

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40418
Docket No. MW-39951
10-3-NRAB-00003-070085
(07-3-85)

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The disqualification of Truck Operator R. Carter from the Brandt truck operator position on Gang 9294 on January 24, 2006 was unjust, on the basis of unproven charges and in violation of the Agreement (System File MW-06-19/1442150 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now remove the aforesaid disqualification from Mr. R. Carter’s record and reinstate him to the Brandt truck operator position on Gang 9294 and he shall be compensated for the difference in pay between the Brandt truck operator rate of pay and the rate of pay on positions he worked, covering all straight time and overtime hours worked by said Brandt truck operator position beginning January 25, 2006 and continuing.”

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.

The Claimant was assigned and working a Brandt Truck Driver on Gang 9294. He had worked the assignment since June 12, 2004. On June 24, 2006, the Claimant was notified by the Carrier:

“This letter is to inform you that you have been disqualified from the position of Brandt truck driver on gang 9294. Account failure to show the necessary requirements to operate and (or) maintain this equipment properly.

In accordance with the agreement between the Brotherhood of Maintenance of Way Employees and the Union Pacific Railroad (Former Missouri Pacific Railroad) you should arrange to exercise your seniority in accordance with your Agreement.”

The Claimant signed the letter noting that it was “under protest pending investigation.” During the handling of the claim on the property, the Carrier produced an email statement from Supervisor Ehlers, which provided as follows:

“I DISQUALIFIED MR. CARTER ID #0175284 FOR HE HAD OPERATE THE BRANDT POWER UNIT FOR OVER A YEAR. THE UNIT HAD NEVER HAD ANY KIND OF OIL LEAKS. THE CLAIM SAYS I DISQUALIFIED MR. CARTER FOR PUTTING TRANSMISSION FLUID IN THE WRONG PART OF THE TRANSMISSION. THAT IS NOT RIGHT. I DISQUALIFIED MR. CARTER BECAUSE HE PUT TRANSMISSION FLUID IN THE TRANSFER CASE WHICH IS NOT WHAT IT USES. IT TAKES

75/90 SYNTHETIC FLUID AND THERE IS A BIG COIN TYPE METAL CIRCLE ATTACHED TO THE DIP STICK THAT TELLS WHOEVER IS CHECKING THE FLUID WHAT TYPE IT USES. THERE WAS A EMPLOYEE ON THE GANG THAT WITNESSED MR. CARTER PUT THE WRONG FLUID IN THE TRUCK. I HAVE TWO DRIVERS ON THIS TRUCK AND THE OTHER DRIVER SAID THAT HE HAS NEVER HAD TO ADD ANY FLUID TO THE TRANSFER CASE AND HE HAS BEEN ON THAT SAME TRUCK FOR OVER TWO YEARS. I HAD THE OTHER DRIVER TAKE THE TRUCK INTO THE SHOP AND HAVE THE SHOP LOOK IT OVER AND ANALYZE THE FLUID AND LET ME KNOW AND THE SHOP SAID IT WAS THE WRONG FLUID AND THE OTHER DRIVER SAVED IT AND I WENT TO BEAUMONT, TX. AND LOOKED AT THE FLUID THAT THE SHOP TOOK OUT AND IT WAS THE WRONG FLUID. IT COST \$5050.00 FOR HIS MISTAKE FOR THAT IS WHY I DENY THIS CLAIM.”

The Organization maintains that the Carrier violated the Agreement when it disqualified the Claimant from the Brandt truck. Initially, the Organization argues that disqualification is a form of discipline and an appropriate Investigation must be conducted pursuant to the Agreement. The Organization continues that the instant disqualification is unsupported by the evidence. Specifically, the disqualification letter provided no underlying reasons for the disqualification. Further, the email from Supervisor Ehlers was unsigned. Moreover, an examination of the alleged statement from Supervisor Ehlers compared to the maintenance history of the truck revealed not only that there were no oil leaks, but also that there were leaks in the transmission. The transmission leaks contradict the statement of Supervisor Ehlers that there were no transmission problems with the Brandt truck.

The Carrier counters that numerous Awards support the proposition that disqualification is not discipline. Rather, the proper inquiry is whether the Carrier acted in an arbitrary manner when it disqualified the Claimant from his position as the Brandt Truck Driver. The Carrier can determine whether employees have the necessary fitness and ability to perform their duties and the Board should review it

only as to whether the disqualification decision was arbitrary. Moreover, the Organization submitted documentation with its Submission that was not exchanged on the property and should be excluded. In addition, the Claimant was offered a return to the position if he attended training. He did not request the training.

The Board addressed the issue of whether disqualification from a position was discipline under the instant Agreement in Third Division Award 36957, wherein the Board cited Third Division Award 29307 in relevant part:

“Moreover, we reject the Organization’s contention that the action taken against the Claimant was tantamount to discipline thereby warranting the invocation of the investigation and hearing procedures of the Agreement. The vast majority of Awards considering this issue have differentiated facts such as those herein from facts constituting discipline. Third Division Awards 11975, 14596, 20045; Second Division Award 11064.”

Therein the Board also addressed the issue of the appropriate standard of review for a disqualification as follows:

“The Carrier determines whether its Foremen have the fitness and ability to perform their duties, subject to review by the Board only as to whether the Carrier’s decision was arbitrary. Third Division Award 35808 (Qualification, fitness and ability to perform a job are determinations to be made by the Carrier, subject only to limited review by the Board as to whether the Carrier was arbitrary in its determination).”

The Board carefully examined the record in the instant matter. The Board notes that the Organization’s argument that the transmission was leaking and that the oil was not leaking on the Brandt truck is not dispositive. As discussed in the correspondence during handling on the property, it was not a question of whether motor oil was in the crankcase or transmission fluid in the transmission. Rather, the disqualification was for placing transmission fluid into the transfer case, despite a dipstick tag requiring synthetic 75/90 weight gear oil for the transfer case.

The Board cannot find that the Carrier was arbitrary when it determined that the Claimant was not qualified to continue to hold the position of Brandt Truck Driver. The Organization's documentation shows that the Claimant had been documenting the condition of the Brandt truck in the "Driver's Vehicle Inspection Report," wherein he noted that the transmission was leaking in a number of reports. Supervisor Ehlers spoke with the other driver of the truck, who stated that he never added fluid to the transfer case. The inspecting garages detected transmission fluid in the transfer case. Part of the Claimant's job was to properly service his assigned vehicle. The evidence establishes that he did not.

Because the Organization failed to meet its burden of proving that the Carrier's decision was arbitrary, the claim must be 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 14th day of May 2010.