

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 154, (Case No. 175)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION - IBT RAIL CONFERENCE**

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
K. N. Novak, Carrier Member

Hearing Date: February 23, 2011

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

- 1. The Agreement was violated when the Carrier improperly disqualified and removed Assistant Foreman D. Fuller from his position on Gang 9103 on August 12, 2009 (System File UP-512-JF-09/1524144).**
- 2. As a consequence of the violation referred to in Part 1 above, the aforesaid disqualification shall now be reversed and Claimant D. Fuller shall now receive all straight time and overtime wage losses by being compensated for the difference between the hours and wage rates he worked and the hours and wage rates he would have received absent the aforesaid disqualification beginning August 12, 2009 and continuing."**

FINDINGS:

Public Law Board No. 6402, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and that the Board has jurisdiction over the dispute herein; and that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Review of the record reveals that the Claimant had been in the service of the Carrier in excess of seven years and over one year as an Assistant Foreman at the time of his disqualification. Prior to the incident in question Claimant had no prior issues in connection with the performance of his duties.

The facts substantiate that near the close of the workday on August 11, 2009, the Claimant was instructed by Carrier Supervisor C. Martin to perform an air brake test on the Brant truck, which was operated by a different employee who normally performed the test.

Claimant was unable to perform the test because the procedures had changed since he was last trained on it, approximately six years before. The following day August 12th, he was disqualified as the Assistant Foreman on Gang 9103 on the basis that he could not do the aforementioned test.

It is the position of the Organization that the Claimant was entitled to a formal Investigation as the disqualification was tantamount to discipline. It argued that the record is clear that the Carrier's air brake test procedures had changed since the Claimant had been trained and through no fault of his the Carrier had not updated his training and he should not be held accountable for the Carrier's failure. It concluded that the disqualification should be rescinded and the Claimant made whole for loss of all monies sustained.

It is the Carrier's position the Claimant was not entitled to a formal Investigation as the disqualification was not discipline. It argued that the task of properly performing the air brake test is an integral and vital part of the required duties of the Assistant Foreman position on a gang that has a Brant truck and because he could not perform such, disqualification was proper. It further argued that the Organization's request for a remedy was without merit because immediately after the Claimant's disqualification he exercised his seniority to an Assistant Foreman position on a gang that did not have the Air Brake requirement. The Claimant was fully employed after his disqualification and the fact that he was ultimately furloughed was not relevant because he subsequently did not have enough seniority to hold any position. It also pointed out that the Claimant was advised by his Supervisor that he would be put in the first class that came up for airbrake testing. It closed by asking that the Claim remain denied.

It is determined that the question of whether or not the Claimant was entitled to a formal Investigation need not be addressed in this instance as it is clear that his inability to perform the air test and subsequent disqualification was due to the fact that he was not afforded updated training by the Carrier on the new procedures for the airbrake test. This was a unique fact driven dispute and because of the specific facts peculiar to this case the Board finds and holds that the disqualification should be removed from the Claimant's personnel record and he should be afforded the appropriate training if he has not already received it. However, there is no proof that he suffered a financial hardship, as he immediately exercised his seniority to an equal paying position as Assistant Foreman on Gang 9101, and was fully employed until his subsequent furlough which negates any basis for returning him to the position of Assistant Foreman on Gang 9103 as his seniority was not enough to hold that position as well.

P.L.B. No. 6402

Award No. 154, Case No. 175

Page 3

AWARD

Claim sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: June 27, 2011