

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37649
Docket No. MW-37249
05-3-02-3-250**

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 Agreement was violated when the Carrier's decision to disqualify Machine Operator T. E. Beasley from operating any type of tie adzer machine on February 22, 2001 was arbitrary, capricious, without just and sufficient cause and in violation of the Agreement [System File D21702101/12(01-0246) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. E. Beasley shall now be placed back on the machine and paid for any loss of wages and benefits."**

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.

At the time of the incident in question, Claimant T. E. Beasley had operated an adzer/cribber machine for approximately five years. As such, the Claimant was responsible for the primary operation, care and maintenance of a rider adzer and a smaller walking adzer. An adzer is a piece of equipment that is used by the Engineering Department to shave or dress cross-ties in the roadbed to provide a smooth and level track support surface.

Since May 11, 2000, Supervisor of System Production Teams J. S. VanKirk had experienced almost a dozen incidents involving poorly maintained equipment operated by the Claimant. Pursuant to these incidents, VanKirk disqualified the Claimant from the position of Equipment Operator by letter dated February 22, 2001. The Claimant was allowed to exercise his seniority in accordance with the Agreement.

The Organization requested an Unjust Treatment Hearing. On March 30, the Claimant was instructed to appear for the Unjust Treatment Hearing which was scheduled to take place on April 17. The Claimant was notified by letter dated May 7 that he remained disqualified. However, it appears that the Claimant did not receive the letter until May 15, 2001.

The Organization takes the position that the Carrier violated the Agreement when it disqualified the Claimant from the position of Equipment Operator. According to the Organization, the Carrier did not establish that the Claimant could not competently operate equipment so as to disqualify him from the position of Equipment Operator. In addition, the Organization claims that the Carrier attempted to discipline the Claimant using the guise of disqualification. Finally, the Organization claims that the notice informing the Claimant of his disqualification was untimely in that it was received more than 20 days after the Unjust Treatment Hearing. The Organization asks that as a result of the Carrier's improper actions, the Claimant be reinstated to his position as an Equipment Operator and compensated for net wages lost, straight time and overtime.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that the record clearly shows that the Claimant was properly disqualified from the position of Equipment Operator. The Claimant engaged in numerous errors and it was reasonable for the Carrier to disqualify him. In addition, the disqualification notice was timely. Based on prior Awards because the notice was mailed on May 7, 2001, the Carrier's actions fall squarely within the 20 day limit and, is therefore, timely.

After a review of the record evidence, the Board finds that the Organization has not been able to sustain its burden of proof in this matter. In the instant case, there is insufficient evidence in the record to demonstrate that the Claimant was improperly disqualified from the Equipment Operator position.

Further, the Organization cannot prove that the ultimate disqualification notice was untimely. As the Carrier submits, numerous Boards have held that the decision is considered to be rendered in a timely fashion provided that it is mailed on or before the 20th day following the Unjust Treatment Hearing. See Public Law Board No. 2789, Award 30, as well as Public Law Board No. 2119, Award 15. In addition, the Carrier properly characterized this matter as a disqualification as opposed to discipline. Thus, the Board finds that the Organization has been unable to meet its burden of proof to show that the Carrier violated the Agreement.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 7th day of December 2005.