

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees
and
Burlington Northern and Santa Fe Railway
(Former ATSF Railway Company)

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement on June 27, 2003, when it removed the Claimant, Mr. N. A. Miranda, from the Welder Training Program and then subsequently permanently disqualified him from the program on October 19, 2003, as a result of a hearing held on September 24, 2003.
2. As a consequence of the violation referred to in part (1), the Carrier shall immediately reinstate the Claimant to Welder Training Program with benefits and seniority unimpaired and make him whole for all wages lost account of this violation. Additionally, the Carrier shall remove any mention of this incident from the Claimant's personal record. [Carrier File No. 14-03-0315. Organization File No. 180-13D3-035.CLM].

FINDINGS AND OPINION:

Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the dispute herein.

The Claimant, Mr. Nicholas A. Miranda, was hired by the Carrier on July 31, 2001, and was working as a Trackman when, on September 23, 2002, he entered the Carrier's welder training program. Successful completion of this program is considered a promotion which requires greater skills than those of a Trackman, and which commands a higher rate of pay. (In 2001, the difference in pay was more than \$2.00 per hour, according to the Parties' Collective Bargaining Agreement.)

The Parties' Collective Bargaining Agreement provides that an employee who fails to satisfactorily perform the duties of a higher class within 120 days may be disqualified and returned to his former position, but an employee who is assigned more than 120 days will be considered qualified. If a qualified employee is thereafter determined to be disqualified, he may request a formal investigation, and if a claim is filed for restoration of his rights, the matter will be handled as a discipline case.

The record here indicates that the Claimant was not making satisfactory progress while training under an experienced Welder. The Claimant's immediate supervisor, Roadmaster Jimmy Capps, interviewed him on February 25, 2003, and had prepared a letter disqualifying the Claimant from the welder trainee program "for failure to demonstrate the ability, fitness and skills to perform the duties in a safe and efficient manner." The letter was shown to the Claimant, but not delivered, because he requested a "second chance" to continue training and to become qualified.

On June 27, 2003, an almost identical letter was sent to the Claimant, declaring him disqualified on the same date, for the same reasons that were stated in the February letter. As the result, the Claimant responded in writing to the Carrier's Division Engineer, requesting reconsideration of the Carrier's decision, and also demanding a formal investigation. He asserted that he had been certified satisfactorily on all but grinding skills, and the examiner had said he would return in three weeks to check on his progress in that respect. The record shows that assessment of his proficiency had taken place on June 25, 2003, just two days before he was notified of his disqualification.

The Claimant's letter was dated July 7, 2003, but according to the Division Engineer's response, not received until August 15, 2003. The requested formal investigation was set for September 15, 2003, and rescheduled for September 24, 2003, by agreement of the Parties. The Claimant was present with the Organization's Vice General Chairman representing him. Roadmaster Capps and Welding Supervisor Mark A. Neufeld appeared as witnesses for the Carrier. A transcript of testimony and evidence taken at the investigation is in the record before this Board.

The transcript discloses that although Mr. Capps felt that the Claimant was not making satisfactory progress in his training, he kept giving him further chances to gain the necessary skills. It was his final assessment, however, that the Claimant was, after nine months of training, still unable to perform all the duties required of a welder, based on his discussions with experienced welders and Welder Supervisor Neufeld, and his personal observations. After five months, in February, 2003, he had still not obtained a Commercial Driver's License (CDL), a requirement for Welders. When he was disqualified in June, he was still without a CDL, as far as Mr. Capps knew at that time. He said he felt that the Claimant simply could not do the welding work, from his observations and from reports given him. Mr. Capps submitted in evidence copies of operations tests done in February and June, 2003, in which he observes employees while performing their duties and determines whether operating and safety rules are being complied with. Although the Claimant passed several of the observed requirements, he failed on February 20, 2003, to fill out the forms required to show how his work gang is protected while on the track. On June 18, 2003, he was observed not wearing all the prescribed personal protection gear; i.e., hard hat, glasses, etc.

Mr. Neufeld was the individual who assessed the Claimant's skills on June 25, 2003. When asked how the Claimant failed to perform satisfactorily, Mr. Neufeld testified:

He failed to show to myself, as well as BNSF, that he could conduct finish grind procedures on a thermite weld. He also demonstrated to myself, as well as Roadmaster Jimmy Capps, that he could not perform duties that are also required of a welder trainee as far as working as a team with the lead welder; setting up the truck as instructed by the lead welder; following instructions by the lead welder, which pertain to, again, working as a team; making sure that oxygen and propane bottles are put onto the truck – the lead welder was performing most of the duties; as well as obtaining his CDL driver's license as instructed by the railroad. [Transcript page 11.]

In support of his assessment, Mr. Neufeld submitted in evidence a document captioned, "Thermite Welding - Field Checklist - Boutet process."¹ This checklist provides for assessments as "S: Satisfactory or Yes," "U: Unsatisfactory or No," and "NA: Not Applicable." There are spaces for the name of the welder being assessed, along with spaces for additional comments, and a summary line:

Worked performed was: Excellent _____ Acceptable _____ Unacceptable _____

This document had checkmarks indicating satisfactory performance on 20 of 55 items, and the summary line was checked at "Unacceptable." Those items not checked "satisfactory" were left blank, and an additional comment was appended, "Needs hot grind knowledge. Did not qualify." Mr. Neufeld said that he does not customarily mark items as "U: Unsatisfactory," but that leaving the "S - Satisfactory" space blank indicated that the item was not done satisfactorily.

The Claimant testified that he thought he was making good progress, but acknowledged that he was still not proficient in the process of grinding after a weld has been applied. He said that since his February meeting with Mr. Capps, he had received no criticism of his progress or the work he had done. He had welded two joints, but had not had sufficient time to grind them to satisfaction, due to time limitations.

¹ "Boutet Process" is a trade name for a thermite welding process, in which a mixture of powdered or granular aluminum metal and powdered iron oxide is ignited in a crucible. The aluminum reduces the iron oxide to molten iron through a chemical reaction induced by ignition. Temperatures above 4,500°F may be reached. The molten iron flows into the rail joint being welded, providing both heat for fusion and filler metal. The mold approximates the shape of the rail, but excess metal which remains must be ground off to present a smooth welded joint.

As for the CDL, he submitted in evidence his Class B CDL² which was issued on May 28, 2003. The record also indicates that he was required to undergo a road test examination administered by the Carrier, and this was successfully passed on July 6, 2003.

On October 19, 2003, the Division Engineer again wrote the Claimant:

As a result of the hearing held on September 24, 2003, at your request, to discuss your disqualification on June 27, 2003, this is to inform that after further review of the transcript it has been decided that your disqualification from the Welder Training Program has been upheld.

On December 26, 2003, this decision was appealed by the Organization to the Carrier's Assistant Director - Labor Relations. The Organization argues that the Claimant was denied due process and denied a fair and impartial hearing by reason of the fact that up until that date, neither the Claimant nor the Organization were supplied with copies of the transcript of testimony and evidence taken at the investigation, although both of them had made "repeated verbal requests." The Organization suggests that its appeal rights are impaired without a transcript to examine. It asks that the Claimant's seniority as a Welder be restored and he be made whole for any lost wages and unnecessary expense as the result. It further argues that the Carrier has not produced the evidence to support its disqualification of the Claimant.

The Carrier responds that the Claimant was afforded due process, that the transcript was sent to both the Claimant and the Organization, and that there is no record of "repeated requests." Nevertheless, the Carrier stated that it was sending another copy for the Organization's review.

The Carrier also argues that substantial evidence was developed, including the Claimant's own testimony, that he was not quite able to perform the duties of a Welder. It asserts that Roadmaster Capps coached and counseled the Claimant over a period of several months. The Claimant himself testified that over a period of nine months, he only tried to perform the duties of a qualified Welder on two occasions, and in both cases, the experienced welder had to step in and finish the job. The Carrier denies the Organization's claim.

The Board has carefully studied the transcript of evidence and accompanying exhibits, and has given consideration to the arguments presented by the Parties. The procedural issue of the alleged failure to furnish copies of the transcript will be addressed first, as it is a threshold issue.

² A Class B CDL authorizes operation of a single vehicle with a gross weight of more than 26,000 pounds, or any such vehicle towing a vehicle not in excess of 10,000 pounds. (49 CFR § 383.91(a)(2).)

Rule 13 - (e) of the Parties' Agreement reads as follows:

13 - (e) - Stenographic Report of Investigation. Copy of the stenographic report of the investigation will be furnished to the employe(s) disciplined and to the duly accredited representative of the Brotherhood of Maintenance of Way Employees who acts as the representative of the disciplined employe(s) at the investigation.

The Board notices that there is no time limit in this rule, but if a transcript is to be used in the preparation of an appeal, common sense dictates that it must be ("will be") furnished in time for an appeal to be prepared, based on the contents of the transcript. The Organization appears to have gone over its time limit in which to appeal the Division Engineer's October 19 decision, but the Carrier may have extended the time limit due to the Organization's alleged failure to receive the transcript. Time limits must be complied with, but Rule 13 - (e) states no time limit.

It has been the Carrier's practice in the many cases which have come before this Board to promptly furnish the transcript. Here, the Organization says neither it nor the Claimant received a copy before December 26, 2003. The Carrier asserts that they were sent out. The Organization states that it made repeated verbal requests for the transcript. The Carrier rejoins that it has no record of such requests. The Board has no reason, based on past experience, to disbelieve either Party. As we have previously observed, the Parties run a risk when critical documents are not sent by certified mail or a courier service, which provides proof of dispatch and evidence of receipt.

The Board also notices that the Claimant sent a letter to the Division Engineer dated July 7, 2003, allegedly received by the Carrier on August 15, 2003. If the Carrier had acted upon its date of receipt rather than the date on the Claimant's letter, it might have held that his request for an investigation was not timely made. Again, as in the preceding paragraph, one party states this and the other party states that, and there is no reason to believe one as opposed to the other.

The Board believes the Parties are best served if this dispute is not resolved on strictly technical issues, such as that discussed in the preceding paragraphs. Further, when the Organization finally did receive a copy of the transcript, it had the opportunity to amend its appeal based on its examination of the evidence therein. It chose not to do so, suggesting that its appeal required no supplement. The Board's finding on this matter is limited to this dispute only. The Parties should not construe these words to indicate that this Board will waive any departure from the Agreement's prescribed procedures in other cases.

The totality of the evidence in the transcript of testimony and the attached exhibits persuades this Board that the Carrier did not act improperly when it disqualified the Claimant. He had been in the welder trainee program for nine months when he was declared to be disqualified.

The Parties entered into a letter agreement in 1994 to establish a training program for new employees entering Group 6, the Welder Group. This letter agreement reads as follows, in pertinent part:

All new employees entering service in Group 6 after December 31, 1994, will establish seniority as welder on the appropriate welder (Class A) seniority roster on the first day their pay starts in Group 6. However, they will not be placed on a welder (Class A) position until such time as they are deemed qualified. . . . [I]n the event such employee fails to qualify as a welder within 120 days, he will be required to exercise seniority in accordance with the applicable rules of the agreement. . . .

It is evident that the Parties, when they executed this letter agreement, intended that 120 days *should be sufficient time for an employee to become qualified. The Claimant in the instant case has been afforded several "second chances," and nine months after he began, he could still not perform the grinding work which is an integral part of the welder's skills.*

There may be underlying issues which did not emerge. There was a suggestion of tension between the Claimant and the experienced welder with whom he was training in February. Mr. Capps was prepared to disqualify him at that time, but relented when the Claimant asked for another chance. The picture that emerges is the Claimant as a likeable young employee, unable to catch on to all the considerable skills required of a Maintenance of Way Welder, and a softhearted immediate supervisor who keeps extending "second chances" until the more direct Welding Supervisor comes on the scene and discovers how far short of the required skills the Claimant has fallen.

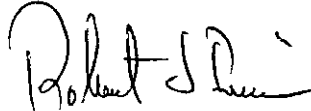
There are questions which remain unanswered. The Claimant contends that he was not criticized for his job performance after February, until Mr. Neufeld's assessment on June 25. We can only speculate that those welders with whom he was working were not disposed to upbraid a fellow employee, leaving that unpleasant task to their supervisors. Then, the Claimant asserted that Mr. Neufeld was not present when he and another Welder began their task on June 25; therefore, Mr. Neufeld did not observe all the work that he did and could not have accurately filled out the Thermite Welding Field Checklist. Mr. Neufeld, on the other hand, stated three times that he was there for the entire process. The Board cannot resolve these contradictory statements. One thing is clear, however. The Claimant admitted that he could not do the grinding work in an acceptable manner, even after nine months of training and practice.

One reason given by Mr. Capps and Mr. Neufeld for the disqualification was the Claimant's failure to obtain a CDL. The record shows, without question, he obtained a Class B CDL on May 28, 2003. He did not undergo the Carrier's own road test examination until July 6, 2003, and by that time he had already been disqualified. If this case turned on the sole issue of his

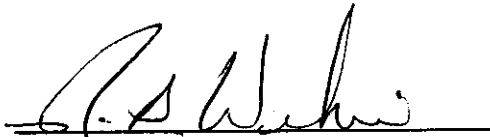
possession of a CDL, the outcome might be different, but the Board is persuaded that the Claimant is not a qualified Welder, he has had more than enough time to become qualified, and the Carrier was within its rights, finally, to disqualify him. The claim is therefore denied.

AWARD

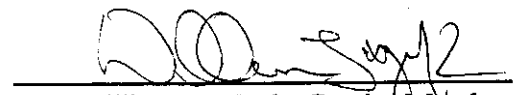
The claim is denied.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

July 9 2004
Date