

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD 6302**

**NMB NO. 169**

**AWARD NO. 169**

**PARTIES TO DISPUTE**

**CARRIER**

Union Pacific Railroad

**Carrier's File**

**1505681**

AND

**ORGANIZATION**

Brotherhood of Maintenance of Way Employees  
Division of International Brotherhood of Teamsters

**System File**

**J-0848U-257**

**STATEMENT OF CLAIM**

1. The Carrier's decision to disqualify Claimant, Thomas A. Cox from his two (2) positions of Track Inspector on Gang 5263 and Group 8 Section Foreman, effective April 8, 2008, by reason of his alleged inability to properly perform the duties associated with said positions pursuant to the Federal Railroad Administration (FRA) and Union Pacific Standards is unjust, unwarranted, excessive and, in violation of the applicable provisions of the Collective Bargaining Agreement effective July 1, 2001.

2. As a consequence of the violation set forth in Part 1 above, the Organization requests that disqualification of Claimant as both Track Inspector and Group 8 Section Foreman be immediately removed from Claimant's record and, as a remedy, that Carrier return Claimant to his former position of Track Inspector and compensate him for loss of wages incurred for the difference between the rate of pay of a Track Inspector and Track Machine Operator for the duration of time Claimant suffered the improper disqualification.

**STATEMENT OF BACKGROUND**

At the time of his disqualification, Claimant had thirty-six (36) years of service with Carrier, twelve (12) of which had been as a Track Inspector and fifteen (15) of which had been as a Section Foreman. Effective April 8, 2008, in accordance with the letter

informing Claimant of his disqualification given to him by the Manager of Track Maintenance (MTM), R. Landers, Claimant was required to exercise his seniority and by so doing, Claimant assumed the position of Track Machine Operator. As Claimant believed he had been unjustly treated, he forwarded the letter of his disqualification to the Organization and, in turn, by letter dated April 10, 2008, the Organization requested a conference with the Carrier pursuant to the provisions of Rule 48 (n) of the controlling 2001 Collective Bargaining Agreement. Rule 48 (n) reads as follows:

**An employee in service who feels he has been unjustly treated may request a conference through the General Chairman or other officer of the Organization. If the matter cannot be resolved in the interim, the representative may make written request for a conference to the appropriate Company manager involved and such request will contain the precise nature or cause of the complaint. Such request for conference must, however, be made within twenty (20) calendar days of the cause of the complaint. If the asserted unjust treatment is left unresolved, it may be handled as a claim or grievance under the provisions of Rule 49.**

The Carrier honored the Organization's request and a telephone conference was held on April 24, 2008 which was conducted by Manager of Track Projects (MTP), Gary C. Mehalic. Participating in this telephone conference for the Carrier were: Director of Track Maintenance (DTM) Tom Chapman; MTM, Ron Landers; and MTM, George. Halte. Participating in the conference for the Organization were: Vice Chairman, Dave Scoville; Vice Chairman, David (Joe) Dean; and Claimant. According to the Organization, at the outset of the telephone conference, Mehalic made certain that no participant involved in the conference was going to record the ensuing discussion and that when he ascertained no one was going to record the discussion, he commenced the conference. Also, according to the Organization, at the conclusion of the conference, Mehalic stated he would render a decision in writing via a letter regarding Claimant's disqualification. However, contrary to this assertion by the Organization, Mehalic denied stating he was going to write a letter rendering a decision. Rather, according to the record evidence, Mehalic maintained that a discussion occurred following the telephone conference call and, in this discussion at that time, a decision was made that Claimant would remain disqualified as both a Track Inspector and Section Foreman due to his inability to perform duties per FRA and Union Pacific Standards. The record evidence reflects Carrier countered the Organization's assertion of a decision by Mehalic in writing addressing the matter of Claimant's disqualification by noting that there are no provisions contained in Rule 48 (n) requiring rendering a decision by letter. In fact, no such written decision was issued by Mehalic and, as a result, on May 28, 2008, thirty-four (34) days subsequent to the close of the telephone conference, the Organization filed the subject claim in accord with the applicable provisions of Rule 49 of the Agreement which reads in pertinent part as follows:

**(a) All claims or grievances will be handled as follows:**

**(1) All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Carrier authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. The date a claim is presented is the date the claim is sent, as evidenced by postmark, when the U. S. Mail service is utilized. Should any such claim or grievance be disallowed, the Carrier will within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for the disallowance. If not so notified, the claim or grievance will be allowed as presented but this will not be considered as a precedent or waiver of the contentions of the Carrier as to other similar claims or grievances. The date a party is notified is the date written notification is received by the party. The date claim is filed is the date the claim is received by the Carrier's designated officer.**

**(2) If a disallowed claim or grievance is to be appealed, such appeal must be in writing and must be taken within sixty (60) days from receipt of notice of disallowance, and the representative of the Carrier will be notified in writing within that time of the rejection of his decision. The date a party is notified is the date written notification is received by the party. Failing to comply with this provision, the matter will be considered closed, but this will not be considered as a precedent or waiver of the contentions of the employees as to other similar claims or grievances. The date an appeal is taken is the date the appeal is transmitted or dispatched, as evidenced by postmark, when the U. S. Mail service is utilized. It is understood, however, that the parties may by agreement, at any stage of the handling of a claim or grievance on the property, extend the sixty (60) day period for either a decision or appeal, up to and including the highest officer of the Carrier designated for that purpose.**

### **CARRIER'S POSITION**

Carrier notes the job requirements for the position of Track Inspector essential in performing the duties of the position are a requisite knowledge of inspection, repair and reporting of track defects for corrective action. Carrier submits that prior to taking the action of disqualifying Claimant from this position Claimant had previously demonstrated an alleged inability to satisfactorily perform track inspection duties citing the following incidents:

**September 9, 2007** the occurrence of a derailment at Byers;

**October 28 – November 3, 2007** no inspections performed on sidings;

**November 5 – November 9, 2007** no reports done for track inspections on sidings.

Carrier asserts the incident that finally resulted in its action to disqualify Claimant from his Track Inspection position occurred on April 1, 2008. On that date, Carrier notes, MTP, Mehalic performed an inspection behind Claimant and discovered missing bolts, swinging rail joints, and numerous other track defects and, in addition, Claimant failed to identify these defects in his reporting responsibility thereby failing to inform these defects required repair. Carrier asserts that Claimant's failure to perform the essential duties of a Track Inspector is ultimately a safety issue as a failure to identify defects such as the defects Claimant failed to report and designate for repair on April 1, 2008 can potentially result in catastrophic derailments and injury to persons.

Carrier asserts it is well established by a long line of arbitral precedent that it retains the sole authority to set the qualifications for positions and to make the determination as to employees' fitness and ability to satisfactorily perform the duties of any position. Carrier maintains that in the instant case, it has shown by substantial evidence that Claimant was not, by previous occurrences and the subject occurrence satisfactorily performing the essential duties of his position as Track Inspector, as well as his position of Section Foreman. Carrier asserts that in accord with well established arbitral authority, in order for the Board to reverse its decision to disqualify an employee from his/her position, here the Claimant, it is incumbent on the Organization to bear the burden of proof to show, through substantial and competent evidence that Claimant is fit and able to perform the essential duties of his supervisory positions of Track Inspector and Section Foreman and, in addition, that the action to disqualify Claimant was, under the prevailing circumstances arbitrary, capricious, discriminatory and excessive. Carrier submits that the Organization was unable to make such a showing in this case and that the Board should not disturb its decision in the matter of Claimant's disqualification.

### **ORGANIZATION'S POSITION**

The Organization does not challenge that in disputes involving employee disqualification cases such as the instant case it is the moving party and, as such, must shoulder the burden of proof to demonstrate that Carrier's decision to disqualify Claimant was not a proper decision under the prevailing circumstances. As its first defense, the Organization argues that other than to just state that Claimant failed to satisfactorily perform the essential functions of his two (2) supervisory positions of Track Inspector and Section Foreman, the Carrier has not presented one shred of substantial and probative evidence in this entire record to support the decision to disqualify Claimant. As a second defense, the Organization asserts that numerous track problems have been evident in the territory worked by Claimant and that essentially, for whatever reason, Claimant has been made the scapegoat for the identical performance of duties by others on his assigned gang and deficiencies by Carrier in providing the necessary

tools and equipment to make repairs. As a third line of defense, the Organization references the fact of Claimants many years of service with the Carrier and given those years of service, nearly 37 in all, Claimant is seasoned, experienced and very knowledgeable of the railroad and of the track structure geometry and maintenance. In addition, the Organization cites the fact that, months prior to the circumstances that resulted in Claimant's disqualification he attended a five (5) day FRA Track Inspector course at the end of which he scored 98% on a final examination.

The Organization submits that since Carrier failed to produce any bona fide evidence to substantiate and support its action to disqualify Claimant from not only his Track Inspector position but also his position as Section Foreman which latter disqualification appears to have been piled on as a punitive action, the Board should hold to sustain the claim.

### **FINDINGS**

Public Law Board No. 6302, 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.

At the outset, the Board affirms the following: (1) the instant case is not a case involving a matter of discipline and therefore any cited rules other than Rule 48 (n) pertaining to discipline are inapplicable and invalid to the case at bar; (2) the Board recognizes and affirms Carrier's right and sole authority to set the qualifications for positions including the two (2) positions the object of this claim, specifically, Track Inspector and Section Foreman, as well as to determine an employee's fitness and ability to perform the duties of these two and all other positions; and (3) that in cases of disqualification of an employee, the Organization has the burden of proof to overcome the Carrier's act of disqualification. However, upon such affirmation, the Board finds concurrence in the Organization's position that the record before us lacks the necessary substantial and probative evidence to support Carrier's action of disqualifying Claimant from either of his two (2) supervisory positions. By absence of such evidence, the Board is compelled to deem the Organization's effort to challenge the decision as sufficient, in and of itself to overcome Carrier's act of disqualifying Claimant.

In accord with the above finding, we rule to sustain the claim but note that, that part of the remedy requested by the Organization to return Claimant to his former position of Track Inspector cannot be ordered as Claimant has since retired. However, the Board does rule to make Claimant whole for wages lost as a result of his disqualification from his position as Track Inspector.

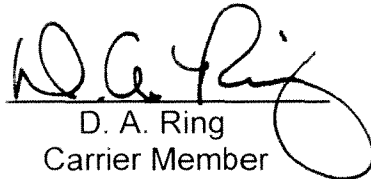
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AWARD

CLAIM SUSTAINED AS PER FINDING

  
George Edward Larney  
Neutral Member & Chairman

  
D. A. Ring  
Carrier Member

  
T. W. Kreke  
Employee Member

Chicago, Illinois

Date: 5-25-2010

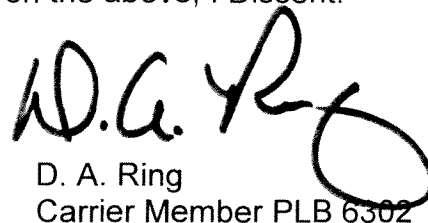
CARRIER DISSENT TO  
AWARD 169 of PUBLIC LAW BOARD 6302  
Referee Larney

In this case the Referee, while concurring that the Carrier has the sole right to determine an employee's fitness and ability to perform the functions of their position, found that the record lacked the necessary substantial and probative evidence to support the Carrier's action of disqualifying the Claimant as a Track Inspector and Track Foreman. The Carrier disagrees.

The record substantiated that within a nine-month period the Claimant was found not performing inspections to the track or submitting reporting mandated by the Federal Railroad Administration (FRA) track safety standards (49 CFR Part 213). In fact, the last incident clarified he had not reported various track deficiencies (swinging joints, missing bolts and other defects) on the FRA track inspection reports. The defects were (1) clearly safety issues requiring remedial action and, (2) his decision to not report them could have led to a violation of the FRA track reporting standards resulting in substantial fines from the FRA. His lack of performance did not occur on one occasion but on at least four (4) occasions documented over the period mentioned in the claim handling. Clearly, the Carrier did substantiate and provide the necessary evidence to determine the disqualification was appropriate and it should have stood.

In good conscience the Carrier cannot leave an employee who cannot meet the expectations of a Track Inspector position working in that classification. This is especially true for a position that is critical to the safety of the Carrier's operation; critical to the safety of the general public; critical to the safety of an employees peers; and, subject to governmental regulations. Further, this Claimant was handled no differently than anyone in a like situation has been in the past.

Because of the decision of the Arbitrator and based on the above, I Dissent:

  
D. A. Ring  
Carrier Member PLB 6302