

**PUBLIC LAW BOARD NO. 5564**

<b>Brotherhood of Maintenance of Way</b>	)	
<b>Employees</b>	)	<b>AWARD NO. 42</b>
	)	<b>CASE NO. 42</b>
<b>and</b>	)	
	)	
<b>Northeast Illinois Regional Commuter</b>	)	
<b>Railroad Corporation</b>	)	

**STATEMENT OF CLAIM:**

**“Claim of the System committee of the Brotherhood that:**

- 1. The Carrier’s decision to disqualify Machine Operator C. G. Stevenson as a ballast regulator operator effective May 10, 2010 is unjust, unwarranted and in violation of the Agreement.**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Stevenson shall be allowed to displace onto the Metra System Surfacing Crew immediately and paid for all overtime he lost as a consequence of the Carrier’s actions.”**

**OPINION OF BOARD:**

**Public Law Board No. 5564, upon the whole record and all the evidence, finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended; that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing and did participate therein.**

**When events giving rise to this dispute occurred, Claimant was a qualified Rank 1 Class B Machine Operator. The record establishes that on May 7, 2010, Claimant’s position was abolished, and pursuant to applicable provisions in the parties’ Collective Bargaining Agreement, he exercised his seniority (“bumped”) to a ballast regulator position held at the time by junior machine operator Manuel Palacies. There is no dispute that at the time, Palacies had been operating a ballast regulator with a small undercutting crew, and Claimant therefore assumed he would be taking over those particular duties. Instead, however, the Carrier placed Claimant in an open ballast regulator position on a high-speed system surfacing gang, and Palacies subsequently exercised his seniority (as a result of Claimant’s bump) to a laborer’s job.**

May 8, 2010 was Claimant's first day on the new job, and over the course of the next three days, he was occasionally observed by General Roadmaster Al Bobby. It is not disputed by the Organization that Claimant had some trouble, despite being assisted on the first day by a more experienced regulator operator, keeping up with production requirements on the gang. On May 10<sup>th</sup>, therefore, Bobby disqualified Claimant as a ballast regulator operator. By letter dated May 11, 2010, the Organization requested an "Unjust Treatment Hearing" under Rule 32 of the Collective Bargaining Agreement, and on June 1, 2010, the parties convened for purposes of adducing testimony and evidence concerning Claimant's disqualification.

General Roadmaster Bobby testified at the hearing that, while Claimant was, at least on paper, a qualified ballast regulator operator, the duties and responsibilities of a ballast regulator operator on a system surfacing gang were significantly more demanding than those of a ballast regulator operator working in a less production-sensitive setting. Bobby believed that Claimant had been given ample opportunity to reacquaint himself with the machine to which he had been assigned, and in the end, Claimant simply could not keep up. For his part, Claimant testified that, from the beginning, he thought he would be bumping Palacies from the machine he was operating with the undercutter crew, and not onto a system gang job. Claimant also testified that, even though he was three days on the new job before being disqualified, much of that time was spent waiting for trains and not in actual production.

In support of this complaint, the Organization cited Side Letter 6 of the Collective Bargaining Agreement, which states:

*An unqualified Maintenance of Way work equipment operator will be allowed to make Rule 9(D) displacement in his group, rank and class under the following conditions;*

- *A work equipment operator who has not previously demonstrated his ability on a particular machine will be allowed to displace the junior operator assigned to that machine.*
- *The unqualified operator will be allowed to train for a period of ten (10) days.*
- *Training will be provided by the qualified operator who held the position.*
- *The determination as to his qualifications to continue on that machine will be made within this ten (10) day period by a Work Equipment Supervisor.*

The Organization argued that Claimant was not given anywhere near ten days in which to qualify on the system gang ballast regulator. The Carrier, on the other hand, argued that Claimant had already qualified as a ballast regulator and

as such, Side Letter 6, which refers only to “unqualified” machine operators, did not apply in his situation.

What makes this case difficult for the Board is the Carrier’s ready admission that all ballast regulator jobs are not “created equal” in terms of performance expectations. Indeed, while Claimant was “qualified” by virtue of his class of machine operator seniority, and as such, Side Letter 6 was perhaps inapplicable, the fact remains that he was, for all intents and purposes, “unqualified” in the specific context at issue. Importantly, Claimant had no idea when he first exercised his seniority to Palacies’ job that he would be placed in a system gang rather than with the crew with whom Palacies had been working. Perhaps had Claimant known ahead of time that this would happen, he might have exercised his seniority elsewhere. Perhaps not. In any event, the unfortunate outcome was not strictly a result of Claimant’s overestimation of his own skills and abilities. The record establishes that Claimant admitted needing a period of time in which to reacquaint himself with the operation of a ballast regulator, and clearly, a production-oriented high-speed system surfacing gang was not the best place for such “reacquainting” to occur.

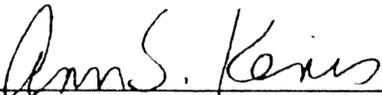
We understand and appreciate the conundrum on both sides of this particular issue. Under the Agreement, Claimant exercised his seniority to a position for which, at least on paper, he was qualified. However, in the particular context at issue, he was clearly not qualified. That being said, the Board does not agree with the Carrier that three days was adequate in terms of a learning curve, at least not in these particular circumstances where the two ballast regulators were so different in their operation.

Importantly, the Board also understands from the record that productivity on these system gangs is measured daily, and time is of the essence. In that regard, then, the Carrier should not be required to unduly sacrifice its operation in the interest of coddling a patently unqualified employee. We find, however, that in this particular case, the Carrier afforded Claimant insufficient opportunity to bring his performance into line with productivity expectations, and total loss of his ballast regulator seniority was too high a price for his evident, but perhaps temporary, skill deficiencies during what amounted to an inappropriately short trial period.

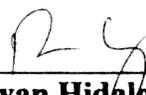
As to remedy then, the Board will rule to restore Claimant’s ballast regulator seniority without back pay, and award him one-time displacement rights to a ballast regulator position held by a junior employee. Should he choose to do so, Claimant has 45 days from the date of this award in which to exercise the displacement awarded herein.

AWARD

**Claim is sustained in part and denied in part, in accordance with the above Findings.**

  
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**ANN S. KENIS, Neutral Member**

  
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**Tim Martin Hort  
Carrier Member**

  
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**Ryan Hidalgo  
Organization Member**

**Dated this 25 day of March, 2014.**