

BEFORE SPECIAL BOARD OF ADJUSTMENT NO. 924

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION
IBT RAIL CONFERENCE**

and

**UNION PACIFIC RAILROAD COMPANY
(FORMER CHICAGO & NORTHWESTERN TRANSPORTATION COMPANY)**

Case No. 272

Award No. 248

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier improperly disqualified Material Department Truck Driver J.E. Johnson from operating any Company motor vehicle effective March 8, 2005 (System File 3KB-6881G/1421122).
2. As a consequence of the violation referred to in Part (1) above, Claimant J.E. Johnson shall not have the restriction on his seniority removed (qualifications reinstated) and be compensated for all wage loss suffered."

FINDINGS:

At the time of the events leading up to this claim, the Claimant was employed by the Carrier as a truck driver in its Material Handling Department.

By letter dated March 8, 2005, the Claimant was informed that he was disqualified from operating any motor vehicle as an employee of the Carrier, due to the Carrier's determination that the Claimant was unable to satisfactorily complete the required duties of his position as a truck driver. The Organization thereafter filed a claim on the Claimant's behalf, challenging the Carrier's decision to disqualify the Claimant from operating Carrier motor vehicles. The Carrier denied the claim.

The Organization initially contends that the Carrier violated Rule 20 of the

controlling Agreement when it failed to schedule the hearing in accordance with Rule 20. The Organization argues that this failure renders indefensible the Carrier's position that the Claimant was not qualified to operate Carrier vehicles. The Organization asserts that in situations such as the instant matter, the Carrier, when challenged, must present evidence to show that the employee was not qualified as asserted. Such evidence must be produced through a hearing, as contemplated in Rule 20. Referencing several prior Board Awards, the Organization therefore maintains that because there was no hearing in this matter, the Carrier has not established its affirmative defense.

The Organization argues that it submitted the claim to the Carrier officer designated to handle claims, and it sent a copy of the claim to the Carrier officer that the Carrier subsequently identified as the person whom the Organization should contact about scheduling the hearing. The Carrier's refusal to schedule a hearing under these circumstances violated Rule 20.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the instant matter is an unabashed attempt by the Organization to circumvent the Agreement Rules in an effort to have the Claimant's disqualification set aside on the basis of an alleged procedural violation, as opposed to the merits of the decision to disqualify the Claimant. The Carrier emphasizes that it immediately notified the Organization of the Carrier officer it needed to contact in order to arrange the hearing, but the Organization refused to do so. Moreover, the Organization flatly rejected the Carrier's subsequent attempt to schedule the hearing. The Carrier

asserts that these facts provide an ample basis for the dismissal of the instant claim.

The Carrier argues that in the unlikely event that the Board is inclined to consider the substance of this dispute, there is no merit to the Organization's claim. The Carrier insists that the clear and unambiguous language of Rule 20 provides that such claims must be submitted to the "designated Carrier Officer," meaning the Carrier Officer involved in the matter giving rise to the claim, and not the officer to whom the matter is progressed under Rule 21. The Carrier asserts that only the Claimant's supervisor had knowledge of and could address the matter giving rise to the claim. The Carrier argues that if the Claimant believed that his supervisor's decision to disqualify him was unjust, then the Claimant should have protested in writing to his supervisor.

The Carrier emphasizes that Rule 20 establishes an appeal process whereby if the employee requests a hearing and is dissatisfied with the results, then he can appeal that decision to another officer, designated under Rule 21, for an independent review. The Carrier asserts that if the independent review officer also receives the initial protest and request for hearing, then the fairness and impartiality of the review could be compromised. The Carrier therefore contends that for common-sense reasons alone, Rule 20's reference to "designated Carrier officer" must be understood as meaning the officer involved in the matter giving rise to the claim, and not the officer to whom time claims and grievances are to be addressed under Rule 21.

The Carrier emphasizes that the Organization's list of file numbers constitutes unexplained and irrelevant data that can hardly be viewed as sufficient to support a past practice. The Carrier points out that the Organization did not bother to provide any

copies of actual correspondence from these files; moreover, many of the files numbers relate to rules involving an entirely different agreement.

The Carrier goes on to assert that even if there were an accepted past practice that hearing requests of this nature are directed to the officer who also addresses any appeals stemming from such hearings, the instant claim nevertheless lacks Agreement support. The Carrier points out that the hearing request was premature in that the Claimant did not file a "written protest," as required by Rule 20. The Carrier therefore contends that because the hearing request was premature, any failure to schedule the hearing within fifteen days can hardly serve to support this claim.

The Carrier additionally emphasizes that there is nothing in Rule 20 that provides that the Carrier must remove the disqualification and make the aggrieved employee whole for any losses if it fails to hold the hearing within fifteen days of a hearing request. In fact, Rule 20 is silent with regard to any penalty should a hearing not be held within fifteen days from the date of such a request. The Carrier points out that given the fact that the Carrier officer designated under Rule 21 has sixty days to respond to a grievance, therefore, common sense alone supports a finding that this is nothing more than an attempt to circumvent the Agreement's rules.

The Carrier emphasizes that it offered to hold the hearing, but the Organization rejected that offer. Because the Rule does not support the penalty sought by the Organization, and because the Organization rejected the offer that would have enabled the Claimant to pursue this matter in the proper venue, the Carrier maintains that the instant claim lacks Agreement support and should be denied on this basis alone.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the evidence and testimony in this case, and we find that the Organization has failed to meet its burden of proof that the Carrier improperly disqualified the Claimant from operating any Carrier motor vehicle, effective March 8, 2005. The Organization relies on Rule 20, which states the following:

Should an employee feel he has been unjustly dealt with in other than discipline matters, he may make written protest to the designated Carrier Officer, with copy to the General Chairman. If a hearing is requested to develop the facts, same shall be granted within fifteen (15) calendar days and written decision rendered within ten (10) calendar days. If the employee is dissatisfied with the decision, same may be progressed in accordance with Rule 21—Time Limit on Claims.

The Organization contends that the letter protesting the Carrier's action was mailed on March 18, 2005. The Organization also argues that the Carrier's decision not to schedule the hearing in accordance with Rule 20 leaves its position that the Claimant was not qualified to operate Carrier vehicles indefensible. The Organization continues that since there was no hearing, the Carrier has not met its affirmative defense and the claim must be sustained.

This Board finds that there is nothing in Rule 20 which requires the sustaining of the claim because of the Carrier's failure to schedule a hearing within the time limits set forth in the rule. Moreover, there is evidence in this record that the Organization rejected

the Carrier's subsequent attempt to schedule and hold a hearing and then pursue the results through the procedures outlined in Rule 21. Consequently, there is no basis for this Board to sustain the claim as it is written.

However, a review of the correspondence between the Organization representative and the Carrier representative makes it clear that although they argued extensively about procedural matters, the loser in that argument was the Claimant. There was never a hearing to determine whether or not the Claimant was properly disqualified from his position as truck driver. Rule 21 gave the Carrier sixty days to schedule the hearing; but since the Organization persisted in its argument that the hearing should have been held within fifteen days, no hearing was ever held for the Claimant. We find that the Claimant should not suffer a derogation of his rights because the parties had a dispute as to who was the "designated Carrier officer" and which rule applied.


Consequently, this Board orders that within sixty days of the receipt of this Award, the Carrier must schedule a hearing concerning the disqualification of the Claimant to determine whether or not there was a legitimate basis for that disqualification. If it is found that the Claimant was improperly disqualified from his job, then he should be entitled to the relief requested in the claim and compensated for all wage loss suffered.


AWARD:

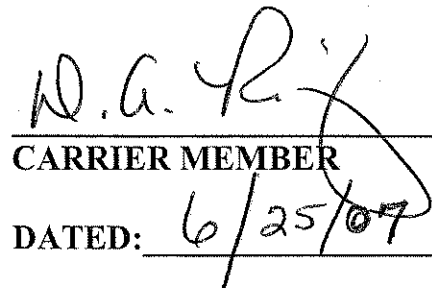
The claim is sustained in part and denied in part. A hearing should be held within sixty days of the issuance of this Award to determine whether or not the Claimant was

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properly disqualified from his position as a truck driver.


PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER
DATED: 6-25-07


CARRIER MEMBER
DATED: 6/25/07