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

Award No. 42186
Docket No. MW-41741
15-3-NRAB-00003-110357

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: **(Brotherhood of Maintenance of Way Employes Division -**
(IBT Rail Conference
(
(Union 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 subsequently disqualified Mr. R. Hemmerling from a system crawler backhoe position on Gang #9529 beginning on April 6, 2010 and continuing (System File D-1020U-205/1536548).

(2) As a consequence of the violation referred to in Part (1) above, the aforesaid disqualification shall be removed from Mr. R. Hemmerling's personal record and he shall be reinstated to said position and compensated for the difference in pay between the respective rate of REO pay and the rate of pay he earned during the period subsequent to the removal from the crawler backhoe position and continuing until he is reinstated on said position."

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 started his service with the Carrier in May 1998. In the spring of 2010, the Claimant bid on and, as the senior bidder, was awarded a Crawler Back Hoe Operator position. He reported to his new assignment on April 5, 2010, and was instructed by Gang Supervisor Gerald Carpenter on various aspects of safety, production, and Rules compliance. On April 6, 2010, the Claimant was told to look over the machine and familiarize himself with its operation. Sometime that morning, he was observed dismounting the back hoe in an unsafe manner (not maintaining three-point contact with the machine), a safety violation for which he was subsequently counseled on April 8, 2010. The Claimant was then instructed to attach a tamping head to the back hoe. He asked for help from an experienced Operator, Abe, who was in the vicinity, but was told by Abe's Foreman that Abe was busy elsewhere and that he should "figure it out for himself." Unfortunately, the Claimant was not successful in figuring it out for himself, and the part dropped off and was damaged. A Mechanic in the area made a hand motion to the Claimant to stop what he was doing in an effort to avoid the damage that occurred. The Claimant stated during the April 21 conference regarding the incident that he stopped as soon as he saw the hand signal; management contends that the Claimant saw the signal and failed to stop. Less than an hour after the start of the Claimant's hands-on training, the Carrier determined that he was not qualified to operate the Crawler Back Hoe and advised him that he was disqualified from the position.

Employees are entitled to a written statement of the reasons in cases like this, and by letter dated April 8, 2010, Supervisor Carpenter wrote:

> **"This letter is to inform you are hereby disqualified from the position of System Crawler Back Hoe Operator on Gang 9259.**
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> **As a system crawler operator on gang 9259 you failed to demonstrate the ability and knowledge to safely perform the duties of a Union Pacific Railroad System Crawler Back Hoe [Operator]. You lack the ability to ask for instruction on operation of the assigned equipment. As a result of not asking for instruction you caused damage to Union Pacific equipment attachment. Additionally, you were unable to show the ability to operate this machine properly and follow verbal and hand signals to stop. . . ."**

The Claimant filed a complaint under Rule 48, and on April 20, 2010, the Parties conducted a conference call to discuss the disqualification decision. Following the meeting, Alvah Stahlnecker, Manager of Work Equipment for the Northern Region, declined to reverse the decision, explaining:

> **"I base my decision on the fact Mr. Hemmerling, through his own admission, made personal choices resulting in safety concerns while attempting to qualify on the crawler backhoe. He was observed dismounting the machine improperly . . . Although he denies this alleged statement, he admits he was not sure how he came off the machine when asked 'were you facing the machine or looking away from the machine when you dismounted?' To dismount the machine properly the rules state a person must be facing the machine and maintain a three point contact. In addition, Mr. Hemmerling admits a Mechanic was at the work location when he damaged an attachment for the machine. The Mechanic gave Mr. Hemmerling a stop signal which Mr. Hemmerling did not comply with resulting in damage to the unit. Failure to comply with any signal while operating on any machine is a safety matter.**
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> **Based on both of those situations, I support Mr. Carpenter's decision to remove Mr. Hemmerling from the machine to eliminate the chance of Mr. Hemmerling causing injury to himself or someone else working in the area of the machine he was operating. . . ."**

Following Stahlnecker's decision, the Organization filed this claim, alleging that the Carrier violated Rules 10 and 20 of the Parties' Agreement when it summarily disqualified the Claimant after less than an hour's hands-on experience with a new piece of heavy equipment. Specifically, Rule 10(b) provides:

> **"An employee applying for position of operator of a type of roadway equipment to which he has not heretofore been assigned will not be assigned until considered qualified by management.**
>
> **Upon application to qualify on a different type of roadway machine, applicants will be furnished with Operating and Maintenance manuals and other instructional material as pertains to the operating characteristics and maintenance of the particular machine on which he desires to be qualified.**

> **Subsequent to his completing his studies of the material furnished, he will upon request be given a written examination within a period of thirty (30) days. Upon satisfactory completion of the written examination, applicants will be given an opportunity to gain sufficient work experience on the machine at the first reasonable opportunity.**
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> **It is understood that the length of time of the required work experience may vary dependent upon the individual qualifications of the applicant and the type of the machine; however, it will not exceed one week for blade or tractor type equipment and two weeks for boom-type equipment."**

In addition, Rule 20, Bulletining Positions – Vacancies, paragraph (d) states, in relevant part:

> **"Except as otherwise provided in this Agreement, the senior applicant retaining seniority in the applicable class will be assigned to bulletined positions. If no qualifications for the position have been previously established, the employees assigned will be given full cooperation and assistance of supervisors and others in their efforts to qualify. . . ."**

According to the Organization, the Claimant was denied a fair and reasonable opportunity to demonstrate the requisite fitness and ability to qualify for his new assignment as a System Crawler Back Hoe Operator. The record demonstrates that the Carrier failed and refused to provide the Claimant the ". . . full cooperation and assistance of supervisors and others . . ." in his efforts to qualify as required by Rule 20(d); nor did it give him a reasonable period of time to qualify on his new assignment as required by Rule 10(b). The Carrier's decision to disqualify the Claimant after less than an hour of operating a new piece of equipment was arbitrary, unjust, unwarranted and a direct violation of the Agreement. In defense of its decision, the Carrier cites its right to determine the qualifications necessary for operating equipment and its right to decide if individual employees meet those qualifications. Within a very short time, it became apparent to the Supervisor that the Claimant did not have either the mechanical proficiency or the mental aptitude required to operate the system crawler back hoe in a safe and efficient manner, and his decision to disqualify the Claimant was neither unreasonable nor arbitrary; indeed, it was necessary, in order to protect the Claimant from harming himself, other employees or equipment. The Organization has the burden to establish that the Claimant was qualified, and it failed to meet that burden.

There is no dispute that the Carrier retains the right to determine the fitness, ability and qualifications of an employee attempting to qualify for a position; the Organization acknowledged that fact in its Submission. The claim presented here is not about whether the Claimant was qualified on the morning of April 6, 2010, to operate a system crawler back hoe, because he patently was not qualified at that point; he had just been awarded the bid and had only begun the qualification process the day before, with instruction on Safety Rules, procedures and the like. The next day, April 6, was his first opportunity to familiarize himself with the actual backhoe and begin to learn how to operate it.

An employee who has not operated a piece of equipment before cannot be expected to be familiar with the equipment, or "qualified" to operate it, beforehand. In Rules 10 and 20, the Parties agreed to certain parameters in relation to employees attempting to qualify on new equipment. Rule 10 requires that employees be given instructional materials in order to familiarize themselves with the equipment before actually operating it. It also requires that after this introduction, they ". . . will be given an opportunity to gain sufficient work experience on the machine at the first reasonable opportunity." Rule 20(d) specifically addresses senior bidders who are not already qualified on equipment required on their new position: "If no qualifications for the position have been previously established, the employees assigned will be given full cooperation and assistance of supervisors and others in their efforts to qualify." (emphasis added) Between them, Rule 10 and Rule 20 recognize that employees who want to qualify on new equipment need instruction, assistance, and time to familiarize themselves with the safe and efficient operation of that equipment. Logically, more complex equipment may require more training, assistance and time in order to qualify. A crawler back hoe is a heavy piece of roadway equipment that, from all outward appearances, would require some period of actual hands-on training before someone previously unfamiliar with the machine could reasonably be expected to operate it safely.

Supervisor Carpenter's April 8, 2010 letter stated generically that the Claimant ". . . failed to demonstrate the ability and knowledge to safely perform the duties . . ." of a Crawler Back Hoe Operator. The letter cited two specific reasons for the Claimant's disqualification: (1) he did not ask for instructions on how to operate the equipment, and (2) he failed to follow verbal and hand signals to stop. During the conference call that took place on April 21, 2010, Carpenter also referenced the Claimant's unsafe dismount from the machine. The notes from that conference call are the best evidence in the record of what occurred in relation to the Claimant's training on the crawler back hoe and subsequent disqualification. During the

conference call, the Claimant stated that he had asked for assistance with regard to attaching the tamping head to the back hoe from an experienced Operator, Abe, whose Foreman denied the request and told the Claimant to "go figure it out." The Claimant also stated that he was unaware there was a Mechanic in the area and that he stopped the machine after the Mechanic got out of his truck and he saw the hand signal. There is no indication that there was any effort verbally to tell the Claimant to stop.

A review of the record evidence establishes that at the time the Claimant was assigned to operate the crawler back hoe, he had not previously operated one and was not qualified on it. He had had a one-on-one conversation on April 5, 2010, with Supervisor Carpenter regarding Safety Rules and procedures and he had had about an hour's session on April 6 with another Back Hoe Operator who showed him how the machine worked. As far as the record indicates, the first time the Claimant ever attempted to operate the back hoe was later that morning on April 6. No one was present to train, assist or guide him. His request for assistance was denied. There is no indication that the Claimant had been given any instructional materials as required by Rule 10(b) so that he could familiarize himself with the machine and its operation, or what the content of his "classroom training" with Carpenter was. Under these circumstances, it is not surprising that his first hands-on performance demonstrated a lack of qualifications – he had not had any significant training or support in his effort to learn how to operate the crawler back hoe. While the Claimant's dismount may have been unsafe, the record does not indicate whether he was trained in the proper dismount procedure. He was counseled on the proper dismount procedures, so that should not have been a problem in the future.

In its Submission, the Carrier propounds that ". . . where an employee fails to demonstrate the ability to perform work in a safe and efficient manner, the Carrier has the right to deem that employee unqualified." That is undeniably true. But together, Rule 10(b) and Rule 20(d) require that employees who are not qualified to operate equipment and seek to become qualified have a fair and reasonable chance to do so. When the Carrier acted to disqualify the Claimant from the back hoe within the first hour of his first attempt at operating it – without any real training or assistance – he was denied that chance. The Carrier's concern about the safe operation of the back hoe was warranted, but in failing to adequately train the Claimant, the Carrier must share responsibility for his performance. It is not realistic or reasonable to expect that someone who has had little training will be able to operate a complex piece of heavy roadway equipment proficiently the first time he tries his hand at it.

In the final analysis, the Board concludes that the Carrier violated Rules 10(b) and 20(d) when it summarily disqualified the Claimant from his bid position as a System Crawler Back Hoe Operator before he had a fair chance to be trained and to demonstrate his abilities. By way of remedy, the Organization seeks backpay for the difference in compensation between the Claimant's prior position and the Crawler Back Hoe Operator position since he was disqualified. The Board notes that employees who have been disqualified from a position may bid and seek to become qualified again after a period of 90 days. Accordingly, the Claimant is entitled to the difference in compensation between the two positions, but only for a period of 90 days, when he could have tried again to qualify.

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 28th day of October 2015.

LABOR MEMBER'S
CONCURRING AND DISSENTING OPINION
TO
AWARD 42186, DOCKET MW-41741
(Referee Andria S. Knapp)

A concurrence is necessary because the Majority correctly held that the Carrier's actions violated the Agreement when it summarily disqualified the Claimant from a bid position before he had a "fair chance" to be trained and to demonstrate his ability. Unfortunately, a dissent is also necessary because the Majority erred in formulating a remedy to the Carrier's violation. The Organization's claim requested the difference in pay between the Claimant's respective REO rate of pay and the rate of pay he earned until he is reinstated to the position. The Majority did grant that remedy, but capped it at ninety (90) days. This was apparently based on the reasoning that the Claimant may bid and seek to become qualified again after a period of ninety (90) days. This finding is based on the flawed assumption that there was a position available for the Claimant that would allow him the opportunity to again qualify. Without such knowledge, it was improper for the Majority to cap the Carrier's liability for violating the Agreement.

Therefore, I respectfully dissent.

Respectfully submitted,

Zachary C. Voegel
Labor Member