

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43528  
Docket No. MW-42667  
19-3-NRAB-00003-140366**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 Track Cribber/Adzer Combo Operator S. Beeler from his position on Gang 9102 on April 5, 2013 (System File UP608BT13/1586228 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Beeler shall now be paid ‘... for all time worked by gang 9102 from April 5, 2013 and continuing, until Mr. Beeler has his disqualification removed and he is returned to his position as a Track Cribber / Adzer Combo Operator on gang 9162. This claim should also include any and all overtime worked by gang 9102 during this continuing period as well as compensation at the government rate of 55.5 cents per mile for any additional mileage that Mr. Haines was required to drive because of the Carrier violation.’”**

**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 had established and held seniority as a Track Cribber/Adzer Combo Machine Operator within the Carrier's Maintenance of Way Department. The machine operated by the Claimant from February 8 to April 5, 2014, was experiencing mechanical difficulties. On April 4, 2013, it was determined that a three-inch steel shaft on the machine had been bent, causing it to vibrate, which caused the machine to malfunction. The Claimant's supervisor concluded that the Claimant was responsible for the bent shaft and disqualified him from the position. Manager Stuart wrote,**

**"Mr Beeler was disqualified on the combo because the 3 inch steel shaft that guides the movement of the workhead was determined to be bent. The vibration issues Mr. Beeler refers to in his claim were caused by this bent shaft. It was not until after further breakdowns that the mechanics were able to determine the shaft was bent which kept causing the vibrator motors to leak and break. The ONLY way this tremendous 3" solid steel shaft could have been bent was if Mr. Beeler had hit something very solid while the workhead was in a down position. Mr Beeler denied hitting anything with work head, but work mechanic manager and supervisor agreed the only way the shaft could have been bent was if hit something in the down position. We require that our operators properly lock up work head while in travel mode and Mr Beeler had no previous issues with the shaft of the work head not working as designed. Due to the expense of the part, the accumulated downtime, the importance of the piece of equipment, and the machine not being properly run we chose to disqualify Mr. Beeler."**

**The Organization contends that the Carrier's disqualification of the Claimant was arbitrary because there is no direct evidence that he was responsible for the bent shaft. The Organization points out that no one saw the Claimant damage the machine, let alone in the way stated by the Carrier.**

The Carrier contends that it has the managerial prerogative to determine fitness and ability of its forces, and that such decisions are subject to review only as to whether the determination was arbitrary, citing Third Division Award 36957. Further, the Carrier contends that once it has established that the employee does not possess the requisite fitness and ability to perform the job, the burden shifts to the Organization to show that the Carrier's determination was arbitrary.

There is no dispute that the Claimant was experiencing ongoing mechanical issues with the machine he was assigned to operate. Once the bent shaft was discovered as the source of the mechanical problems, the Carrier determined that the Claimant lacked the fitness and ability for his position, having concluded that the Claimant was responsible for the damage. The Organization points out that the Carrier has failed to present any direct evidence that the Claimant was responsible for the damage. However, not every case must have direct evidence to be sustained, as some circumstantial evidence is very strong. Here, the Organization has not presented any evidence to refute the assertion that the Claimant was responsible for the damage to the machine that he was assigned to operate. The Carrier made a logical inference that the Claimant was at fault. Under the circumstances, the Carrier's determination to disqualify him cannot be said to be arbitrary.

**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 27th day of March 2019.