

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43545
Docket No. MW-43088
19-3-NRAB-00003-150273**

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 wrongfully disqualified Restricted Ballast Regulator BR-1005 Operator C. Monroe as a machine operator by letter dated March 13, 2014 (System File UP508JF14/1603820 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Monroe shall be compensated ‘... for eleven (11) hours each day, for the difference in pay between Maintenance of Way, Restricted Ballast Regulator, assigned to BR 1005 and the respective position he is currently working and any and all overtime acquired by the Machine Operator currently operating tamper BR-1005, to begin on March 13, 2014, 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 within the Carrier's Maintenance of Way Department, having entered the Carrier's service 33 years prior to the events here. At the time of the dispute, the Claimant was assigned as a restricted machine operator ballast regulator. On March 13, 2014, the Carrier disqualified him from that position as a result of an inspection on February 23, 2014. Track Supervisor Richard Whitaker provided the following reasons for the disqualification:

"Yes sir it's been several time he's damaged the plow and not properly reporting it, also Mr. Monroe and I talked about his safety running the machine and agreed that he's unsafe operator."

The Organization contends that the Carrier's disqualification of the Claimant was arbitrary because the Claimant was not afforded the due process required under the Agreement before his rights were taken away. The Organization further contends that the Claimant's disqualification was based on the vague and unsupported statement of Track Supervisor Whitaker. The Organization contends that Whitaker initially gave one reason for the disqualification and then during the on-property handling offered a completely different reason. The Organization contends that the Carrier's disqualification of the Claimant was arbitrary, as it gave conflicting reasons and failed to refute the Claimant's statement.

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 Claimant repeatedly caused damage to his machine and failed to report it to the proper personnel.

The Organization offered the Claimant's statement as refutation of Whitaker's statement. In sum, it states that the machine he was assigned was already in bad shape when he started his work day. He stated that he was unable to have it repaired because a supervisor could not be located.

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. However, the Carrier's right to evaluate employees is not unfettered.

The Carrier must provide credible evidence that demonstrates a reasonable basis to disqualify the Claimant. Here, the Carrier offered contradictory statements for the Claimant's disqualification. The initial reason was so vague that it failed to provide any specific reasons for the decision to disqualify him. Thereafter, it provided additional reasons which differed from the original justification. We have carefully reviewed the entire record and find that it does not substantiate the Carrier's decision to disqualify the Claimant from his position as Restricted Ballast Regulator. Therefore, the claim must be sustained, and the Claimant must be made whole for wages and benefits lost, except for any period that the Claimant was determined medically unfit for duty.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 27th day of March 2019.