

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39669
Docket No. MW-38752
09-3-NRAB-00003-050160
(05-3-160)**

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(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 improperly disqualified and removed Mr. D. Gibbs from his assistant foreman position on System Rail Gang 9101 on January 6, 2004 (System File MW-04-79/1393989 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Gibbs shall now have his assistant foreman qualifications and seniority status reinstated and he shall be compensated for the difference in pay between a two ton (+2) plus truck operator and an assistant foreman for eight (8) hours per day and for all overtime acquired by Rail Gang 9101 at the applicable time and one-half rate of pay beginning January 6, 2004 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.

The Claimant, who had approximately two years' service with the Carrier at the time of the relevant events, established seniority as an Assistant Foreman on System Rail Gang No. 9101 on August 8, 2003. On January 6, 2004, the Claimant's supervisor sent him a letter stating, "This letter is to inform you that you have been disqualified from the position of M/W asst. foreman . . . Reason: Failure to organize your work group, failure to stay involved in daily work activities." Shortly thereafter, the Claimant submitted a statement in which he asserted that he had never seen a project before beginning work, that he had not received sufficient advance notice of projects to allow for adequate planning, and that he had received no training from his supervisor.

It is well settled that the Carrier has the right to determine employee qualifications, and such determinations should not be disturbed by the Board unless they were made in an arbitrary manner. There is no such showing here. The record indicates that although the Carrier did not provide detailed reasons for the Claimant's disqualification, it did assert that he was unable to perform the basic functions of his position as an Assistant Foreman, i.e., organizing his work group and overseeing their daily activities. Although the Claimant places responsibility for any shortcomings on the Carrier, his own statement confirms that he was not able to properly organize and plan a project. This case is, therefore, distinguishable from Third Division Award 30284, cited by the Organization, where the Carrier provided no reasons for an employee's disqualification. Under these circumstances, it was not arbitrary for the Carrier to determine that the Claimant was not qualified to continue in his Assistant Foreman position.

The Organization contends that the Carrier's action was disciplinary in nature, so as to trigger the requirement that he be afforded a full and fair Investigation, but we do not agree. The Carrier did not contend that the Claimant committed any misconduct or negligent act. Rather, the Carrier asserted, as the Claimant acknowledged, an overall lack of preparedness and ability to perform the duties of the position, that is, that he was not able to perform his position satisfactorily. Because this was not a question of discipline, the Claimant was not entitled to an Investigation.

We also cannot accept the Organization's argument that the Carrier was precluded from disqualifying the Claimant because he held the position longer than 30 days. The Organization points to Rule 19(c) which provides, in relevant part, that "Employees accepting promotion and failing to qualify within thirty (30) days may return to their former positions without loss of seniority." The Organization contends that because there is no Agreement provision providing for disqualification beyond that period, the Carrier's action must be viewed as discipline, governed by Rule 21. However, the argument that such Rule language is a limitation upon the Carrier's right to disqualify an employee beyond the 30-day period has been specifically rejected by this Division, see Third Division Award 36957. The case cited by the Organization involves language specifically providing that an employee will not be disqualified beyond the 30-day period, language not present here, and therefore does not support its position in this case.

Finally, the Organization contends that the process was flawed because the Organization received no response to its request, made to the Chief Engineer of Track Programs, to initiate the Manager Conduct Supplement Review Process. The Carrier disputes that this request was included in the parties' on-property handling, and the Organization has not described the process or explained what impact it might have had upon the Carrier's action herein. Therefore, it does not provide a basis for overturning the Claimant's disqualification.

For the foregoing reasons, the claim will be denied.

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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 22nd day of April 2009.