

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 February 7, 2003, when it disqualified the Claimant, Mr. M. P. Saiz, from holding a Welder A position; for allegedly failing his welding exam at the training center and failing to maintain a current DOT/CDL.
2. As a result of the violation referred to in part (1), the Carrier shall reinstate the Claimant's Welder A seniority, remove the disqualification from his personnel record, and make him whole for the difference in pay that he could have earned had he maintained his Welder A seniority. [Carrier File No. 14-03-0124. Organization File No. 160-13D3-033.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. Michael P. Saiz, was hired by the Carrier in its Maintenance of Way Department on May 4, 1998. His personal record indicates that he worked as a Trackman until furloughed on October 2, 1998. He returned to service on January 1, 2001, and was promoted to Welder on April 9, 2001.

On February 6, 2003, he was notified of his disqualification as a Welder by Kansas Division Welding Supervisor Alfred L. Franklin, who stated the cause:

It has been determined that you do not possess the ability, fitness and skills to handle the position in a safe and efficient manner.

The Parties' Agreement provides that under these circumstances, a disqualified employee may request an investigation and file a claim for restoration of his rights. This was done and a

formal investigation was held on April 23, 2003, in which the Claimant was represented by the Organization's Vice General Chairman.

Welding Supervisor Franklin was the principal Carrier witness, who explained his reasons for disqualifying the Claimant. He testified that the Claimant did not possess a valid Commercial Driver's License (CDL), a requirement for Welders. Reportedly, it had been suspended for a DWI (driving while intoxicated) violation. He further stated that in monitoring the Claimant's performance, he found that the Claimant required coaching and counseling by himself or other Welders. Some of his work did not meet the Carrier's standards. He did not properly use personal protective equipment.

Besides the above deficiencies, Mr. Franklin said the Claimant failed to achieve a passing grade in the thermite welding class held in Overland Park, Kansas, shortly before he was notified of his disqualification. He offered in evidence an e-mail he received from Mr. Ricky L. Bell, Manager of Rules and Training, which reads:

This is the 2nd time this man has not passed the thermite class. It is my opinion [sic] that he is not qualified to make thermite welds and the comments below will reflect it. I will send him a letter when I get back informing him he failed.

Appended below was a memorandum from a welding instructor at Johnson County Community College (JCCC), which reads:

Mike Saiz received a (D) grade for the thermite welding class TW-0103
He need 75% to make a (C).

His grades in the class were:

Lab grade	86% of the 300 possible
Wide gap	90% of the 300 possible
Quiz's	74% of the 100 possible
Final written test	52% of the 200 possible
<u>Attendance</u>	<u>50% of the 100 possible</u>
Loss of letter grade	
<u>For attendance</u>	<u>-10%</u>

Total for the class was 65% of the possible.

This student did not want to be here! It show in action in class by pulling his hat down over his eye and sleeping in class, Jumping up and leaving the class room every little bit, His work practices on the weld that he made was just to get it

done! He tried to make a weld with a 7/8 inch gap, and when I stop him on it **“he said I was just being picky”** His negative attitude affected him and other students in class.

He stated to me that he had 8 - 10 welder working under him!

His attitude has to effect the quality of his worker! [Bold type, misspelling, and grammatical errors in original text].

On cross-examination, Mr. Franklin stated that his decision to disqualify the Claimant was based on several rule violations, but he was unable to specify any details such as precise dates and the nature of the alleged violations. These answers given by Mr. Franklin reflect the imprecise character of the alleged violations:

Q. So if he was not disqualified under the terms of this side letter agreement, or Rule 8 nor, why now?

A. Because of several rule violations.

Q. Okay, but he was never written up for any rule violations. He was never disciplined for any rule violations.

A. My understanding, no. [Q&A Nos. 101 and 102]

(The Board notices that the Claimant's personal record bears no disciplinary entries).

Mr. Franklin explained that rule violations are preferably addressed by coaching and counseling, and that only repeated violations would result in formal disciplinary procedures.

Welder Trainee Robert E. Castillo was called as a witness by the Carrier. He had worked with the Claimant and said, “I was told to be a witness to how Mike Saiz was performing as a welder and stuff.” — Answer No. 195. He said he had worked with the Claimant for about two weeks. The only criticism he offered involved the manner in which the Claimant broke open the thermite weld mold, which might permit molten metal to escape if it had not solidified. Mr. Castillo had been taught to open the mold slowly to determine whether the metal had solidified. He said the Claimant was an efficient worker and, “he taught me a lot of what I know.”

The Claimant, called to testify, asserted that he was qualified to perform the duties of a Welder, but attributed his poor test score to difficulty reading and the stress of a divorce and his son's illness, which resulted in absence from the training class. He said he missed two days from the first class, an excused absence, because his son was admitted to a hospital emergency room. He said he must have passed the first class he attended, however, because he was thereafter permitted to perform thermite welding. Nonetheless, he was told he had failed and was required to attend the second class, in which he received a grade of 65% — a failing grade. He further testified that he had experienced personal hostility from the instructors. He also denied that he

had been coached or counseled by Mr. Franklin, since his only service in that supervisor's territory was in his capacity as a Machine Operator. He asserted that Welding Supervisors on the Gulf Division had told him he did a good job and would be "more than welcome" to work for them again. The Claimant exercised his seniority as a Machine Operator when he was disqualified as a Welder, and has continued in the Carrier's service, as far as the record shows, albeit at a lower rate of pay than that of a Welder.

With respect to the 50% attendance grade recorded by the welding instructor, the Claimant testified that he was not absent at all for the second thermite welding class, but was ten minutes late on one occasion.

On May 14, 2003, General Manager Greg A. White confirmed the Claimant's disqualification as a Welder. That determination was promptly appealed by the Organization to the Carrier's Labor Relations Department. Being denied at that level, this dispute has been placed before this Board for a final and binding decision.

The Organization raises a threshold issue, arguing that the Carrier has no authority to disqualify the Claimant because he had been working as a Welder more than 145 days. In support of its position the Organization points to Paragraph 4 of a Letter Agreement dated December 27, 1994, and Rule 8(c) of the Schedule Agreement, which read as follows, respectively:

[Paragraph 4]. 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. They will be paid \$14.70 per hour until such time as they are considered qualified and placed on a welder position th [sic] the applicable welder (Class A) rate. Without prejudice to any other agreement, rule or practice, particularly Rule 8 of the current Agreement, in 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. Such employees will not establish welder Class B seniority. Through attrition, welder Class B seniority will be eliminated.

[Rule 8(c)]. An employee who accepts promotion to a higher class but fails to satisfactorily perform the duties of the higher class within twenty-five (25) work days will be disqualified. This employee will return to his former position in accordance with Rule 5. All employees affected thereby will be governed by Rule 5.

An employee who is assigned more than twenty-five (25) work days to a position will be considered qualified.

An employee who fails to pass the examination(s) or who is otherwise disqualified, shall be advised promptly in writing, with copy to the General Chairman, as to the cause or causes of his failure to qualify.

NOTE: "An employee disqualified under the provisions of this rule after having been assigned more than twenty-five (25) work days to the position, may, within 20 days following notification of disqualification, request a formal investigation. If the employee requests a Formal Investigation and a claim is filed for restoration of his rights, it will be handled as a discipline case."

In light of the provisions above, the Board does not concur in the Organization's position. As a general rule, any employee — without regard to his or her length of service — may be found disqualified upon sufficient evidence. Diminished capacity to perform the required duties of a position might result from legitimate causes; *e.g.*, progressive negligence because of advanced age or infirmity, injury, or physical or mental incapacity caused by disease, or emotional disability, either temporary or permanent. Therefore, even though the Claimant had been qualified as a Welder, and worked more than 25 days as such, some circumstances might call his qualifications into question. Here, the Claimant failed to pass an examination, a disqualifying circumstance specifically named in the third paragraph of Rule 8(c), *supra*.

Indeed, the Board notices, Rule 8(c), in its appended NOTE, clearly provides a procedure to be followed in the event an employee challenges a determination that he fails to pass an examination or is "otherwise disqualified."

An employee disqualified under the provisions of this rule after having been assigned more than twenty-five (25) work days to the position, . . . [Underscoring added].

That is the procedure which was followed in the instant case. This NOTE would have no meaning if an experienced employee, once qualified, could never be disqualified.

The Organization further argues that the Claimant's record is free of any disciplinary entries for work practices or rule or safety violations. Only the opinion of Welding Supervisor Franklin lends any support to the Carrier's decision to disqualify the Claimant.

The Carrier responds that the Claimant was disqualified because he twice failed the Carrier's instructional course and did not have a CDL. The evidence is clear. The Claimant readily admitted to these facts.

The Carrier further asserts that in a disqualification, the burden of proof falls to the Claimant and the Organization to prove the Claimant was qualified, and in this case no such evidence was presented.

The Board has carefully studied the record in this case and considered the arguments of the Parties. The sharp differences in the testimony of the Claimant and Mr. Franklin are troublesome. One issue is clear, however. The Carrier asserts that the possession of a valid CDL is a necessary qualification for a Welder, and the Organization has not disputed that contention. The suspension of the Claimant's CDL renders him disqualified, of itself. The matter cannot be left at that point, however decisive it might seem to be. Suspended licenses are generally restored after a passage of time. That disqualifying premise, therefore, cannot be considered permanent, regardless of its reality on February 7, 2003.

In accordance with the third paragraph of Rule 8(c), the Board believes that the Claimant's failure to pass the examination at JCCC is also sufficient cause for his disqualification:

An employee who fails to pass the examination(s) or who is otherwise disqualified, shall be advised promptly in writing, with copy to the General Chairman, as to the cause or causes of his failure to qualify.

The failure to possess a valid CDL and the failure to pass the examination on thermite welding are sufficient causes for the Claimant's disqualification, and he has not rebutted these two facts.

The Board is not persuaded that permanent disqualification is fully justified, however. First, as noted above, the Claimant's CDL may be restored at some point in time after its suspension.

Second, the Board finds the evidentiary conflicts troublesome. The Carrier's own witness, Mr. Castillo, indicated that he thought the Claimant was a competent Welder, finding fault with only one aspect of his work. Mr. Franklin was imprecise in his criticism. He referred to safety violations, but did not name any. He referred to rule violations, but did not name any. He referred to personal protection equipment, but did not specify any misuse. No dates and places were recorded. No discipline was assessed. No warning letters were submitted into evidence. The imprecise nature of his testimony is illustrated in these questions and answers in the record:

- Q. Mr. Franklin, you made a statement that, that Mr. Saiz compromised safety. Did Mr. Saiz compromise safety to himself and others in performance of his duties?
- A. Yes, sir.

- Q. Okay, could you give me an example?
A. Yes. In following rules and procedures, okay, going into the, say the preheat process.
- Q. Okay.
A. If we would ask Mr. Saiz right now what are the requirements for wearing, for that job task, just, just right now, I don't believe he'd be able to answer the question. The correct PPE for different job tasks. And even in the field I had to instruct him on those.
- Q. Okay, did, you said you had to instruct him, did you notice a rule violation or, or something of that nature?
A. Absolutely, that's correct.
- Q. Okay, why was he not written up for a rule violation?
A. Why was he?
- Q. Yeah, I mean it, it...
A. That's, that's the reason why he's being disqualified right now.
- Q. So in other words, off of a single rule violation then he is being disqualified?
A. No, several, several rule violations. I have numerous of rule violations from the Maintenance of Way Operating Rule, from the Thermite Welding Manual. I have several rules.
- Q. Okay, was he ever written up or disciplined because of a rule or safety violation?
A. No, sir. Not, not from Al Franklin.
- Q. Okay, was he ever written up or disciplined for any rule violation of safety violation by any Carrier official?
A. Presently, only, speaking for Al Franklin, he's being pulled out, disqualified as a welder presently because of his performance as a welder.
- Q. Okay, so it's your determination that he's not qualified as a welder?
A. Yes, sir. Over a period of time. Yes, sir. [Q&A Nos. 70-79].
- Q. Okay, and so how long was he on your territory?
A. Off and on for at least, I'm going to say at least a year.

Q. Off and on. Okay, so...

A. The year 2002.

Q. So what's the difference from when he first come on your territory to three months later, to six months later, to nine months later, to now a year later?

A. Several rule violations.

Q. Okay, but he was never written up for these rule violations?

A. Right now that's the reason why he's being disqualified.

Q. But he was never written up for these rule violations?

A. I, I, I, I don't have record of, of all the failures and...

Q. Okay, you never wrote him up for any rule violations?

A. I want to say, yes.

Q. Okay, do...

A. Enter into what we call OPS testing and I, I'm almost certain I have some failures, but I don't have a record of them.

Q. Okay, so you don't have a record of any of them?

A. Not, not with me right now.

Q. Do you, do you show any discipline on his personal record or anything of that nature that you've written up for anything?

A. No, just, just the disqualification right now. [Q&A Nos. 88-96].

Although he testified that the Claimant was not qualified at the time of the investigation, Mr. Franklin acknowledged that he might become qualified at some future date. In his Answer No. 49, he said, "Maybe in the future, but right now presently, no. Not at the present time."

The Arbitrator does not unreservedly share the Carrier's view that the burden of proof falls to the employee and his or her representative to prove that an employee is qualified. In the Arbitrator's view, once an employee is determined to be qualified, the burden of proof is upon the employer to show cause for his or her disqualification. Once the employer makes a prima facie case for disqualification, then there is a shifting burden of proof to the other party the refute the employer's case.

Turning to the Claimant's failing grade in the thermite welding class at JCCC, the Board believes there is more here than meets the eye. The Claimant's failing grade appears to be contrived. Although he denied that he was absent 50% of the time, the Board notices that he was

given a 50% grade on attendance, and then further reduced by 10 points, resulting in a bottom line grade of 65%, and a double penalty for imperfect attendance. The computation without the 10-point reduction is as follows:

Lab grade	86% of 300	=	258
Wide gap	90% of 300	=	270
Quizzes	74% of 100	=	74
Final written test	52% of 200	=	104
Attendance	50% of 100	=	<u>50</u>
756 of 1000 or 75.6% of 100			

Without the 10-point reduction, the Claimant would have had a passing grade of 75.6 or a C grade. Further, the Claimant denied that he was absent 50% of the time. In view of this conflicting testimony, an attendance record or roll would have been helpful in resolving the conflict.

The damning comments at the close of the instructor's memorandum seem to go well beyond the impersonal relationship which should exist between an instructor and a student. The employment of exclamation marks and bold-face type expose an unusual degree of hostility, which brings into question the objectivity of the writer. Essentially, by giving weight to the opinion of the welding instructor, the Claimant is condemned by an accuser he could not face. The Board grants, however, that the Claimant, in his testimony, also reveals an "attitude," in the idiom of today's youth, which may have provoked the instructor. Although the instructor may have exaggerated, it would be quite a stretch to conclude that all his criticism was fabricated.

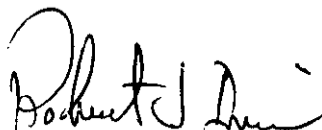
The totality of the testimony and evidence leads the Board's majority to the following conclusions. By reason of his failure to hold a valid CDL and because he received a failing grade, although suspect, in the thermite welding class, the disqualification will stand. The claim for the difference in pay had he maintained his Welder seniority is, therefore, denied.

Because the Carrier's Welding Supervisor could not be more specific with regard to his observations of the Claimant's work, because the Carrier's other witness indicated that the Claimant was a competent Welder, and because the Claimant would have received a passing grade, except for the pyramided penalty for imperfect attendance, the Board believes he should be given another opportunity to prove his qualifications by achieving a passing grade in another thermite welding class. Preferably, a different instructor should assess his ability, but the Board cannot direct that this be done. The Claimant must be afforded the opportunity to attend the next available thermite welding class after the date of this Award. If he achieves a passing grade, and if he can present a valid CDL, his seniority shall be restored, but without pay for time lost as the result of his disqualification on February 7, 2003.

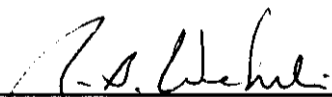
Because he has been marked as an employee and student with an "attitude," the Claimant is counseled to monitor his own social posture with others, to ensure a harmonious interrelationship conducive to achieving a passing grade.

AWARD

The claim is sustained in accordance with the Opinion.



Robert J. Irvin, Neutral Member



R. B. Wehrli, Employee Member



William L. Yeck, Carrier Member

February 2, 2004

Date