

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44237
Docket No. MW-44209
20-3-NRAB-00003-200457**

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 Agreement was violated when the Carrier upheld the disqualification of Group 3 Machine Operator S. Humphrey following a disqualification hearing held on September 15, 2015 (System File T-D-4814-M/11-16-0079 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Humphrey shall ' ... have his seniority date restored! Mr. Humphrey must be immediately paid for his lost time on the day to attend investigation, including any and all overtime paid to the position he was assigned to work, any expenses lost, difference in pay, and we also request that Mr. Humphrey be made whole for any and all benefits, and his record cleared of any reference to any of the discipline set forth in the letter received by the Organization on October 13, 2015 letter from Jason Randash.”**

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 operated a Spiker on Gang RP-07. He was disqualified on July 17, 2015 for failing to properly maintain his machine. He requested an unjust treatment hearing which was held on September 15, 2015. On October 9, 2015, a decision on the Unjust Treatment hearing was issued stating that the Claimant was not unjustly treated and was properly disqualified.

The Organization argues the Claimant never received a notice in writing of the reasons for his disqualification as required by Rule 23B. The Carrier argues that both the Claimant and his representative knew the reasons behind the disqualification, and written communication was given after the hearing. The cited Rule does not specifically require that the notification precede the hearing. Nor does the Rule call for removal of the disqualification in the event the written notice does not precede the hearing prior to hearing. In our assessment, the question becomes whether or not the Claimant was prejudiced in his ability to defend against disqualification by lack of written notice prior to hearing. We do not find adequate evidence in the record of prejudice to the Claimant's case, such that a finding of due process violation could be supported.

The Organization's argument that all Rule 40 protections are incorporated by reference into Rule 62 is not persuasive. Rule 62 specifically says that the Claimant "shall have the same right of hearing and appeal as provided in Rule 40." Hence this incorporation, by its terms, applies only to the hearing and appeals processes, not to any notice requirements.

The Carrier has cited substantial precedent which places the initial burden of proving qualifications on claimants. These cases follow the generally accepted principle that the Organization must establish a *prima facie* case in contract interpretation cases, after which the burden shifts to the Employer. In our view, the burden on the Organization is relatively light since disqualification decisions made by the Carrier are typically based on information that may not be accessible to

claimants or their representatives. Machines could malfunction while being operated or serviced by other employees on other shifts. Maintenance logs and records belong to the employer and are kept in its possession. A disqualification is an adverse employment action based on information to which the employer may have exclusive access. As such, the Organization need only present elementary evidence of contract breach in order for the burden to pass to the Carrier. The standard of review is whether or not the Carrier has abused its discretion by acting in a way that is arbitrary, capricious, unreasonable or discriminatory.

In this case, the Organization has met its initial burden by showing that the Carrier failed to provide it with written notice prior to a hearing, and by way of the Claimant's assertion that he had no idea why he was disqualified.

In response, the Carrier has provided adequate evidence to support its decision. The language of the Agreement does not address the timing of the written notice, and it is not for the Board to insert a time requirement the parties have never agreed to. Carrier witness S. MacDonald testified to missing entries in maintenance logs; the Claimant admitted they were "not there." MacDonald insisted brakes should be checked at least once a day while the Claimant waffled and legitimated more lax surveillance. MacDonald said the Claimant called in about his machine without getting out to even look at it and see if an assembly was hanging down. There were also missing or broken bolts which the Claimant had not observed or repaired. This testimony establishes that the Carrier's decision was not arbitrary, capricious, unreasonable or discriminatory, and therefore was not an abuse of discretion.

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 23rd day of October 2020.