Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 41813
Docket No. MW-41523
14-3-NRAB-00003-110140

The Third Division consisted of the regular members and in addition Referee Burton White when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference**
(BNSF Railway Company (former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier's decision to disqualify Mr. M. McBain as a grinder, welder and welding foreman on District 500 by letter dated December 2, 2009 and its February 1, 2010 decision (following the formal hearing held on January 12, 2010) to uphold said disqualification was arbitrary, capricious, excessive, on the basis of unproven charges and in violation of the Agreement (System File C-10-D090-1/10-10-0167 BNR).

(2) As a consequence of the violation referred to in Part (1) above, we request that '* the disqualification assessed to Mr. McBain be overturned and his hearing and disqualification be removed from his personal record.'"**

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 Carrier objects to the matter on a procedural ground. It asserts:

> **"First, it is Carrier's position that this claim must be dismissed by the Board due to a fatal procedural error on the part of the Organization in the initial filing of this claim. Rule 42(A) of the applicable agreement provides in pertinent part:**
>
> **'Rule 42. TIME LIMIT ON CLAIMS**
>
> **A. All claims or grievance must be presented in writing by or on behalf of the employe involved, to the officer of the Company authorized to receive same . . . .'**
>
> **B. Carrier's longstanding instructions to the BMWE representatives for the territory here involved are that claims involving discipline are to initially be submitted to the General Manager (Mr. Rob Reilly) and that non-disciplinary claims are to be submitted to the Director Maintenance Support (Ms. Lesha Baker). The Organization's Vice General Chairman submitted the claim here involved to General Manager Reilly. However, inasmuch as it does not involve discipline, it should have been presented to Director Maintenance Support Baker."**

The Carrier correctly notes that this matter is non-disciplinary and that the Organization's appeal was presented to the General Manager (by letter dated February 18, 2010). The Carrier is also correct that in its letter to the Organization dated June 4, 2012, the Carrier noted this and charged the Organization with failing to follow "the proper procedure." The Carrier argues:

> **"The awards are legion in holding that a claim must be filed with the representative designated by the Carrier and that failure to do so causes the claim to be barred.**

> **The Carrier notes that it advised the Organization of this procedural failure in our letter of June 4, 2010. At no time thereafter in the on-property correspondence did the Organization offer any rebuttal whatsoever to Carrier's position – thereby accepting it as fact!"**

In support of its argument, the Carrier cites Third Division Award 18553, a case that involved a Rule identical to Rule 42(A). Therein the Board held:

> **"Clearly the Agreement permits the Carrier to designate its representatives at each step in the grievance procedure, an obligation it had fulfilled. Rule 36 1(a) requires that the claim must be presented on behalf of the employe involved to the officer authorized to receive same.**
>
> *** * ***
>
> **This Board has consistently held in numerous awards that a claim must be filed with the representative duly designated by the Carrier to receive claims. The procedure for processing claims was collectively bargained by the parties, must be complied with, and cannot be waived or set aside except by mutual agreement of the parties.**
>
> **The record shows that the claim here was not presented to the proper official of the Carrier at any time during the handling on the property. Therefore, the Board cannot consider the substantive issue in the claim."**

The problem for the Carrier in the case now before the Board is that while Rule 42A specifies, "All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same . . . ." and, although the Carrier asserts that it had informed the Organization that non-disciplinary claims should be submitted to the Director of Maintenance Support, nowhere in the record is there proof of what is asserted; namely, that the Carrier had fulfilled its obligation to inform the Organization of "the identity of its representatives, by position title, authorized to receive a claim . . . ." This omission distinguishes the current case from Award 18553 that was cited by the Carrier, for in that case:

> **"By letter dated April 29, 1966 the Carrier notified the Organization of the identity of its representatives, by position title, authorized to receive a claim in first instance, to receive first appeal, and to receive last appeal."**

Without proof that the Carrier identified to the Organization the Carrier Officer authorized to receive a claim challenging a non-disciplinary action and indication in the record that the Organization then addressed its claim to the wrong person, an assertion by the Carrier in its June 4, 2010 letter that the Organization sent its appeal to the wrong person does not establish the Carrier's assertion as fact. The Carrier's observation that this argument was not addressed by the Organization in subsequent communications may be true, but that would not amount to accepting the assertion as a fact. In light of this analysis, the Carrier's contention that the appeal must fail as a consequence of the claimed procedural flaw is rejected.

We now turn to the substantive dispute.

In its Submission, the Carrier summarized its position as follows:

> **"1. [The] Claimant . . . had not worked in the Welding Department for 16 years prior to going on the welding position here involved.**
>
> **2. Some three months prior to him going on the position he was given two manuals and told that he would have to pass CBT testing as an 'initial step' to working the assignment. (After having the manuals for 90 days, he failed the tests miserably. He was subsequently retested and still scored poorly.)**
>
> **3. Prior to going on the position, he was offered the opportunity to participate in a December training class, which he declined with a resounding "NO."**
>
> **4. During the time on the job, [the] Claimant completed 10 thermite welds, none of which were within the required timeframe.**

> **5. While working with and observing [the] Claimant on the job, Supervisor Aeschliman became concerned not only about [the] Claimant[‘s] . . . safety, but also the safety of individuals working around him.**
>
> **6. While operating an Ox/Propane Torch, [the] Claimant burned a pair of gloves; did not adjust the torch for the proper flame required; caused a massive release of propane while adjusting the regulator settings; did not shut down the torch per prescribed procedures; and a lack of the use of proper PPE (personal protective equipment).”**

Welding Supervisor Aeschliman disqualified the Claimant by letter dated December 2, 2009. The Claimant acknowledged that the letter accurately described what had taken place during the testing.

There are, however, other aspects to consider.

In its letter of March 22 rejecting the Organization’s appeal dated February 18, 2010, the Carrier stated:

> **“The transcript clearly shows that . . . [the Claimant] was given the time and training to become a welder, but failed to meet the requirements or demonstrate his abilities to Mr. Aeschliman.”**

This assertion highlights the central problem with the Carrier’s position: The record does not support a conclusion that the Claimant was given the time and training to become a Welder. The record does establish that Aeschliman gave the Claimant the relevant welding manuals, but there is no indication in the record that the Carrier took into consideration whether there truly was time available to the Claimant for studying. At the Unjust Treatment Hearing, the Claimant asserted without contradiction:

> **“Yes he did give me the training manual, at that time I was working on, oh, almost 7 days a week, with the structures department we were building a bridge, and you know I was working overtime every day and working the weekends also, and you know I had limited, I**

> **did require sleep to do my job safely in structure so I didn't get into those books as much as I should of I guess."**

In his letter disqualifying the Claimant, Aeschliman wrote, "I had hoped that you would study and be prepared for the CBT testing and be able to demonstrate your ability. At that time, I offered a December thermite class date which you turned down with a resounding NO." As noted above, the Carrier made a similar point in its Submission. These assertions do not present the complete story. What the Carrier's argument and the Supervisor's disqualification letter fail to address was that (1) the Claimant had been scheduled to take a welding training class in November, but that class was cancelled without explanation and (2) the Claimant refused the December class because he had already scheduled his vacation for that month. The Claimant confronted Aeschliman on this matter at the Unjust Treatment Hearing:

> **"If you're testing me on procedures, and things I don't know or haven't used, I haven't been to school (inaudible), I asked you for school, I was supposed to go in November, and I was taking all the class, and then that's when you changed saying I should go to, in December when I was, had vacation with, was planning a vacation cause I had vacation time left. I was already in a class, and I was taken out of the class. Why is that?**
>
> **AESCHLIMAN: I don't remember."**

Later in the Unjust Treatment Hearing, the Claimant again addressed the matter that in November he had asked for training, had been placed in a class but "never got to go to that class, I was taken out of that class, and that was in November." The Welding Supervisor responded, "Okay I don't remember what happened there to be honest with you."

There is no question but that the Claimant was not ready to undertake assignment to a welding position under circumstances in which he was not able to demonstrate sufficient ability, but the record raises significant question as to whether he was given a fair opportunity to develop that ability. It also raises significant questions as to whether or not the welding Supervisor was inclined to provide him a valid opportunity to develop the needed ability. The above discussion

focuses on access to training before the testing; the following excerpt focuses on access to training after the testing:

> **"[Claimant]: I, I asked you several times about getting in some of the, in the classes I'm required to have, and at this time am I in any classes yet?**
>
> **AESCHLIMAN: At the present time, no, I was waiting for the outcome of this to be certain, found out what was going on.**
>
> **[Claimant]: Being that I have asked you 5 times and I sent you an e-mail, you know, after, how can I get in a class, what do I have to do, do I have to send it in writing, do I, you know what's required of me to get in the class, to learn these procedures?**
>
> **AESCHLIMAN: Well first of all, I don't think you, I think you might of emailed me once, you had your foreman email twice or something like that of the B&B crew so; let, let's get this out of the way and then we'll go from there.**
>
> **[Claimant]: But this process is going to take however long this takes, there's no reason I can't get scheduled and get in a class and get learning of these procedures, why would I have to wait for the outcome of this to learn to get started getting trained on this?**
>
> **AESCHLIMAN: I need to get with your present supervisor and see when he can turn you loose to be able to go to the class, and then we'll, we'll make some arrangements on that based on that information and the outcome of this."**

It is the view of the Board that based on the total record and for the reasons addressed in the above discussion, the exercise of management discretion in this case was not reasonable. Accordingly, the claim must be sustained.

AWARD

Claim sustained.

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 27th day of February 2014.