

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 97
UNION PACIFIC RAILROAD COMPANY) Award No. 84
_____)

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 L. Wiesman from the position of CAT tamper on August 5, 2003 was unjust, on the basis of unproven charges and in violation of the Agreement. The Agreement was further violated when the Carrier failed and refused to assign Mr. Wiesman to a subsequently established restricted CAT tamper position effective September 1, 2003 (Systems File MW-03-320/1374999 MPR).
- (2) As a consequence of the violations referred to in Part (1) above, the Carrier shall remove the aforesaid disqualification from Mr. L. Wiesman's record and he shall be reinstated to the CAT tamper position and compensated for the difference in pay between the CAT tamper operator rate and the ballast regulator rate for all straight time and overtime beginning August 5, 2003 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.

Claimant, who has seniority as a Machine Operator from June 11, 1972, was awarded the position of operator of the CAT Tamper on February 21, 2003. Carrier held Claimant over on his former position until March 16, 2003, when he assumed the new position. On August 5, 2003, Carrier disqualified Claimant from the CAT Tamper position.

The Organization filed a claim on Claimant's behalf with Carrier's Manager Quality Procedures on August 28, 2003. The claim maintained that the disqualification violated the Agreement because Claimant was not afforded an investigation or a conference. The primary thrust of the claim was that, because Claimant had remained in the CAT Tamper operator position for more than 30 days, his removal from that position was disciplinary and required a hearing.

On July 15, 2003, Carrier and the Organization entered into an agreement effective September 1, 2003, covering seven restricted positions, including the Continuous Action Tamper (CAT). 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 but the positions were awarded to employees with less seniority. Apparently, discussion ensued between the General Chairman and Carrier's General Director Labor Relations concerning the failure to award Claimant a CAT Tamper Position. On October 7, 2003, the General Director Labor Relations wrote the General Chairman advising that, in light of Claimant's disqualification, he was not entitled to be selected under the July 15, 2003 Agreement. On October 14, 2003, the General Chairman responded to the General Director Labor Relations disagreeing with Carrier's position.

On October 22, 2003, the Manager Quality Procedures denied the Organization's August 28, 2003 claim. The denial only addressed the August 5, 2003, disqualification. On October 27, 2003, the Organization appealed the denial of its August 28, 2003, claim to Carrier's Director Labor Relations Maintenance of Way. The appeal addressed the August 5, 2003, disqualification, and the failure to award Claimant a CAT Tamper Position pursuant to his bid in September 2003 under the July 15, 2003 Agreement. The Director Labor Relations Maintenance of Way replied denying the appeal on December 26, 2003.

The critical issue with respect to the August 5, 2003, disqualification is whether that disqualification was discipline and subject to Rule 21's requirement of a fair and impartial investigation. The Organization points to Rule 19(C), which provides, in part, "Employees accepting promotion and failing to qualify within thirty (30) days may return to their former positions without loss of seniority," and argues that an employee who is not disqualified within thirty days of beginning a new position can only be removed from that position through a Rule 21 investigation. The clear weight of authority on this property, however, is to the contrary. *See, e.g.,* Third Division Award Nos. 36957, 35713, 29307. These awards make clear that Carrier has the management right to assess employee qualifications, that the Board may only intervene on a showing that Carrier's decision to disqualify an employee was arbitrary, and that the burden of proving arbitrariness is on the Organization.

Against this weight of authority, the Organization cites Third Division Award No. 28721. The claimant in that case had been dismissed from his position as Assistant Foreman but was reinstated by a Special Board of Adjustment. Two months following his return to service, Carrier purported to disqualify him as an Assistant Foreman and demote him to Trackman. The Board held that the disqualification was disciplinary and required a formal investigation. The Board relied on Rule 12, the discipline rule then in effect between the parties, which provided in Rule 12(f):

No demoted employee will be allowed to exercise his seniority in a lower classification except by agreement between the management and the local and/or General Chairman.

The Board reasoned:

The reference to demotion in Subsection (f) in the disciplinary Rule must be given attention. Thus, the Carrier is free to demote or otherwise affect an employee where failure to perform satisfactorily is alleged, but this must be pursued through the investigation process specified in Rule 12, Section 1(a).

The parties have not cited any provision of the current Discipline Rule, Rule 21, comparable to Rule 12(f). Because the reasoning of Third Division Award No. 28721 does not appear to apply and because it is contrary to the weight of authority on this property, we conclude that Claimant's disqualification was not disciplinary and a formal investigation was not required.

We further conclude that the Organization has failed to prove that Claimant's disqualification was arbitrary. The record contains evidence that Claimant had problems setting up the CAT Tamper to plot curves, working the on-board computer, setting the machine to line track properly, and making running repairs and adjustments to the equipment. There is no evidence of any ulterior motive on Carrier's part in disqualifying Claimant. We conclude that the claim over Claimant's August 5, 2003, disqualification must be denied.

We now turn to Carrier's refusal to award Claimant a CAT Tamper position when he bid in September 2003. Rule 22(a) provides:

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 Officer of the Carrier authorized to receive claims was the Manager Quality Procedures. Yet, the record contains no evidence that any claim concerning the failure to award Claimant a CAT Tamper position in September 2003 was ever presented to her. Although it appears that the General Chairman had informal discussions with the General Director Labor Relations, the sole claim on which the Manager Quality Assurance ruled concerned the August 5, 2003, disqualification. In its October 27, 2003, appeal, the Organization raised the September 2003 failure to award Claimant a CAT Tamper position. This was clearly improper. As stated in

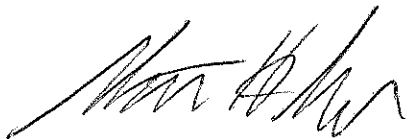
Third Division Award No. 36020:

[T]he Organization attempted to modify the claim on the property. This is not permitted. As the Carrier contends, amending an appeal during the on-property proceedings is a fatal error, rendering the claim procedurally defective and requiring its dismissal by the Board."

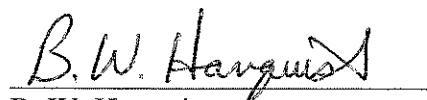
Accordingly the claim under the July 15, 2003, Agreement must be dismissed.

AWARD

Claim over the August 5, 2003, disqualification denied. Claim under the July 15, 2003 Agreement dsimissed.

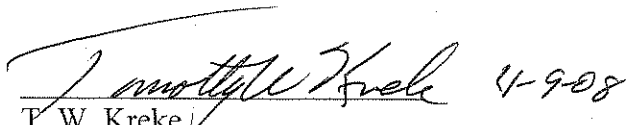


Martin H. Malin, Chairman



B. W. Hanquist
Carrier Member

4-9-08



T. W. Kreke
Employee Member

4-9-08

Dated at Chicago, Illinois, March 31, 2008