

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43529
Docket No. MW-42713
19-3-NRAB-00003-140391**

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 and unjustly disqualified and removed Machine Operator J. Seals from his Jackson 6700 Tamper Operator position on Gang #9106 by letter dated June 30, 2013 (System File UP513JF13/1587951 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Seals shall be compensated ‘... for ten (10) hours each day, for the difference in pay between Maintenance of Way, Jackson 6700 Tamper Operator and the respective position he is currently working and any and all overtime acquired by Gang # 9106, to begin on June 30, 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.

The Claimant had established and held seniority as a Jackson 6700 Tamper Operator within the Carrier's Maintenance of Way Department. The Claimant bid into the position on June 7, 2013, and the Carrier disqualified him from that position on June 30, 2013. Track Supervisor Cory Burkhalter wrote that the Claimant was not disqualified but was given a letter for "Failure to Qualify." Burkhalter wrote that the Claimant was given ample opportunity to exhibit the basic knowledge and support to succeed in the position but failed to do so.

The Organization contends that the Carrier's disqualification of the Claimant was arbitrary because the Claimant was not given 30 days to qualify for the position, and the Carrier did not grant his request to go to tamper school. The Organization contends that the Carrier knew the 30-day qualification period was illusory, as no one was likely to qualify for that machine in such a short period. Further, the Organization contends that Burkhalter's statement wasn't written until well after the Claimant was disqualified. The Organization contends that the Carrier never intended to give the Claimant the full opportunity to qualify that he was entitled to under the Agreement. The Organization contends that the Carrier disqualified the Claimant to avoid having to participate in the disciplinary process.

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. 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.

The Carrier contends that the Organization has failed to produce any evidence to show that it was incorrect to bar the Claimant from working as a Tamper Operator.

Further, the Carrier contends that the Organization has failed to demonstrate that the Claimant was actually qualified and able to perform the duties of a Tamper Operator.

Numerous Boards have found that the Carrier has the managerial right to judge fitness and ability. E.g., Third Division Award 36957. When the Organization challenges the Carrier's judgment, the burden falls on the Organization to establish proof of the employee's fitness and ability. Third Division Award 21615. Here, the Organization does not argue that the Claimant was able to perform the duties of a Tamper Operator, but instead argues he should have been given more time to learn and master the duties. This position acknowledges that the Claimant was not able to perform the required duties. Furthermore, the Organization has alleged, but failed to offer evidence to show, that the Carrier was predisposed to ensure the Claimant's failure. The Organization has failed to show that the Carrier's determination was 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.