

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35713
Docket No. MW-35746
01-3-99-3-731

The Third Division consisted of the regular members and in addition Referee Nancy F. Murphy when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier removed and disqualified Truck Operator D.E. Baisey from his assigned position on July 7, 1998 and thereafter removed his seniority on the applicable seniority roster (System File MW-98-179/1153667 MPR).
- (2) As a result of the violation referred to in Part (1) above, Claimant D.E. Baisey shall be compensated ‘ . . . for the difference in pay between Machine Operator and +6 Ton Truck Operator beginning on July 7, 1998 and to continue until this matter is resolved, and any overtime due to the claimant, the claimant’s seniority restored on the appropriate +6 Ton Truck seniority rosters, reimbursement for ticket for violation #657209 paid by the claimant at the amount of \$48.00 and carrier to pay Ticket Violation #N804363 for violation which the claimant was under instructions from his supervisor, and his personal record clear of all alleged charges.”

FINDINGS:

The Third 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.

Prior to the time this issue arose, D. E. Baisey had established and held seniority as a Truck Operator dating from 1979. The Claimant was assigned to the position of +6 ton Truck Operator on Gang 4129 when the events surrounding this dispute occurred.

On July 7, 1998, the Carrier notified the Claimant that he was disqualified from his position as +6 ton Truck Operator for failure to perform the duties assigned to the position. Specifically, on July 3, 1998, the Claimant violated, and was ticketed for, Federal Motor Carriers Safety Regulation #395.3, which states: "No Carrier shall permit or require any driver used by it, to drive more than 10 hours. . . ."

The Organization protested the disqualification, maintaining the following:

"Beginning on July 7, 1998 the Claimant was disqualified as a +6 Ton Truck Operator because on Friday, July 3, 1998, the Claimant drove two (2) hours past the D.O.T regulation time limits as per instructions given to the Claimant and Mr. J.P. Castro, as to not lay over on any Friday and come in on Saturday, by supervisor Gary E. Smith on two separate occasions in 1997. Claimant should not have been disqualified, but rather his supervisor should have been disciplined for giving those instructions.

It is further our position and we take exception to the fact that the Claimant was disqualified from a +6 Ton Truck Operator, a position which the Claimant has over twenty (20) years of experience without the opportunity of a fair and impartial hearing as is the Claimant's right under 'Due Process' and in accordance with Rule 12, Discipline and Investigations.

It is still further our position that the Carrier should be held responsible and be compelled to pay the Claimant's fines for the overweight because the Claimant was under instructions from his supervisor. Also, Claimant reported the condition of the vehicle to his supervisor and nothing was ever corrected.

It is also still further our position that the reason for the disqualification of the claimant is because he holds a position of District Chairman with the S.P. Atlantic Federation, and history shows that any union officer is a target for harassment and discipline for alleged rule violations dreamed up by the carrier, and U.P. Railroad is no exception."

The Carrier denied the claim, premised upon the Claimant's "past practices of ignoring the law, his inability to properly fill out his log book, incompetence, failure to properly maintain his vehicle records, and safely operate the company vehicle." The Carrier submitted a statement from Material Supervisor G. Smith in which he contended that the Claimant had "acted at his own peril," leaving the Carrier "no choice" but to disqualify him. Smith stated unequivocally that he had not given the Claimant instructions to violate any laws, as the Claimant had stated.

With respect to the General Chairman's contention that the Claimant's status in the Organization influenced the Carrier's decision to disqualify him, the Carrier emphatically stated that there should be "no question" that Baisey's status as an officer of the Organization had not influenced the decision in any way.

Finally, the Carrier noted that the determination of an employee's qualification or subsequent disqualification are not discipline issues, therefore, Agreement Rules addressing discipline are not applicable in these circumstances.

At the outset, the Organization asserts that the Claimant was improperly disqualified, without a fair and impartial Hearing, from a position in which he had "over twenty (20) years experience." However, a review of the record reveals that the Claimant had operated this type of truck for approximately four years and was previously disqualified from same.

With respect to the Organization's assertion that the Claimant was disqualified sans Investigation, it is well settled in this industry that the disqualification of an

employee, when justified, is not discipline or a form of discipline. (See for example, Third Division Award 29307 and Public Law Board No. 2627, Award 23). As set forth in the following, the record evidence in this case establishes a clear distinction between discipline and disqualification.

In pertinent part, the Claimant's record of duty reveals the following:

- "3-10-98 Claimant was involved in an accident with another vehicle causing damage to the other vehicle. Claimant was at fault and issued a ticket for failure to 'yield right of way' . . . Damage to other vehicle.**
- 5-08-98 Claimant was involved in an accident in which he veered into the opposite lane, and another vehicle hit Claimant's vehicle, resulting in an injury to a child and damage to other property.**
- 5-18-98 Claimant was issued a citation for state 'DOT' law exceeding weights and measures 80,000 GVW, 'Overweight' at Beaumont, TX.**
- 6-26-98 Claimant violated Federal 'DOT' Laws by knowingly and willingly driving 12 hours across state lines in order to arrive home, violating Federal DOT law #395.3 . . .**
- 7-01-98 Claimant issued a citation for state 'DOT' law exceeding weights and measures 80,000 GVW, 'Overweight' at Baton Rouge, LA**
- 7-03-98 Claimant violated Federal 'DOT' Law by knowingly and willingly driving 12 hours across state lines in order to arrive home, again violating Federal DOT Law #395.3 . . ."**

According to the Carrier policy employees "must comply with all local, state and federal laws regulating truck operation," and it is "the driver's responsibility to observe the law." Although the Claimant asserts that he was "instructed" to violate at least one of these laws, Federal DOT Law #395.3, we find no evidence on this record which

supports that assertion. In fact, according to Material Supervisor Smith's unrefuted testimony, when asked why he had logged 12 hours on July 3, 1998, the Claimant stated that he drove 12 hours so that he could "come home." When Supervisor Smith asked him if he knew he was violating the law, the Claimant stated that he did, and he "did not care," and "would not stay out of town on a Friday." The Claimant went on to state that he would, if necessary, drive 15 hours to come home, and that "no one could stop him." When Smith asked the Claimant if he understood that he was putting himself and the Carrier at risk for possible fines, the Claimant answered in the affirmative, maintaining that he would "do it every time."

The Claimant's persistent and willful disregard of the Carrier Rules and State and Federal Safety Regulations provided just and sufficient cause for the Carrier's decision to disqualify him from the position of +6 ton Truck Operator.

Based on all of the foregoing, this claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 19th day of September, 2001.

LABOR MEMBER'S DISSENT
TO
AWARD 35713, DOCKET MW-35746
(Referee Murphy)

If any occurrence cried out for an investigation prior to the disqualification of an employee, this clearly was one. The Carrier disqualified the Claimant in this case, who had nearly twenty (20) years' experience, from operating heavy duty trucks based solely on assumption and innuendo. Apparently, the Majority read only the correspondence generated by the Carrier and nothing from the Organization. There was evidence in this record that refuted the assertions raised by the Carrier. Remember, this Board early on held that seniority is not a gift from management, but a valuable property right. Hence, before taking drastic action, such as removing an employee's hard earned seniority of nearly twenty (20) years, a hearing is required. If what the Carrier asserted actually happened from March through July 1998, such would be prime issues to be addressed at a hearing. What is so exceedingly wrong here is for the Majority to simply decree that whatever the Carrier said was the truth. Moreover, at Page 5 of the award, the Majority referred to Material Manager Smith's written statement as "unrefuted testimony", giving the reader the impression that a hearing was held. Sadly there was no hearing or investigation held, much to the detriment of the Claimant. Such action leaves the Agreement badly wounded, not to mention the long-term effects it has on the Claimant's ability to earn a living.

In this case, the Majority blithely overlooked the fact that the Claimant was a seasoned truck driver with nearly twenty (20) years of seniority and had his hard earned seniority removed based on assumption and innuendo.

Labor Member's Dissent

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Therefore, I hereby register my dissent to this award as being palpably erroneous.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is fluid and cursive, with the first name "Roy" being more prominent.

Roy C. Robinson
Labor Member