

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13902
Docket No. 13776
06-2-05-2-28

The Second Division consisted of the regular members and in addition Referee Raymond E. McAlpin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood Railway Carmen/ Division of TCU
(Indiana Harbor Belt Railroad Company)

STATEMENT OF CLAIM:

- "1. The Indiana Harbor Belt Railroad Company, hereinafter referred to as "Carrier," disqualified Frank Judy in violation of Rules 36, 153, 154 and possibly others of the Agreement presently in place on the property between this Organization and the Carrier.
2. The Carrier must now make Frank Judy whole for all losses due to this disqualification, including, but not limited to, wages, seniority and all benefits in accordance with the Agreement.
3. This claim is filed as a Continuous Claim until a remedy is reached."

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Organization argued that the Claimant, Frank Judy, was disqualified on November 13, 2003. The hearing was not held until December 9, 2003. On December 16 the Carrier issued a letter upholding the disqualification of the Claimant. It is the Organization's position that the Carrier violated Rules 36, 153 and 154 when it assessed the ultimate discipline of disqualification upon the Claimant. The Carrier argued that discipline is used to correct behavior, therefore, total disqualification does not meet the test of discipline. The Claimant was ready, willing and able to perform the essential tasks of his assignment. The Claimant's position does not require a driver's license, nor has it been a prerequisite for employment and retention of seniority as a yard carman. The Carrier's final argument is that a driver's license is required under the terms of the Collective Bargaining Agreement. Rule 154 defines just what carman duties are and what they entail. There was no valid reason that the Claimant must possess a driver's license. Even though the Carrier has provided trucks to car inspectors as a tool to aid them in the performance of their duties, they have never stated that the use of these trucks is a requirement. If travel is required by the Carrier in the performance of the carman duties, it must be provided by the Carrier. The Carrier references a meeting held on September 16, 2003 where the Claimant agreed to obtain a driver's license. The Board knows all too well that employees may not enter into singular agreements with the Carrier. That may be contrary to the terms of the Collective Bargaining Agreement or rules or provisions found therein. In addition, the Claimant was prevented from exercising his seniority in other positions or in another class.

The Carrier argued that a meeting was held on September 16, 2003 to discuss the Claimant's actions of August 6, 2003 for his alleged failure to operate a Carrier vehicle in a safe manner. The meeting resulted in an agreement that the Claimant would obtain a current valid driver's license within thirty (30) days and not operate a company vehicle nor bring his own vehicle onto Carrier property until he complied. In addition, he would refrain from any altercations with the public and refer any similar situations promptly to his immediate supervisor on duty. The Claimant failed to comply with these restrictions and, in a letter dated November 13, 2003, he was disqualified. A hearing was held on December 9, 2003 and it was determined that the Claimant was unable to perform his carman's duties and the disqualification was upheld. The Claimant was notified that he could exercise his seniority as he holds seniority as an engine house laborer. The Claimant was afforded a fair and impartial hearing complying with Rule 36 of the Collective Bargaining Agreement. The Carrier

has shown that the ability to drive on site in the performance of the duties is necessary to the overall success of the operation. Since driving a company vehicle is required, a valid driver's license must be possessed. The Claimant was given ample opportunity to provide a valid driver's license, and he failed to do so. It is the Claimant's own fault that he was disqualified since he failed to obtain a valid driver's license within the prescribed thirty (30) day period. Disqualification is not excessive, arbitrary, harsh or discriminatory. Numerous awards provide that the Carrier has the right to determine fitness and ability to perform essential functions of a position in a safe, efficient and timely manner. Therefore, the discipline imposed was warranted and not in any manner arbitrary, capricious or discriminatory and the claim should be denied.

Upon review of all the evidence presented the Board finds that the Claimant was involved in an accident with a company vehicle off the property with a civilian. As a result, the Carrier became aware that the Claimant's driver's license had been suspended. In a meeting on September 16, 2003 the Carrier and the Claimant agreed that he would obtain a valid driver's license within thirty (30) days and not operate a company vehicle nor a personal vehicle on Carrier property until he complied. This was memorialized in a letter of September 23, 2003. This thirty (30) day period then expired on October 23, 2003. The Organization made arguments with individual employees making agreements with the Carrier without the consent of the Organization and these arguments are well founded. As a result, an investigation scheduled for October 1, 2003 was cancelled. The Carrier memorialized its understanding of the Agreement in a letter dated September 23, 2003. The thirty (30) day period would have expired on October 16, 2003. The Carrier, however, did nothing on this date with respect to the Claimant. Ultimately, on November 13, 2003 the Claimant was disqualified from his position and removed from service. A hearing was scheduled on December 9, 2003. The ultimate result of that hearing was that the Carrier's disqualification was upheld. The facts of this case are that the Claimant was allowed to continue in his position from August 12, 2003 through November 13, 2003, well beyond the thirty (30) day period called for in the September 23, 2003 letter to the Claimant. Yet, on November 13, 2003, approximately one month prior to the investigation, the Carrier determined that it could no longer allow the Claimant to continue in his duties. It has been found by other referees that, under circumstances such this, disqualification prior to a hearing is not appropriate. After all, the Claimant was allowed to remain in his position for a significant period of time without any noted ill effects to the Carrier. There was no reason why he could not have continued in his employment until the hearing, almost four weeks later.

The Board finds that the Carrier has a right to have a policy. The record shows that the Carrier has a right to insist that individuals in the classification held by the Claimant in this matter need to drive company vehicles in order to best perform their duties. The Carrier has the right to have policies. The Carrier has the responsibility to inform the employees of the policies.

The Board will find that the disqualification of the Claimant resulting from the hearing of December 9, 2003 was appropriate. The Claimant really is responsible for his actions which led to his disqualification and, therefore, he has no one to blame but himself. However, the Board will further find that the disqualification from November 13 to December 9, 2003 was inappropriate and will order that the Claimant receive back pay for that period of time.

AWARD

Claim sustained in accordance with the Findings.

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 transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Dated at Chicago, Illinois, this 7th day of July 2006.