

PUBLIC LAW BOARD NO. 6399

**CASE NO. 23
AWARD NO. 23**

**Brotherhood of Maintenance of Way Employes
Division - IBT Rail Conference**

and

**Norfolk Southern Railway Company
(former Norfolk & Western Railway Company)**

Claimant: S. Wood

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when the Carrier upheld its decision to disqualify Mr. S. Wood from his backhoe operator position in Lynchburg, Virginia on August 4, 2020 after an unjust treatment hearing held on September 2, 2020 (Carrier’s File MW-BLUE-20-116-LM-751 NWR).
2. As a consequence of the violation referred to in Part 1 above, Claimant S. Wood shall now have the disqualification removed from his service record and be compensated for any additional mileage incurred as a result of his improper disqualification. Additionally, the Claimant shall be allowed to exercise his seniority back onto the backhoe position in Lynchburg, Virginia should his seniority permit.”

FINDINGS:

The Board, after hearing upon the whole record and all the evidence, finds that the Carrier and Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as amended, that the Public Law Board 6399 has jurisdiction over the dispute involved herein and that the parties were given due notice of hearing thereon.

The Claimant has established and maintains seniority in the Carrier’s Maintenance of Way and Structures Department.

On July 30, 2020, the Claimant, a Maintenance of Way employee with an Eastern Region Roadway Machine Operator seniority date of January 20, 2019, exercised his seniority to displace to a Backhoe Operator position located in Lynchburg, Virginia. On the first day, the Claimant reported to the position. The Claimant was tasked with removing and replacing five ties. The following day

the Claimant was tasked with removing and replacing ten ties. Upon completion of his assigned tasks, Supervisor T. Baity disqualified the Claimant from his backhoe operator position.

By letter dated August 13, 2020, the Organization formally requested an unjust treatment hearing on Claimant's behalf regarding the Carrier's improper disqualification of the Claimant from his backhoe operator position on August 5, 2020. The unjust treatment hearing was held on September 2, 2020, and by letter dated September 21, 2020, the Carrier informed the Claimant of its decision to uphold the Claimant's disqualification from the backhoe operator position.

The Organization filed this claim on October 1, 2020, which was denied by the Carrier on November 23, 2020. The claim was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Organization contends that the Carrier failed to comply with Rule 30 of the parties' controlling Agreement by failing to provide the Claimant with the Rule's procedural rights and protections. Rule 30 gives employees the right to request a hearing concerning treatment they receive at the Carrier's hands that is unjust, even if such treatment takes place outside of a formal disciplinary context. The Organization contends that the procedural standards for the fair and impartial conduct of such a hearing are the same as they are in the context of a disciplinary hearing. A hearing pursuant to this provision of the Agreement was timely requested and held.

The Organization contends that based on the Carrier's failure to protect the Claimant's due process rights, the Carrier's decision to disqualify the Claimant from the backhoe position must be overturned, without consideration of the merits of the claim. Specifically, the Organization contends, that nearly two hours after the investigation had begun, it was discovered that Assistant Hearing Officer C. Delgallo was the immediate boss of Charging Officer Supervisor Baity. The Organization contends that this relationship represented a clear conflict of interest, and that Mr. Delgallo was subsequently relieved of his position as assistant hearing officer and was excused by Hearing Officer Gillespie. The Organization contends that Hearing Officer Gillespie acknowledged that he and Mr. Delgallo had been working together on preparing for the investigation and that the two men had spoken to one another about the investigation. Despite this, the Organization contends that Mr. Delgallo was only removed after the Organization objected to his continued presence in the hearing.

As to the merits of the claim, the Organization contends that although the Charging Officer disqualified the Claimant based on an alleged failure to meet productivity, there is no dispute that the Claimant completed all the tasks assigned to him on both days he was working in the backhoe. The Organization contends that no other employee was tested against this alleged standard of performance, confirming that the Carrier's disqualification of the Claimant was arbitrary, capricious, and an abuse of any Carrier discretion.

The Organization contends that the Claimant testified that Supervisor Baity told him that if he was going to use his seniority to displace someone from the backhoe position, he would have to be as good or better than the person he was displacing, in contradiction to the controlling Agreement, which lists seniority, not relative skill, as the determining factor in matters of displacement. The

Organization contends that the Claimant was clearly entitled to displace the junior employe by virtue of his superior seniority.

The Carrier contends that the Organization has failed to carry its burden of proving that the Carrier's disqualification of the Claimant from the Backhoe Operator Position was not in accordance with the applicable agreement. The Carrier further contends that Carrier Supervision maintains the sole discretion to determine whether an employee is qualified for a particular position. The Carrier contends that there was no evidence that the Claimant had been unjustly disqualified from the Backhoe Operator position. The Carrier contends that Supervisor Baity made a reasonable determination that the Claimant lacked the necessary fitness and ability to qualify for the Backhoe Operator position and issued the disqualification. The Carrier contends that pursuant to Rule 11(b), the Carrier is to be the sole judge of an employe's fitness and ability.

The Carrier contends that once an unfair treatment hearing was requested, it conducted a fair and impartial hearing on September 2, 2020. The Carrier contends that the Hearing Officer concluded that the Claimant was not subjected to unjust treatment and that the disqualification was proper and consistent with the standards set forth in the applicable agreement.

Rule 30 of the applicable Agreement provides, in part:

(a) An employee who has been in service more than sixty (60) calendar days shall not be disciplined or dismissed, nor will an unfavorable mark be placed upon their record without a fair and impartial investigation.

(h) An employee who considers himself otherwise unjustly treated shall have the same right of hearing and appeal as provided for in this Rule 30 if written request is made to his immediate superior within ten calendar days of cause of complaint. This rule does not apply to grievances in connection with time claims, which must be submitted and progressed in accordance with the provisions of Rule 31.

Before considering the merits of the claim, the Board is obliged to review the procedural objections raised by the Organization. It is well-settled that "[t]he concept of just cause includes not only substantive principles of fairness, but procedural ones as well." Third Division Award 41224. There is no question that the Hearing Officer erred by allowing the Assistant Hearing Officer to participate in the unjust treatment hearing, as he was the direct supervisor of the Charging Officer. Additionally, it was discovered that the Assistant Hearing Officer had knowledge of the events prior to the hearing and had worked together with the Hearing Officer to prepare for the hearing. Thus, the Organization had legitimate concerns as to whether the Claimant was deprived of a fair and impartial hearing, as guaranteed by Rule 30.

Although the Hearing Officer asked the Assistant Hearing Officer to leave the hearing once the direct relationship was exposed on the record, the damage had already been done. As described in Third Division Award 41224,

Given that the Hearing Officer is a Carrier official, it is critical to the dispute resolution process that the investigative Hearing not only be conducted fairly, but also that it is perceived to be a fair process. The Hearing Officer must have – and be seen as having – an open mind, one that is not made up in advance of the Investigation. Anything less would render the idea of a “fair and impartial investigation” a sham.

The parties’ Agreement demands that an employe requesting an unjust treatment hearing “shall have the same right of hearing and appeal” as in a disciplinary matter. The Carrier’s breach of the Claimant’s right to a fair and impartial hearing requires a sustaining award without consideration of the merits of the claim.

The purpose of any remedy is to put the employe back in the same place he would have been had his rights not been violated. The Board orders that the disqualification discussed herein be removed from his service record. Since filing this claim, the Claimant has been qualified as a Backhoe Operator. In light of our findings, the Claimant’s qualification as a Backhoe Operator shall be backdated to September 2, 2020, the day of the unjust treatment hearing. All other requested relief, not expressly granted, is denied.

AWARD

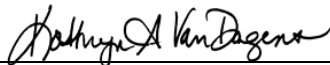
Claim sustained.

ORDER

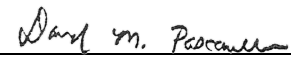
This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is signed by the parties.



Scott M. Goodspeed,
Carrier Member



Kathryn A. VanDagens,
Chairman



David M. Pascarella,
Employe Member

Dated: 2-23-2026