

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 86
UNION PACIFIC RAILROAD COMPANY) Award No. 74
_____)

Martin H. Malin, Chairman & Neutral Member
D. D. Bartholomay, Employee Member
B. W. Hanquist, Carrier Member

Hearing Date: March 20, 2007

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood submitted on behalf of R. D. Roberts (EID 01803336) requestng that the BUC Undercutter disqualification dated October 8, 2005, be null and void and that the disqualification be permanently removed from Mr. Roberts' record. Starting from the date of his disqualification and continuing until such date that Mr. Roberts is returned to his former position on the BUC Undercutter, the Organization requests that Mr. Roberts be compensated for all lost wages including overtime wages, and all lost wages resulting in Mr. Roberts being forced to accept a lower classification position with a lower rate of pay.

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 October 8, 2005, Carrier notified Claimant that he was disqualified as a BUC Undercutter Operator. The letter explained:

You have not shown the aptitude or desire to work within the team environment required for a safe productive undercutter operation. In other words, you are being disqualified because you have consistently jeopardized the safety of yourself and others and affected

both the quantity and quality of work. As you have been previously counseled on more than one occasion, an undercutter operation requires an extraordinary amount of teamwork in order to produce a high amount of quality production, safety (sic). You have been responsible for numerous incidents and for flare-ups, most notably, last winter in the Kansas City Shop, this past Spring in Iowa, and early September on the Marion sub. Your unacceptable behavior culminated in a situation on September 28, wherein you abandoned a fellow employee who could have been severely injured due to your lack of teamwork and your lack of concern for your team's safety.

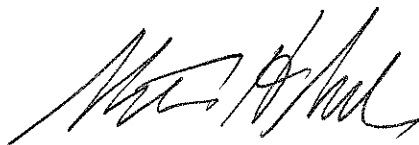
Initially, we note that it is well-established that a disqualification such as the one before this Board is not an act of discipline and, therefore, does not require a hearing prior to its implementation. *See, e.g.*, NRAB Third Division Awards 36957, 35713, 28689. The burden is on the Organization to show that the disqualification was not justified.

The Organization argues that the disqualification was in retaliation for Claimant's filing a time claim for an overtime opportunity that he contended he was denied in violation of his seniority rights. However, other than submitting a copy of the time claim, the Organization has offered no evidence of retaliatory motive. On the contrary, during handling on the property, Carrier denied any retaliatory motive and asserted that Claimant had filed prior time claims which Carrier had paid without any action adverse to Claimant. Those assertions were not denied by Claimant or the Organization and must be accepted by the Board. Moreover, the final incident that led to Claimant's disqualification also resulted in the imposition of discipline at UPGRADE Level 2. That discipline was before the Board in Case No. 85, Award No. 73. We denied the claim. We note that in the hearing that led to the discipline, the primary evidence came not from Claimant's supervisor or from any member of management but rather from Claimant's coworker who Claimant abandoned 13 - 15 feet off the ground to handle a 100 - 150 pound wear plate by himself in a rain storm. Based on the record before us, we conclude that the claim of retaliation is untenable.

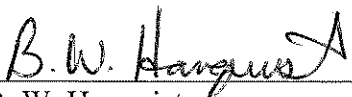
During handling on the property, the Organization submitted written statements from Claimant. Claimant's statements duplicated the testimony he gave in the hearing that led to his Level 2 discipline. That testimony was contradicted in the hearing by Claimant's coworker. In Award No. 73, we found it appropriate to defer to the decision made on the property to credit the coworker's testimony over Claimant's. Moreover, Carrier submitted a written statement from the Manager Maintenance of Way Equipment that in December 2004, at the Kansas City repair facility, Claimant threatened a fellow employee; on or around August 20, 2005, Claimant became angry, threw his hard hat and spoke obscenities; and that several other undercutter operators had related that they did not feel safe working with Claimant. On the record developed on the property, the Organization has failed to prove that Carrier lacked justification for Claimant's disqualification.

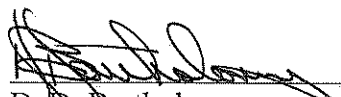
AWARD

Claim denied.



Martin H. Malin, Chairman


B. W. Hanquist
Carrier Member 7/17/07


D. D. Bartholomay 7-17-07
Employee Member

Dated at Chicago, Illinois, July 12, 2007