipment supervisor, the Claimant was notified on April 24, 1995 that he was disqualified. It was not a difficult task to conclude that the Claimant was not given a reasonable opportunity to qualify for the position.

Next, the Minority misconstrues the precedent of Award 7 of Public Law Board (PLB) No. 3460. The findings of PLB No. 3460 ultimately held:

> "On balance, Carrier's defense in this dispute cannot be accepted for a number of reasons. First, it is clear that in the bulletin for the position the particular requirements were not specified, thus employees were not put on notice that they had to be a graduate of the training program provided by Canron in order to accept the position or be considered for the position. Second, there is no indication that the training in question was offered on a broad well-known basis to employees throughout the system to that they could, indeed, qualify for future openings on the particular tamper. It was necessary that such requirement be made generally available to employees for Carrier to maintain its right to pick and choose among those who had or had not taken the program without regard to seniority. Thus, the seniority factor indeed must be important and cannot be ignored provided that the qualification opportunity is made available to all employees. There is no indication herein that this was the case. Word of mouth in general is insufficient for such purposes, particularly since the contract provides no such requirement for bidding. Again it must be noted that the Board does not question Carrier's right to establish requirements for a position, nor to make determinations with respect to fitness and ability, however in this instance the Carrier's judgment was faulty. ***"

Clearly, the Board held in the above-cited award that the Carrier has the right to set requirements for a position; however, it must apply its policy in an equitable manner and in ac-

cordance with the seniority provisions of the Agreement. In the case resulting in Award 36562, it simply denied the Claimant a fair chance to qualify for the position in question.

Next, the Carrier attempts to misrepresent the fact related to Award 35408. In that case, the Carrier disqualified the claimant after more than three (3) weeks on the job. Clearly, in that case, the claimant was not disqualified prior to any reasonable opportunity to qualify.

This Board has consistently held that the Carrier is obligated to give its employes an opportunity to qualify for a position in accordance with the clear terms of the Agreement. The Carrier Members' attempt to distort the findings of Award 36562 and Award 7 of PLB No. 3460 is so fundamentally flawed that it deserves to be brought to light by those who read this response. The award is correct and stands as precedent.

Respectfully submitted,

Roy C. Robinson
Labor Member