NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 132
and	)
	) Award No. 123
UNION PACIFIC RAILROAD COMPANY	)
	)

Martin H. Malin, Chairman & Neutral Member
T. W. Kreke, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: December 17, 2008

STATEMENT OF CLAIM:

1. The discipline in the form of disqualification of Mr. D. D. Fuller from his position as a 2 ton truck operator is unjust, unwarranted, and in violation of the Agreement (System File MW-07-112/1484545 MPR).

2. As a consequence of the violation outlined in Part (1) above, Mr. D. D. Fuller is entitled to the full remedy detailed in Rule 21(f), effective November 1, 2001.

FINDINGS:

Public Law Board No. 6402 upon the whole record and all of 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 July 31, 2007, Carrier notified Claimant that he was disqualified from working as a 2 Ton + Truck Operator for a period of six months. No notice of investigation was given and no hearing conducted.

The Organization contends that Carrier disciplined Claimant without a hearing in violation of Rule 21 of the Agreement. The Organization urges that Rule 19(c) provides that "[e]mployees accepting promotion and failing to qualify within thirty (30) days may return to their former positions without loss of seniority." The Organization maintains that because Claimant was in the position of Truck Operator for more than thirty days, he had qualified and he may not be removed from the position without notice and a hearing in accordance with Rule 21.

Carrier responds that it has the management right to assess employee qualifications at any time. In Carrier's view, disqualification from a position is not discipline and, accordingly, Rule 21 does not apply. Carrier maintains that the Organization has the burden to show that the disqualification was arbitrary and capricious, a burden that, in Carrier's view, the Organization failed to meet.

Both parties have cited awards which they contend support their positions. The Organization relies on NRAB, Third Division Award No. 14803 (1966) and Fourth Division Awards Nos. 2634 (1971) and 3470 (1977). Carrier relies on NRAB, Third Division Awards Nos. 36957 (2004) and 29307 (1992). We have reviewed these awards carefully.

Fourth Division Award No. 3470 involved a carrier special agent. The carrier suspended his commission as a police officer and, as a result of the suspension, disqualified him from the position of special agent. The disqualification precluded the claimant from holding any position in his seniority district. In other words, the purported disqualification effectively amounted to a dismissal from service. The Board rejected the carrier's attempt to distinguish between disqualification and dismissal as untenable. The Board found the agreement violated because the claimant was not afforded notice of charges and a hearing. Fourth Division Award No. 3470 clearly does not control the instant dispute because in the instant case, there is no claim that the disqualification of Claimant from the Truck Operator position effectively dismissed him from service.

Third Division Award No. 14803 involved the carrier's disqualification of the claimant from service as a dining car waiter. The Board observed, "The effect of Carrier's action was to suspend [the claimant] from further service as a Dining Car Waiter." The Board held that such action required notice and a hearing. It is unclear from the Board's brief decision whether the claimant was able to hold any other position within his craft or whether his effective suspension as a Dining Car Waiter effectively amounted to a complete suspension from service. It is certainly a reasonable inference from the Board's opinion that the disqualification amounted to a complete suspension from service.

Fourth Division Award No. 2634 provides the strongest support for the Organization's position. In that case, the carrier disqualified the claimant from serving as a Yardmaster. The Board considered the claimant's ability to continue in the carrier's service in another position irrelevant to determining whether the disqualification amounted to discipline requiring notice of charges and an investigation. The Board reasoned:

> To disqualify an employe as yardmaster and adversely affect his seniority in that classification is without any question, the equivalent of dismissal as yardmaster. The fact that he might or might not be able to assert seniority in a lower rated position is not pertinent for he has been effectively removed from the yardmaster ranks.

Third Division Awards Nos. 36957 and 29307, relied on by Carrier, are in marked contrast to Fourth Division Award No. 2634. In Award No. 36957, the carrier disqualified the

claimant from service as a Track Foreman. Relying on Award No. 29307, the Board held, "The Claimant's disqualification from the Track Foreman's position was not discipline, as argued by the Organization and the fact that he was in the position for more than the 30-day qualifying period specified in Rule 10 does not prevent the Carrier from disqualifying him from that position." The Board held that the disqualification was not arbitrary or capricious and denied the claim.

In Award No. 29307, the carrier disqualified the claimant from operating a Plasser PUM Tamper. The Board rejected the identical arguments advanced by the Organization in the instant case. The Board wrote:

> The fact that Claimant may have previously been deemed qualified is not controlling. Any employee, despite having previously been qualified on a certain piece of equipment, may, for whatever reason, fail to maintain the necessary degree of fitness to continue in that capacity. We do not read Rule 10 as a limitation on Carrier's right to disqualify an individual at any time where there is evidence of incapacity or inability to competently perform the duties of his or her assignment.
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> 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.

We find that the authoritative force of Third Division Awards 36957 and 29307 greatly exceeds the authoritative force of Fourth Division Award 2634. Fourth Division Award 2634 did not involve Claimant's craft. In contrast, Third Division Awards 36957 and 29307 involved Claimant's craft and the same Carrier and Organization as are present in the instant dispute. We defer to and apply the rulings of Awards 36957 and 29307 and hold that Claimant's disqualification was not discipline and therefore did not trigger the process outlined in Rule 21. There being no showing that the disqualification was arbitrary and capricious, the claim must be denied.

AWARD

Claim denied.

Martin H. Malin, Chairman

B. W. Hanquist
Carrier Member 3-23-09

T. W. Kreke
Employee Member 3-23-09

Dated at Chicago, Illinois, February 26, 2009