

**NATIONAL MEDIATION BOARD**

**PUBLIC LAW BOARD NO. 6402**

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES )  
and ) Case No. 95  
UNION PACIFIC RAILROAD COMPANY ) Award No. 82  
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Martin H. Malin, Chairman & Neutral Member  
T. W. Kreke, Employee Member  
B. W. Hanquist, Carrier Member

Hearing Date: January 7, 2008

STATEMENT OF CLAIM:

- (1) The disqualification of Machine Operator H. L. Dixon from the restricted CAT Tamper operator position on Gang 9288 on February 24, 2004 was unjust, improper and in violation of the Agreement (Carrier's File 1399492 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid disqualification shall now be removed from Mr. H. L. Dixon's record and with all lost rights and benefits restored and he shall be reinstated to the Cat Tamper position and compensated for all lost wages and other compensation beginning February 24, 2004 and continuing.

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 September 1, 2003, an Agreement between Carrier and the Organization covering seven restricted positions, including the Continuous Action Tamper (CAT) became effective. Section 2(f) of the Agreement provides:

In initially establishing a restricted position, Carrier will advertise the position. Employees may bid on this position using their appropriate seniority in that class. Assignments will be made to the senior employee in that class irrespective of

qualifications. The position will be advertised sufficiently in advance to allow successful bidders the opportunity to qualify.

Carrier advertised the CAT Tamper position, Claimant bid on it and he was awarded the position on January 9, 2004. He assumed the position effective January 12, 2004, although the CAT was not available until January 23, 2004, when Claimant and other employees moved it from Bloomington, Texas to Victoria, Texas. On February 24, 2004, Carrier disqualified Claimant from the position.

Carrier maintains that it properly and reasonably exercised its management right to assess qualifications when it disqualified Claimant. The Organization contends that the disqualification was disciplinary in nature and that Carrier failed to afford Claimant a reasonable opportunity to qualify on the machine.

It is well established that Carrier determines whether an employee has the requisite fitness and ability to perform a job, subject to limited review as to whether Carrier's determination was arbitrary. *See, e.g.*, Third Division Award No. 36957 and awards cited therein.<sup>1</sup> The burden of proving arbitrariness is on the Organization.

During handling on the property, Carrier submitted statements from three supervisors in support of its determination that Claimant was not qualified to operate the CAT. These statements established that Claimant could not maintain the pace and that in his operation of the CAT, Claimant turned new ties sideways or split them sideways. They also established that Claimant's performance was unsatisfactory with respect to: adjustment of proper limit switches, use of laser, insertions of the tampers into the ballast, blending of line into existing track structure, monitoring of cross level, lift corrections for surface defects, and inspection of run up/run off.

The Organization maintains, however, that Claimant was given insufficient training on the machine to have been afforded a fair opportunity to qualify. The Organization submitted an edited statement from Claimant in support of its position. It urges that the machine was so new to this property that a manufacturer's representative had to instruct the employees in its operation, that the manufacturer's representative was present for a limited period of time, that Claimant was one of three employees qualifying on the machine at the same time and, consequently, received inadequate time with the manufacturer's representative and inadequate time on the machine in general.

One of the supervisor's statements averred, "We had factory representatives and factory instructors w/mechanics there to help. I would not let anyone near that machine so this employee

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<sup>1</sup>In its submission, the Organization cited Third Division Award No. 14803, and Fourth Division Awards Nos. 2634 and 3470 in support of its position that the disqualification was disciplinary in nature. These awards involved situations where an employee was "disqualified" because of specific acts of misfeasance and the "disqualification" effectively resulted in the employee's termination. They clearly are not relevant to the instant case.

had every opportunity to learn this machine." Another supervisor indicated that he met one-on-one with Claimant on January 28, 2004, and reviewed Claimant's performance.

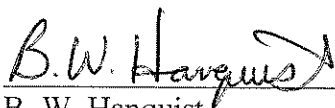
We are confined to the documentary record developed on the property. We do not conduct de novo hearings or otherwise receive testimony. In light of the factual disputes in the documentary record, we are compelled to hold that the Organization has failed to prove that Carrier did not afford Claimant a reasonable opportunity to qualify on the CAT Tamper, or otherwise acted arbitrarily when it disqualified him. Accordingly, the claim must be denied.

**AWARD**

Claim denied.

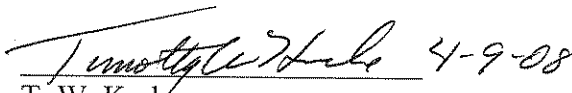


Martin H. Malin, Chairman



B. W. Hanquist  
Carrier Member

4-9-08



T. W. Kreke  
Employee Member

Dated at Chicago, Illinois, March 31, 2008