

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38088
Docket No. MW-37201
07-3-02-3-81

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated “* when on August 15, 2000, after an Appendix “U” conference the Carrier failed to agree and restore Mr. Anderson W. Nelson seniority Truck Driver dates. In addition Mr. Nelson was disqualified on July 24, 2000 as Assistant Foreman by Henry Thomson, Manager Track Maintenance and on September 14, 2000, Mr. Nelson was also disqualified by Howard M. Stowell, Jr., on all the trucks because of an alleged incident that occurred on August 28, 2000, thereby removing his seniority dates on all Truck Driver positions.’ and when the Carrier prevented the Claimant from being assigned to a position as welder helper in Lodi, California on Gang 7162 (Carrier’s File 1255895 SPW).**

(2) As a consequence of the violation referred to in Part (1) above, Claimant A. W. Nelson shall now ‘. . . be compensated all lost wages suffered commencing from May 18, 2000 and continuing until his seniority date as Assistant Foreman (Class 24) and on all other Truck Driver classes that Claimant held and established in seniority prior to the Carrier’s violation of the Agreement and that he be restored on the proper seniority roster under the tern (sic) of the current Agreement.’”

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.

As described in the Statement of Claim, the Claimant was disqualified as an Assistant Foreman in July 2000 and was also disqualified from all truck driving classifications by September of that year.

It is a well-settled principle of managerial discretion in the railroad industry that a Carrier has the right to determine the fitness and qualifications of its employees. If an affected employee challenges the Carrier's determination, the employee has the burden of proof to show that the Carrier's determination was arbitrary, capricious, and/or unreasonable. Thus, if the Carrier's evidence demonstrates that it had a rational basis for its determination that was not impermissibly discriminatory, the Carrier's determination must prevail. See, for examples, Award 7 of Public Law Board No. 5842, Third Division Awards 30950, 30093, and 28802 as well as Fourth Division Award 3260, and the Awards cited in them.

While the Claimant and the Organization took issue with certain aspects of the Carrier's evidence, the record establishes that the Claimant was involved in nearly one dozen instances of failure to follow instructions and/or unsafe operation or parking of various trucks between April 12 and August 28, 2000. In addition, he did not have a valid DOT physical exam to permit him to drive the Carrier's trucks. Accordingly, the record does not show the Carrier's determination of his lack of

qualifications was arbitrary, capricious, or unreasonable under all relevant circumstances.

It is also undisputed that the position of Assistant Foreman requires successful passage of the Carrier's Book of Rules examination. The record contains the Carrier's policy in this regard, which provides that two failures of the Rules exam within a 30-day period will result in disqualification. It is undisputed that the Claimant failed the Rules examination on July 24 and July 31, 2000. As of the date of the August 30, 2001 claim conference on the property, the Claimant still had not successfully passed the exam. The record does not establish that any other employees twice failed the exam contrary to the policy, but were not similarly disqualified. Thus, no impermissible discrimination against the Claimant has been established by the record evidence. Nor has the Carrier's determination been shown to have been arbitrary, capricious, or unreasonable under the circumstances.

Given the foregoing factors, we find that the Carrier's disqualification of the Claimant did not violate 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 21st day of February 2007.