

PUBLIC LAW BOARD NO. 2960

AWARD NO. 137  
CASE NO. 165

PARTIES TO DISPUTE

Brotherhood of Maintenance of Way Employees

and

Chicago and North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The disqualification of Machine Operator M. Whitaker as operator of a Ballast Regulator was improper as it constituted disciplinary action without a fair and impartial hearing as prescribed by Rule 19.
- (2) The Carrier also violated rule 19(a) by not rendering a decision and furnishing same to the Employee within the prescribed ten (10) day time limit.
- (3) Machine Operator M. Whitaker shall be allowed the remedy prescribed in Rule 19 (d).

OPINION OF THE BOARD:

This Board, upon the whole record and all of the evidence, finds and holds that the Employee and Carrier involved in this dispute are respectively Employee and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

Sometime prior to September 22, 1983, Claimant was assigned as operator on a ballast regulator working on the Carrier's Suburban Division. Shortly after being assigned to the position, Claimant was notified by a letter dated September 22, 1983, that he was being disqualified from the position. The

letter read as follows:

"I am herewith advising you that you are being disqualified as an operator on the ballast regulator system machine number 17-3544. Your operation of this machine has been unsatisfactory and you have damaged the machine.

"You used the machine when you were told not to use it by the mechanic. You abused the machine by using the hydraulic pump as a brake instead of the brakes. This type of abuse probably contributed to the pump going out of the machine. You are responsible for bending the linkage to the shifting lever.

"In addition to your lack of respect for the equipment, you apparently do not know how to regulate ballast or dress track. I was told that you knew how to operate a ballast regulator, but I was apparently misinformed.

"Please exercise your rights in accordance with the applicable rules and agreements."

Subsequently, the Vice Chairman filed a grievance contending the Claimant was disciplined without a Rule 19 investigation.

Additionally, the grievance alleged that the Claimant was qualified to run the machine. The Organization asserted he had previously qualified on the machine in question in 1982. They also requested a hearing to determine the facts in connection with the disqualification.

The hearing convened December 5, 1983 and was recessed at the request of the Organization so it could find witnesses to substantiate their claim that the Claimant had previously worked the machine in 1982 and thus was qualified to operate the machine. The hearing was reconvened on December 14, 1983 and January 4, 1984.

The rules applicable to this dispute are:

Rule 7

"Machine Operators and Assistant Machine Operators will not establish separate seniority on each type machine. However, when and as need for operators of a particular type machine occurs it will be the obligation of those holding seniority as Machine Operators to establish to the satisfaction of the Supervising Officer that they are qualified to operate the machine involved. It is understood that an employee will be allowed a reasonable opportunity to demonstrate his ability."

Rule 19(a) and (b) reads:

"(a) Any employ who has been in service in excess of sixty (60) calendar days will not be disciplined nor dismissed without a fair and impartial hearing. He may, however, be held out of service pending such hearing. At the hearing, the employe may be assisted by an employe of his choice or a duly accredited representative or representatives of the Brotherhood. The hearing will be held within ten (10) calendar days of the date information concerning the alleged offense has reached the Assistance Division Manager-Engineering. Decision will be rendered within ten (10) calendar days after completion of hearing. Prior to the hearing the employe will be notified in writing of the precise charge against him, with copy to the General Chairman, after which he will be allowed reasonable time for the purpose of having witnesses and representative of his choice present at the hearing. Two working days will, under ordinary circumstances, be considered reasonable time. The investigation will be postponed for good and sufficient reasons on request of either party.

"(b) When discipline is administered, copy of the discipline notice and the transcript will be furnished the employe and the General Chairman."

Rule 20

"Should an employee feel he has been unjustly dealt with in other than discipline matters, he may make written protest to the Assistant Division Manager - Engineering. If a hearing is necessary to develop the facts, same will be granted within fifteen (15) days. If the employee is dissatisfied with the decision same may be progressed in accordance with Rule 21 - Time Limit on Claims.

"If protest is sustained and compensatory features are involved, proper adjustment will be made."

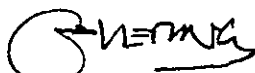
There is one factual question which is determinative of the procedural issues presented in this case. The question is whether the Claimant previously had qualified as a Ballast Regular Operator. If he had, then Rule 19 prevails and he could not be removed from the machine without first holding an investigation as set forth in Rule 19. If he had not, the Carrier, as implied in Rule 7, has the right, apart from Rule 19, to disqualify the Claimant after a reasonable opportunity to demonstrate his ability. In this case, the employee is entitled, on his own motion, to a hearing under Rule 20.

It is the conclusion of the Board that the evidence is insufficient in this record to prove the Claimant was previously qualified as a Ballast Regulator Operator. Thus, his removal from service is governed by Rule 20. An investigation was not needed and there is no specific time limit to render a decision after a Rule 20 hearing.

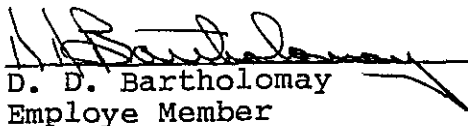
On the merits, we must conclude that as of the time in question, the Carrier correctly determined that Claimant was not qualified to run the Ballast regulator. There was substantial evidence that his performance was inconsistent with the demands of the machine. Perhaps at a later date, if given an opportunity, he could do a better job.

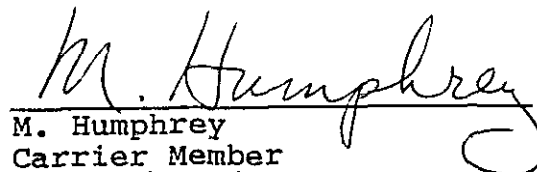
AWARD:

The claim is Denied.



Gil Vernon, Chairman

  
D. D. Bartholomay  
Employee Member

  
M. Humphrey  
Carrier Member

Dated: 5/9/89