

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44235
Docket No. MW-43865
20-3-NRAB-00003-200455**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it disqualified Claimant D. Furar as a track inspector on May 7, 2015 (System File C-15-D090-3/10-15-0282 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Furar must have the improper disqualification removed from his record, he must be reinstated to a track inspector position and he must be compensated for all monies lost as a result of the Carrier's improper 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.

Due to pressure from the FRA, BNSF instituted a new training and certification program for Track Inspectors. This program, known as Tier III, was intended to address concerns that BNSF Track Inspectors did not have the necessary training for certain types of track conditions. The Tier III program was designed to take a deeper dive into certain types of track conditions and defects, and to emphasize certain core competencies. It trained and tested existing Track Inspectors and, as of April 1, 2015, employees were required to have the Tier III certification before they could be awarded or kept in a Track Inspector position. The test has a passing score of 85 or higher. If an employee failed Tier III, that employee was allowed to retake the exam. If the employee failed the retest, he or she had to wait one year before retaking the test. The Claimant failed both the test and retest. Because he could not pass the test and re-qualify before the deadline, he was disqualified on May 7, 2015 as a track inspector.

The Organization protests the disqualification, noting that Tier III qualifications, were not even in effect at the time of the Claimant's disqualification; they were not scheduled to be effective until July 1, 2015, two months later.

Applicable contract language states as follows:

"RULE 23. FAILURE TO QUALIFY

- A. Employees awarded bulletined positions, or employees securing positions through exercise of seniority, in a class in which not yet qualified, will not be disqualified for lack of ability to do such work after a period of thirty (30) calendar days thereon. Employees will be given reasonable opportunity in their seniority order to qualify for such work as their seniority may entitle them to, without additional expense to the Company.

NOTE: 'Without additional expense to the Company' is understood to mean that an employee qualifying on a position will be entitled to the rate of pay he was receiving on his immediately previous assignment.

- B. An employee failing to qualify for a position secured by bulletin, or in exercise of seniority will be given notice in writing of reason for such disqualification.
- C. An employee who considers himself unfairly disqualified may request, and shall thereupon be given, an investigation as to such qualifications pursuant to the provisions of Rule 62.

RULE 62. UNJUST TREATMENT

An employee who considers himself unjustly treated in matters other than discipline, or in matters other than those arising out of the interpretation and application of the rules of this Agreement, shall have the same right of hearing and appeal as provided in Rule 40, if written request is made to his immediate superior within twenty (20) calendar days after the date of the occurrence of the cause for complaint."

The Carrier maintains it has the unequivocal right to determine qualifications for its positions and to disqualify employees who fail to meet its standards.

The Organization argues the disqualification was arbitrary and capricious since the Tier III requirement did not exist at the time of the Claimant's disqualification. It notes he was still qualified as a Tier II Track Inspector, which was sufficient at the time. In the Organization's view, this makes it clear that the disqualification was arbitrary.

There was no argument in this case that Tier III subject matter was new, burdensome, unfair or onerous. Accordingly, we conclude that the material covered in Tier III training and testing was neither new nor different from aspects of track inspection which every Track Inspector was expected to know. The Claimant was given four days of instruction before failing the first test, and had a review session to prepare for the second test. In our view, his failure to pass the either test was properly deemed to be indicative of a lack of requisite knowledge by the Carrier.

AWARD

Claim denied.

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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 23rd day of October 2020.