

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36726
Docket No. MW-36671
03-3-01-3-205**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed and disqualified Machine Operator I. W. Brooks from his assigned burro crane position on the December 14, 1999 Seniority Roster (Carrier’s File 1225297 MPR).**
- (2) As a result of the violation referred to in Part (1) above, the disqualification shall now be removed from Mr. I. W. Brooks’ record and the Carrier shall remove the D.Q. beside Mr. Brooks’ name on the Palestine Division 2600 Roster B Crane.”**

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 Claimant established seniority as a Roadway Machine Operator on October 10, 1975. Pursuant to Bulletin GPAL06336, effective November 12, 1999, the Claimant was awarded the position of Burro Crane Operator on Gang 2563, located in Waco, Texas. The Claimant did not commence work on that assignment until November 22, 1999 because the Carrier had held him on his previous assignment. The Claimant had never operated a burro crane and therefore was required to qualify on the machinery. Machine Operator J. R. Batey assisted him during the qualification process. According to the Organization, Batey told the Claimant that Manager Track Maintenance S. Walker wanted the Claimant to become familiar with the groundwork associated with the burro crane operation before actually operating the crane.

On December 14, 1999, Manager MofW Equipment J. D. Geis arrived at the Claimant's job site for the purpose of testing the Claimant on his ability to operate the burro crane. The Claimant prepared a written account of the procedures and skills he was required to demonstrate to Geis. According to the Claimant, Geis required him to couple and uncouple the crane to and from a freight car and to then pull the crane forward a few feet. According to the Claimant's statement, he was instructed to stop the crane with the independent brake, which he did, and then move the crane forward and bring it to a stop using the air brake.

The Claimant's statement reveals that during the test the crane began to slowly roll backward. The Claimant applied the emergency brake in an attempt to stop the crane in a manner that would not cause any incident or damage, but according to the Carrier, the Claimant did not operate the air brake properly. The statement asserts that Geis told the Claimant to get off the machine and follow him to his vehicle, where Geis disqualified the Claimant both verbally and in writing. According to the Claimant's statement, he refused to sign the disqualification form believing he was "set up" and subjected to "intimidation" and "harassment."

The Organization points out that the December 14, 1999 disqualification took place only 23 days after the Claimant was assigned to the burro crane. The Organization argues that the disqualification was improper under Rules 1, 2, 4 and 10 of the Agreement. The December 14, 1999 disqualification letter signed by Geis reads as follows:

“THIS LETTER IS TO INFORM YOU THAT YOU HAVE BEEN DISQUALIFIED FROM THE POSITION OF MACHINE OPERATOR ON GANG 2563 OPERATING BURRO CRANE MDL 40 CRANE ACCOUNT FAILURE TO SHOW THE ABILITY TO USE TRAIN LINE AIR ABILITY REQUIRED TO OPERATE THIS EQUIPMENT IN A SAFE & EFFICIENT MANNER.

IN ACCORDANCE WITH THE AGREEMENT BETWEEN THE BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES AND THE UNION PACIFIC RAILROAD (FORMER MISSOURI-KANSAS-TEXAS RAILROAD), YOU SHOULD ARRANGE TO EXERCISE YOUR SENIORITY IN ACCORDANCE WITH YOUR AGREEMENT.”

The Organization objects to the Carrier’s decision to disqualify the Claimant from the burro crane for several reasons. First, the Carrier disqualified the Claimant after a mere first attempt to demonstrate his abilities. Second, the Claimant had been assigned to the burro crane for just 23 days, during which time he had only learned the groundwork. Third, the Claimant had not been afforded any opportunity to actually operate the burro crane before being asked to demonstrate his ability. Finally, “the Claimant was not provided sufficient time or training to qualify on the burro crane and . . . the Carrier’s decision to disqualify him deprived the Claimant of valuable seniority rights.”

The Organization avers that the Carrier’s decision to disqualify the Claimant was, “clearly arbitrary capricious and in violation of the Agreement.” Citing Third Division Awards 19934, 31809 and 32216, the Organization asserts that the Claimant should have been given a full 30-day probationary period to qualify, under Rule 10(d).

According to the Carrier, the record indicates that the Claimant did not possess sufficient fitness and ability to operate the burro crane in a safe and proper manner. In support of its position, the Carrier refers to a written statement prepared by Manager MofW Equipment Geis concerning the Claimant’s performance. The Carrier asserts that the statement, quoted below, is “unrefuted,” and is proof that that Carrier’s decision to disqualify the Claimant was based solely on objective factors.

“ . . . Mr. Brooks was jerky and seemed unsure of swinging and handling the super structure. Mr. Brooks while trying to stop the crane, with gondolas attached, put the crane into emergency. He did not handle the air on the crane properly to stop the consist properly. Mr. Brooks told me he did not know how to do an air brake test.

Mr. J. R. Batey . . . told me he had given Mr. Brooks the opportunity to operate the crane and he showed him how to operate the crane with cars and air.”

The Carrier argued that on-property Third Division Awards 30204, 35005 and 36036, involving the same parties, held that the Carrier’s evaluation of an employee’s fitness and ability is a matter of managerial prerogative. Further, the Carrier stated that the record in this case supports its decision to disqualify the Claimant and should not be disturbed. Finally, the Carrier emphasized that the burden of proving that an Agreement Rule was violated rested with the Organization, and that it failed to carry that burden. Because no Rule violation was shown to have occurred, the instant claim should be denied.

Underlying the Board’s review of this case is the fundamental premise that Carrier determinations of employee fitness, ability, and qualifications rest within the authority of management, and absent any evidence that management’s assessments in that regard are arbitrary, capricious or unreasonable, the Board will not reject management’s decision. See Third Division Awards 30204, 36036, and 36540.

The Board finds that Rule 10 - Promotion, paragraphs (a) and (d) are at the core of this dispute. The applicable provisions of Rule 10 read as follows:

“PROMOTION:

Rule 10. (a) Promotions shall be based on ability, merit, and seniority. Ability and merit being sufficient, seniority shall prevail, the management to be the judge subject to appeal.

*** * ***

(d) Employees entitled to promotion shall be given consideration before hiring new men.

Employees declining promotion shall not lose their seniority.

Employees accepting promotion and failing to qualify within thirty (30) days, may return to their former positions without loss of seniority."

According to the record, the Claimant was given more than three weeks to qualify on the burro crane and he failed to qualify. The Organization provided no evidence that the Claimant would have qualified if he had been given additional time to operate the machine. Rule 10(d) does not state in absolute terms that an employee must be accorded exactly 30 days to learn to operate a piece of equipment, unlike the Promotion Rule involved in Third Division Award 31809, cited by the Organization. On December 14, 1999, when asked to demonstrate his qualifications before Manager MofW Equipment Geis, the Claimant did not request any additional time to qualify before being tested. Moreover, according to Geis' statement, Machine Operator Batey told him that the Claimant had been given an opportunity to learn to operate the burro crane with gondolas and using the crane's air brake system. The Organization produced no evidence to contradict Batey's account of the Claimant's qualifying period, as related by Geis, and therefore failed to carry its burden of proof.

Accordingly, based on the above, the Board upholds the Carrier's decision to not qualify the Claimant on the burro crane following the Claimant's demonstration of his abilities on December 14, 1999. There is nothing to indicate that the Carrier's decision was arbitrary, capricious, unfair, or discriminatory. However, with regard to the placement of a permanent disqualification on the Claimant's record and on the roster, the Board finds there is no evidence or Rule support for such an action. Therefore, the disqualification shall be removed both from the Claimant's record and from the Palestine Division 2600 Roster B Crane. In accordance with the applicable Rules governing the Claimant's exercise of seniority, and as his seniority so permits, the Claimant shall be given a new opportunity to qualify on a burro crane assignment in the future.

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 17th day of September 2003.