

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES)
and) Case No. 5
UNION PACIFIC RAILROAD COMPANY) Award No. 5
_____)

Richard K. Hanft, Chairman & Neutral Member
T. W. Kreke, Employee Member
D. A. Ring, Carrier Member

Hearing Date: November 12, 2008

STATEMENT OF CLAIM:

1. The disqualification of System Boom Truck Driver Michael C. Earls is improper, unjust, unwarranted and in violation of the Agreement (Carrier's File 1484556 SPW).
2. As a consequence of Part 1 above, we request that Mr. Earls be immediately returned to his system truck driver position on Gang 8500. Mr. Earls shall also be compensated the difference in pay, both straight time and overtime from June 12, 2007 and continuing, between his current assigned position of track laborer and his former position as system truck driver.

FINDINGS:

Public Law Board No. 7258 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 was first qualified as a system truck driver in June, 2002 and began operating a system truck in January 2006. Since November, 2006 Claimant had operated a system truck on Gang 8500. On June 12, 2007 Claimant was advised by letter that he was disqualified indefinitely as a system boom truck driver in all classes. By letter dated June 15, 2007 the Organization requested an Unjust Treatment Hearing. The record reveals that a telephone conference in this regard was held July 5, 2007 with the decision to uphold the disqualification communicated to Claimant by letter dated July 12, 2007. Claim was filed September 5, 2007 with the claim being denied October 25, 2007. The Organization filed an appeal on November

25, 2007 which was denied January 13, 2008. . The claim was discussed in conference on May 5, 2008 with the parties being unable to resolve their differences.

It is undisputed that Claimant was disqualified as an operator of a system boom truck on Gang 8500 after approximately 18 months service in that position. The record before us indicates that a telephone conference was held on July 5, 2007 in response to an Unjust Treatment allegation and that although the conference was recorded, it was unable to be transcribed due to recording difficulties. The Manager who conducted the telephone conference made a written statement concerning the reason a transcript was unable to be produced and further explaining that:

“...The disqualification was upheld based on an audit by Mgr. M/W equipment”... “on May 16 which indicated that” Claimant “was operating the boom of the truck without current DOT inspection as required and the boom certification was also expired. The audit also indicated that” Claimant “was loading a piece of equipment on the truck, but there were not enough tie downs. There was also no record of the required daily inspections for the boom. On June 12,” the track supervisor “observed” Claimant “drive the truck away from its tie up point with a flat tire after allegedly performing the required morning inspection on the vehicle. This, along with other truck driving related issues which were indicated on his personal record justified upholding of the disqualification....”

The Organization contends that Carrier’s decision to disqualify Claimant from his position of system truck driver is tantamount to discipline without the benefit of a fair and impartial investigation. The Organization asserts that there is no record evidence to prove that Carrier’s decision to disqualify Claimant was not unjust and unwarranted. The Organization avers that the audit report referred to was never made a part of the record and that therefore, there is no probative evidence to support Carrier’s decision to disqualify the Claimant.

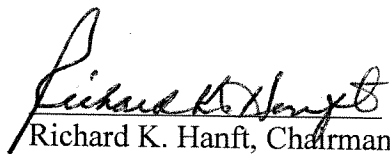
In regard to the Organization’s first contention that Claimant’s disqualification is tantamount to discipline, it is well established that the Carrier determines whether an employee has the requisite fitness and ability to perform a job, subject only to a limited review as to whether Carrier’s determination was arbitrary. See Public Law Board 6402, Award 82 (Malin). Here, the Carrier exercised its right to remove Claimant from the boom truck. The Carrier was under no obligation to conduct a hearing prior to taking that action. See Third Division Award 28689, (McAllister). Pursuant to Rule 48 (n), the Organization requested and Claimant was given an Unfair Treatment Conference. Nothing more than that was contractually required because disqualification is not tantamount to discipline and does not require an Investigation and Hearing pursuant to the Agreement. See Third Division Award 36036 (Kenis).

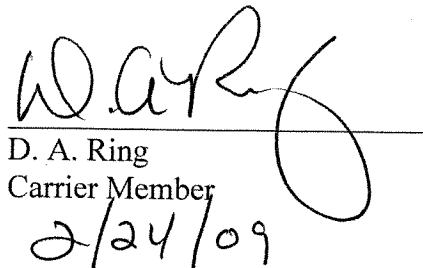
Although the Organization argues that Carrier failed to provide record evidence that its actions were not unjust and unwarranted and that there is no probative evidence to support Claimant’s disqualification, it didn’t have to. It is too well established that Carrier retains its rights to assess employee qualifications and to determine whether the employee maintains the requisite fitness and ability to perform the job. If, in its judgement, the Carrier determines that the employee is not performing that job properly, it has the management right to disqualify the employee from that position. At that point, the burden shifts to the Organization to overcome the

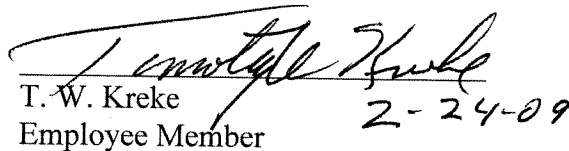
Carrier's decision through the presentation of substantial evidence of claimant's fitness and ability. Only if Carrier's decision can be shown to be arbitrary or unreasonable may this Board intervene. Moreover, the burden of proving arbitrariness rests with the Organization, which in this case, it has failed to establish. See Third Division Award 30093 (Duffy), Public Law Board 6402, Award 84 (Malin).

AWARD

Claim denied.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member
2/24/09


T. W. Kreke
Employee Member
2-24-09

Dated at Chicago, Illinois, January 21, 2009