

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43199
Docket No. MW-42524
18-3-NRAB-00003-140161**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 and unjustly disqualified and removed Foreman G. Cumby from his position on Gang #2294 effective on February 2, 2013 (System File UP507JF13/1581666 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Cumby shall have said disqualification removed from his record and he shall be compensated for '...eight (8) hours each at the difference in the Claimant's straight time rate of pay between Maintenance of Way Trackman and Foreman, to begin February 3, 2013, through and including on a continuous basis until this matter is settled and the removal of his unjust disqualification ***'"

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.

This claim protests the disqualification of the Claimant from his Track Foreman position and other positions that “require supervision of employees” such as Track Welder, due to his failure to “aid in providing protection through ‘Inaccessible Track’ for contractors due to your sitting in the truck” on February 2, 2013 when assigned as Foreman on Gang 2294. The record contains statements from both the Manager and the Claimant. The Claimant explained that his gang was working on the other side of the yard prior to the period in dispute, he was taking his lunch break in his truck while his gang went out, he was not the Foreman in charge of the area where protection was not properly provided, and that the Foreman in charge was responsible and admitted to him that he “messed up.” The Manager stated that it was the Claimant’s responsibility to aid in the protection when he saw an issue, he admitted messing up, he had been counselled previously about sitting in his truck while others worked, and he never showed adequate leadership skills.

The Organization argues that the Claimant was not responsible for providing protection in the incident that led to his disqualification, and that the Foreman in charge received a Level 3 discipline for it. It asserts that the Claimant was not allowed to exercise his seniority as a Welder after his disqualification as a Foreman, which was accomplished without a fair and impartial Investigation, a result that was unduly harsh and unwarranted considering he was not at fault.

The Carrier contends that the Claimant was disqualified for his inability to properly perform the requisite duties of Foreman, and was properly removed from all supervisory positions. It stresses that it is the Carrier’s right to set qualifications and determine fitness and ability, and that its determination can only be overturned if it is found to be arbitrary, citing Third Division Awards 32366 and 36957. The Carrier maintains that, since the Claimant could not safely perform the functions of the job, including possessing inadequate leadership skills, the Organization is unable to sustain its burden of proving that his disqualification was arbitrary.

A careful review of the record convinces the Board that the Organization has failed to sustain its burden of establishing that the Claimant's disqualification from both the Foreman and Welder positions was arbitrary or an abuse of discretion. The Carrier supported its action with direct evidence of the reasons for the disqualification - he failed to aid in providing proper on track protection - and the fact that the leadership skill set it determined that the Claimant lacked was necessary for both supervisory positions. While the Claimant's statement takes issue with his responsibility for the inadequate protection, and disputes who said that he "messed up," at best, the Organization has presented an irreconcilable dispute of fact, which is insufficient to meet its burden of proving that the Claimant's disqualification was not a proper exercise of management's prerogative to determine fitness and ability, or was arbitrary. See, e.g. Third Division Award 36957.

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 30th day of May 2018.