

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43532  
Docket No. MW-42814  
19-3-NRAB-00003-140533**

**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 Tamper Operator E. Hardy from his assigned position on System Gang 3062 on August 19, 2013 (System File UP434WF13/1591540 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. Hardy shall be compensated ‘... for the difference in pay for each day between Division Machine Operator and Division Trackman, including straighttime (sic) and all overtime on each the claim dates, and for reinstatement of qualifications on account Union Pacific Railroad has wrongfully disqualified the Claimant from a Machine Operator position on System Gang 3062, starting on August 19, 2013 and continuing on carrier property.’”**

**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 within the Carrier's Maintenance of Way Department. On the dates in dispute, he was assigned and working as a machine operator, specifically as a tamper operator. Manager of Track Maintenance Keagan Niles disqualified the Claimant from the position of Tamper Operator by letter dated August 19, 2013.**

**The Organization filed this claim on September 9, 2013, asserting that the Claimant was unjustifiably disqualified. The Carrier denied the claim and the parties were unable to resolve it on-property.**

**The Organization contends that the Carrier's disqualification of the Claimant was arbitrary because the reasons initially given to the Claimant for his disqualification are different from those put forth in defense of this claim. The Organization contends that the evidence of the Claimant's poor performance was culled from a variety of second-hand sources, which is arbitrary, capricious, and an abuse of the Carrier's discretion. The Organization contends that the Carrier has failed to provide bona fide evidence of the allegations that provided the grounds for the Claimant's disqualification.**

**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 although the Claimant had been assigned to his machine on August 16, 2013, he had been working as a tamper operator since June of 2013. The Carrier contends that it provided evidence that the Claimant had persistent**

performance issues and failed to demonstrate interest in performing his duties. The Carrier contends that despite prior coaching and counseling, the Claimant was unable to properly perform his duties.

Numerous Boards have found that the Carrier has the managerial right to judge fitness and ability. 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 questioned the origin of the Carrier's determination, but provided no evidence to refute it. 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.**