

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

UNION PACIFIC RAILROAD COMPANY

)
) Case No. 12
)
) Award No. 6
)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
D. A. Ring, Carrier Member

Hearing Date: January 21, 2002

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier disqualified and removed Mr. C. A. Willis as a track foreman on March 1, 2000 (System File MW-00-95/1228408 MPR).
2. As a consequence of the violation referred to in Part (1) above, Claimant C. A. Willis shall now have his track foreman seniority status reinstated and he shall be compensated for the difference in pay between as assistant track foreman and a track foreman for eight (8) hours per day at the respective straight time rate of pay beginning March 1, 2000 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.

On March 1, 2000, Carrier notified Claimant that he had been disqualified as a track foreman. Carrier did so without first holding an investigation. The parties disagree over whether Rule 12, Section 1(a) required an investigation. The parties agree that if the disqualification amounted to discipline, an investigation was required. They disagree over whether the disqualification was disciplinary.

Both parties cite numerous prior awards in support of their positions. Several of those awards merit discussion.

In Public Law Board 5842, Case No. 7, Carrier disqualified the claimant as a truck driver

after he had had three accidents in an eight month period. The Organization claimed that Carrier violated the Agreement because it had disciplined the claimant without an investigation. The Board disagreed. It wrote:

The Board has reviewed the record in this case and we find that the action taken by the Carrier did not amount to discipline. Consequently, there was no requirement for a formal investigation into any discipline. The Claimant was disqualified from the truck driver position because he was involved in three separate accidents on June 24, 1993, October 27, 1993, and February 11, 1994. Those three accidents took place within the short eight month period that he was serving in the position of boom truck driver. Those accidents apparently made it clear to the Carrier that the Claimant could not properly carry out the duties of his position and the Carrier removed him. This was not discipline; it was simply a disqualification.

In NRAB Third Division Award No. 28721, Carrier disqualified an assistant foreman and demoted him to trackman after he had performed as an assistant foreman for two years. The Board held that Carrier violated the Agreement by disqualifying the claimant without an investigation. The Board observed that Carrier was asserting that it had the right to disqualify an employee based on the employee's inability to perform his assigned responsibilities without holding an investigation, and continued:

In the Board's view, the Carrier assumes rights exceeding the requirements of the Schedule Agreement. The Claimant held the position of Assistant Foreman for two years. His failure to continue to perform his responsibilities certainly would sanction corrective action by the Carrier, disqualification being one such option. To suggest, however, that an employee may simply be "disqualified" and removed from a position after two years, without supportive evidence provided through an investigation, would infer that any employee may be removed from any position without review.

Whether the Claimant's removal from his Assistant Foreman's position was disciplinary in nature or simply an exercise of the Carrier's judgment of his performance, the Agreement nevertheless offers specific protection.

Carrier relies on PLB 5842, Case No. 7, and the Organization relies on Third Division Award No. 28721. Both are on property awards and, at first glance, they appear to conflict.¹ We believe, however, that an award of PLB 526, cited by the Organization, although rendered on another property, assists in reconciling the first two awards on their facts, if not all of their language, and is the most persuasive authority for drawing the boundaries of the term "discipline" as used in Rule 12.

¹PLB 5842, Case No. 7 was decided five years after Third Division Award No. 28721. However, PLB 5842 made no reference to Award No. 28721. We have no way of knowing whether this omission was deliberate or whether it merely reflects that PLB 5842 was unaware of Award No. 28721.

The Award of PLB 526 involved the removal of the claimant from his position as Signal Test Foreman and his demotion to Signaller without an investigation. The carrier argued that discipline and disqualification were two separate vehicles to removal of the claimant from his position and that it had the absolute right to determine which vehicle to use. The Board rejected this argument, stating, "In this regard, the Board believes the Carrier to be clearly wrong." The Board continued:

The Board is of the opinion that there is a distinction between a situation on one hand where an employee simply does not possess the skill or experience to perform a job and the failure of satisfactory performance is not attributable to any "fault" on the part of the employee in the sense that he could do the job if he wanted to, and a situation on the other hand where an employee has the native ability to do the job but does not do so because he is careless, insubordinate, or does not follow instructions or directions that he is capable of following. The former situation is clearly one that involves the issue of "qualifications" and the latter does not. One might say, for example, that an employee who is removed from his job for stealing is removed on the basis that any person who steals is not "qualified" for the job. However, it is clear to the Board that in such an example, removal from a job for stealing is disciplinary in nature and does not involve the question of qualifications as contemplated or intended by the Agreement. The Agreement provides for a very specific procedure to be followed when disciplinary action is taken against an employee, and that procedure cannot be avoided by calling the action by another name.

We agree with PLB 526. When Carrier disqualifies an employee from a position based on a determination that the employee is incapable of performing in the position, the disqualification is not disciplinary in nature and no investigation is required. When Carrier disqualifies an employee from a position based on the employee's misconduct or failure to perform in the position despite being capable of performance, the disqualification is disciplinary in nature and an investigation is required. Each case must be examined on its facts to determine on which side of the line it falls.

PLB 5842 declared that the claimant's removal from his truck driver position "was not discipline; it was simply a disqualification." If the Award is read to mean that a disqualification can never be disciplinary and can never require an investigation, we respectfully disagree. However, we think it far more likely that PLB 5842 meant that the disqualification in the case before it was not disciplinary in nature and did not require an investigation. It appears that in the case before PLB 5842, Carrier was not disciplining the claimant for his three prior accidents. Rather, Carrier had determined that the three accidents reflected an inability to operate the boom truck safely or, in other words, a lack of qualifications and fitness for the position.

Third Division Award No. 28721 referred to the claimant's "failure to continue to perform his responsibilities." To the extent that this reference to a "failure" to perform indicates that the Board found that the claimant was removed from his position because he did not perform his responsibilities despite the ability to do so, then the Board found the removal to be

disciplinary in nature and required an investigation. If Award No. 28721 is based on such a finding, we fully agree with it.² However, Award No. 28721 contains much language that appears to declare in absolute terms that a disqualification always requires an investigation regardless of whether it is disciplinary in nature. To the extent that Award No. 28721 so holds, we find that it is palpably wrong, and with all due respect to the Board that decided it, we decline to follow it.³

Accordingly, we must analyze the facts of the instant claim to determine whether Claimant's disqualification was disciplinary in nature. Again, we find the reasoning of PLB 526 instructive. In this regard, PLB 526 wrote:

There certainly could be and undoubtedly are situations where an employee is both unqualified for a job and has conducted himself in such a manner as to justify disciplinary action. Take, for instance, a man who does not possess the capabilities in terms of knowledge, ability, or experience to perform the job in question and who also shows up on the job in an intoxicated condition. In such an instance, the Carrier could well have the option of deciding which route to follow in removing the employee from his job — removal by disqualification or removal by disciplinary action. However, the facts themselves must govern which course of action must be taken in any given situation, and simply saying that a man has been removed for lack of qualifications does not in and of itself make it so.

Turning to the facts presented to it, PLB 526 observed that the claimant's removal from his position occurred because he had not disposed of an unsafe ladder, had not seen to it that the Signal Shop was cleaned, had shipped relays from the Signal Shop in an inoperative condition, had driven his personal vehicle on company business against specific instructions, and had left work early. The Board concluded that the claimant "could have done everything that the Carrier asked of him and was capable of refraining from doing those things which the Carrier told him not to do. He was removed not because he couldn't but because he didn't." (Emphasis in original.) The Board concluded that the removal was disciplinary and required an investigation.

²Award No. 28721 also observed that Carrier had provided no written reason for Claimant's disqualification, but merely advised him orally that he was disqualified. Even where a disqualification is not disciplinary, Carrier may not act in an arbitrary or capricious manner. Failure to provide a reason for a disqualification renders the action arbitrary and capricious and violative of the Agreement even if an investigation is not required. See Third Division Award No. 30284. We believe that the Board could have sustained the claim in Award No. 28721 on this basis alone. However, it is apparent from the Award that the Board did not base its decision on this ground.

³The Board in Award No. 28721 based its decision in part on Rule 12, Section 1(f)'s provisions concerning the rights of an employee who has been demoted. The Board reasoned that this provision indicated that any demotion was covered by Rule 12 and required an investigation. We must respectfully disagree. Rule 12, Section 1(f) merely recognizes that a demotion can be disciplinary in nature and covers those situations where it is. It does not mean that every demotion is disciplinary in nature.

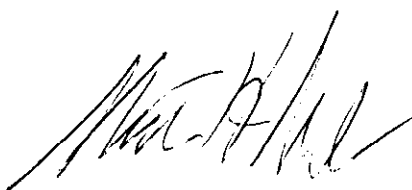
In the instant case, Carrier cited Claimant's prior disciplinary record. Carrier also cited incidents where a machine operator was disciplined for running his machine into a turnout frog and derailing it, where an operator was disciplined for running his machine through a mainline switch, where an operator was disciplined for running through a switch and entering the main track before receiving a job briefing, and where an operator resigned for an improper purchase of fuel. Carrier continued, "Despite informal conferencing on two occasions and a formal conference . . . incidents involving yourself and employees under your supervision continue to occur at a staggering rate. This incident rate is unacceptable. The fact that these incidents continue to occur despite repeated counseling only demonstrates your continued inability to supervise at the first line level."

We think it clear from the record, that Carrier was not disciplining Claimant for alleged wrongdoing. Rather, as in PLB 5842, Case No.7, Carrier had determined based on Claimant's consistent inability to perform the duties of his position that Claimant lacked the requisite qualifications for that position. In the words of PLB 526, Carrier did not determine that Claimant could perform but didn't; rather Carrier determined that Claimant was incapable of performing as a first line supervisor.

Accordingly, we conclude that Carrier's actions in disqualifying Claimant were not disciplinary in nature and did not require an investigation. We further find, based on our review of the record, that Carrier did not act arbitrarily, capriciously or unreasonably. Therefore, the claim must be denied.

AWARD

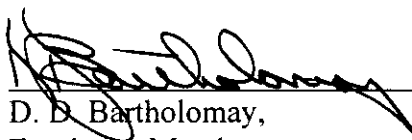
Claim denied.



Martin H. Malin, Chairman



C. M. Will,
Carrier Member



D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, May 13, 2002.