

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5332**

Parties to Dispute:)	
)	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS)	AWARD
)	
-and-)	Case No. 182
)	
NORFOLK SOUTHERN RAILWAY COMPANY)	Claimant P. Wilson
)	

STATEMENT OF CLAIM:

“Claim on behalf of Operator Wilson, hereafter referred to as Claimant, in Norfolk, Virginia, on account of her unjust dismissal in violation under the Current Controlling Agreement as amended. Claimant to be made whole for all losses sustained. These begin the date of the unjust dismissal, continue to the present date and include, but are not limited to, lost wages, vacation rights, health and welfare and insurance benefits, pension benefits such as Railroad Retirement and Unemployment Insurance, and any other benefits that would have been earned during the time the violation continued.”

FINDINGS:

The Board finds that the parties herein are Carrier and Employee as defined by the Railway Labor Act, as amended; that the Board has jurisdiction over this dispute; and that due notice of the hearing thereon has been given to the parties.

Claimant was hired as a Car Dumper Operator at Carrier’s Lamberts Point Coal Pier on August 20, 2018. Subsequently, on December 4, 2018, following her return from a personal injury on November 28, 2018, Carrier notified her that she had failed to qualify for the operator position for which she was training. On December 11, 2019, the IBEW then submitted a written request for an unjust treatment investigation pursuant to Rule 29 F – Unjust Treatment, Employees. Carrier declined that request on February 6, 2019. The Organization responded on March 25, 2019, and when the parties’ efforts to resolve the dispute, including a telephonic conference held on May 20, 2019, were not successful the matter was advanced to the Board for final and binding determination.

Because of the nature of the dispute it was handled outside the protocols normally applicable to termination disputes under Agreement Rule 29. Thus, no formal investigation was held on the property. The Board's findings, accordingly, are predicated on the written communications exchanged when the dispute arose as well as on information provided by the parties during the ensuing oral argument presented when the Board convened on December 3, 2019.

It appears that Claimant Wilson had been working as a Student Operator attempting to qualify for the Car Dumper position at issue for approximately four months at the time of her disqualification. Each Pier Six employee in such training is required to demonstrate proficiency on the equipment assigned and be certified by a Supervisor and the Training SGL as possessing sufficient aptitude for the job. In this instance, unlike with respect to the standards used in assessing student/journeyman electricians, the criteria for qualifying for the position Claimant aspired to are not set forth in the controlling Agreement.

The Organization, however, contends that pursuant to Rule 29 F- Unjust Treatment, Claimant was entitled to an investigation for unjust treatment. The relevant terms of that Rule are:

An employee who considers himself unjustly treated, otherwise than covered by the current agreements, shall have the same right of representation, investigation and appeal as provided in this rule if written request is made by the General Chairman to the employee's immediate supervisor within fifteen (15) days of the cause of complaint.

Claimant argues that Carrier circumvented those provisions; that past awards require hearing prior to disqualification under the Unfair Treatment terms; that Carrier employed disparate treatment in arbitrarily assessing a 6-month disqualification period; that she received no advance notice or forewarning of her impending disqualification; and that therefore the discipline was excessive. Carrier's Loader Qualification Card information suggests that its criteria for qualification is based on hours, and Claimant's hours were below those accumulated by 5 of her 7 contemporaries. That, the Organization argues, highlights an arbitrary disqualification.

Carrier takes the position that Claimant was disqualified after struggling to qualify on the pusher and dumper and on the ship's loader, surpassed by a number of employees who hired after her despite supervisory attempts to guide and train. She had ample time to

demonstrate her ability but over the course of 4 months nevertheless failed to ever qualify on any of the 3 units she was working on. That time, it contends, included time spent observing, and thus while her total hours in training received on the machines may have been fewer than most others, Carrier did everything it could to make certain she succeeded in her attempt to qualify. Due to the intense safety aspects of the coal pier operations, Carrier could not permit her to continue with the attendant risk to herself and others.

With respect to the Organization's procedural arguments, the Board finds that while Rule 29-F does in fact entail rights of representation, investigation and appeal, it is undisputed that Claimant was afforded representation and appeal rights. She was, however, disqualified, not dismissed. Whether the Rule contemplates the formal investigation assured to dismissed employees under Rule 29 is therefore far from clear. The record does not inform us on the point with respect to past practice, and the awards sponsored reflect governing terms that are distinguishable. Thus, while one foot trembles, given the state of the record the Board is reasonably persuaded by Carrier's contention that although Claimant's disqualification resulted in forfeiture of seniority, disqualification was not by its nature disciplinary action. Rule 29 and its attendant obligations regarding charges and formal investigation were inapplicable in this instance.

Carrier necessarily enjoys the prerogative to determine an employee's fitness and ability for any given position. The Board must defer to those judgments absent proof that Carrier acted arbitrarily or in bad faith. The mere fact that Claimant was disqualified 4 months into a 6-month period does not, in our judgment, establish arbitrariness. Probationary personnel are commonly disqualified prior to the expiration of maximum qualification periods. Numerous prior Boards, including precedent on the property, have determined that Carrier is not obligated to exhaust the six-month time period allotted before making its judgment on fitness issues.

One aspect of the Organization's complaint, however, is forceful. It contends, without contradiction, that Claimant was caught by surprise upon return from injury leave and notified of disqualification without ever being put on notice of exactly where she was failing and that her job was in jeopardy. Had that fundamental courtesy of forewarning been extended, it would not have guaranteed a different outcome, but the possibility cannot be

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ruled out. Under the unique circumstances presented, and with the weakness of any compromise, the Board will direct Carrier to offer Claimant a return to service at the earliest possible time consistent with her seniority, without back pay or benefits, but with a reset of her qualification period to the three- month mark, allowing her an additional 3 months to attempt to demonstrate fitness and ability for the Car Dumper Operator position to which she aspired.

A W A R D

The Claim is partially sustained in accordance with the Opinion.

Tom Owens
Tom Owens
Employee Member

James E. Conway
James E. Conway
Chairman and Neutral Member

Tara Arnett 02/11/2020
Tara Arnett
Carrier Member

Dated: January , 2020