

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43035  
Docket No. MW-43417  
18-3-NRAB-00003-160191**

**The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(Kansas City Southern Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier's decision to disqualify Claimant J. Watkins as a machine operator by letter dated July 15, 2014 was arbitrary, unwarranted and constituted a violation of the Agreement (System File 14 08 08/K0414-5260 KCS).**
- (2) The Agreement was further violated when the Carrier failed to convene an unjust discipline hearing following a request by the Organization on October 1, 2014.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, the Claimant shall be afford the full remedy prescribed in Rule 13-2.**

**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 this dispute arose, the Claimant – an employee since 1993 – established and maintained seniority as a Machine Operator and was assigned in that capacity on System Mobile Production Gang 506 working in the vicinity of Many, Louisiana.**

**Prior to the incident which caused this dispute, on June 17, 2013, the Claimant's machine collided with another piece of equipment, which prompted a notice of Investigation, that resulted in the Claimant accepting responsibility for the accident and waiving his right to a hearing, with the admission that he violated the Carrier's rules. The Claimant received a 30-day suspension for that violation (5 days actual; 25 days of record).**

**Turning to this dispute, on July 13, 2014 and while operating equipment, the Claimant was involved in another collision, this time running into the back of another piece of equipment at MP 630.4 in Many, LA which caused damage to that equipment.**

**On July 15, 2014, the Carrier notified the Claimant in light of the 2013 and 2014 incidents, the Carrier determined that he failed to perform his duties as a Machine Operator in an adequate, safe and proficient manner and, as a consequence, was disqualified as a Machine Operator under Rule 12. The Claimant then exercised his seniority and displaced to a Track Laborer position. The Machine Operator position from which the Claimant was disqualified was then bulletined.**

**On July 21, 2014, the Claimant was issued a notice of an Investigation for the July 13, 2014 collision. As he did for the 2013 collision, the Claimant waived his right to an Investigation and, this time, accepted a 60-day suspension (30 days actual; 30 days of record).**

**Focusing upon the Claimant's disqualification, the Organization requested a hearing under Rule 12 (Failure to Qualify) and then also under Rule 13 (Discipline**

and Grievances), which requests were not granted by the Carrier with the Carrier taking the position that the Claimant's disqualification was not discipline and that the Claimant had no contractual entitlement to a hearing protesting his disqualification.

Because the Claimant waived the Investigation and accepted discipline resulting from the July 13, 2014 collision, the merits of that disciplinary action are not before the Board. The focus of this dispute is on the Carrier's separate disqualification of the Claimant from his Machine Operator position without holding a hearing.

The Carrier is correct that Rule 12 (Failure to Qualify) does not have a specific hearing provision for protests over disqualifications. However, Rule 13-2 (Discipline and Grievances) provides [emphasis added]:

**RULE 13**  
**DISCIPLINE and GRIEVANCES**

\* \* \*

“13-2. If an employee subject to this agreement who has been in service sixty (60) days or more feels that he has been unjustly disciplined or unjustly treated, or that any of the provisions hereof have been violated, he shall have the right to present his case either individually or through the local or general representative of his craft, to his supervising officer, within (60) days. If a hearing is necessary to determine the facts, it will be given promptly, at which hearing he shall have reasonable opportunity to secure the presence of necessary witnesses, and to be represented by an employee or committee of employees (not to exceed three) of his choice, or by the local or general representatives. If he is not satisfied with the decision rendered, he shall have the right of appeal in succession to the next superior officer, up to and including the highest officer designated by the carrier to handle such cases, and shall have the right in such appeals to be represented by either local or general representatives. ....”

Thus, a plain reading of Rule 13 covers discipline and grievances (as specified in the caption of Rule 13) and further provides in 13-2 that if an employee "... feels that he has been unjustly disciplined or unjustly treated ... [i]f a hearing is necessary to determine the facts, it will be given promptly ..." [emphasis added]. The Organization's position that Rule 13-2 extends the hearing right to grievances for unjust treatment beyond discipline is correct. There was a "grievance" over the assertion of "unjust treatment" flowing from the Claimant's disqualification. The Claimant was therefore entitled to an unjust treatment hearing for the Carrier's disqualification of the Claimant from his Machine Operator position.

However, the Carrier is correct that disqualification determinations are the Carrier's managerial prerogative subject only to limited review by the Board to determine whether the managerial decision was "arbitrary." Third Division Award 35808 ("Qualification, fitness and ability to perform a job are determinations to be made by the Carrier ..."); Third Division Award 40287 ("Whether an employee can be disqualified from a position he or she holds is the Carrier's determination, subject only to limited review by the Board under a standard which requires the Organization to demonstrate that the Carrier's decision was arbitrary").

Given that the Claimant had collisions in 2013 and 2014 coupled with the Claimant's admissions that he engaged in misconduct by waiving hearings and accepting suspensions for both of those collisions, any dispute over whether the Carrier was arbitrary or capricious when it exercised its managerial prerogative to disqualify the Claimant from his Machine Operator position is academic. Given the collisions and the fact that the Claimant admitted to misconduct and accepted discipline for the collisions, the record clearly demonstrates that the Carrier had the right to disqualify him as the Carrier did in this case. The Organization's procedural arguments tied to the lack of the granting of a hearing are therefore moot.

Based on the above, the merits of this claim shall be denied.

### AWARD

Claim denied.

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**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 2nd day of May 2018.**