

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
)	Case No. 17
and)	
)	Award No. 17
UNION PACIFIC RAILROAD COMPANY)	
)	

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

Hearing Date: May 1, 2009

STATEMENT OF CLAIM:

1. The disqualification of semi-truck driver Archie L. Whitson is in unjust and in violation of Rules 1, 2, 3, 5, 6, 7, 8, 10, 12, 22, 23, 24, 25, 26, 28, and 44 of the Agreement (Carrier's File 1489514).
2. As a consequence of the violations outlined in Part (1) above, on behalf of Mr. Whitson, the Organization requests the dismissal be removed and disregarded from Mr. A. L. Whitson's personal files, and that he be immediately reinstated to the position of semi-truck driver on Gang 8842, and that he be further compensated for all earnings lost, straight time and overtime, respective to the truck driver position.

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 entered the Carrier's service on August 20, 2008, was qualified first as a truck driver on November 31, 1979 and later as a semi-truck driver on January 17, 1992. On August 30, 2007, Claimant was notified by his manager that he was being disqualified as a semi-truck driver due to his inability to properly take care of and maintain the semi-truck that he had previously been assigned to operate. The Organization filed claim on October 22, 2007 alleging that Claimant's disqualification was unjust and in violation of the parties' Agreement. That

claim was denied on December 13, 2007 and appealed on January 22, 2008. Carrier denied the appeal on March 28, 2008 and the claim was discussed in conference on July 8, 2008 without resolution.

It is undisputed that Claimant was disqualified as a semi-truck driver by his Track Supervisor for allegedly failing to properly maintain the truck that he was assigned to. The record indicates that Claimant went on vacation and that another employee was assigned to operate the vehicle customarily assigned to the Claimant. Upon being assigned to that truck, the temporary replacement driver notified a supervisor that the truck was two (2) gallons low on oil. The Organization contends that a semi-truck being two (2) gallons low on oil is the equivalent of a personal automobile being no more than a quart low on oil, and therefore a de minimus oversight. The record shows, however, that upon further inspection an additional \$5,680.00 in repairs had to be performed on this truck to put it in a roadworthy condition.

The Organization contends that the Track Supervisor has offered no evidence showing that the truck was inappropriately maintained aside from being a little low on oil and states that the Track Supervisor's opinion does not establish proof. Instead, the Organization opines, Claimant's twenty-eight years of experience as a railroad qualified truck driver indicates a driver who knows when his truck needs to be repaired or serviced. Hence, the Organization requests that the Claim be sustained and that Claimant be reinstated as a semi-truck driver and made whole for all lost earnings.

The Carrier asserts that it has the right to disqualify an individual who is not satisfactorily performing their duties and that here, Claimant was disqualified due to his inability to perform the essential duties of a semi-truck driver including properly maintaining the vehicle that he was assigned to, and failing to properly complete and submit required paperwork in a timely fashion.

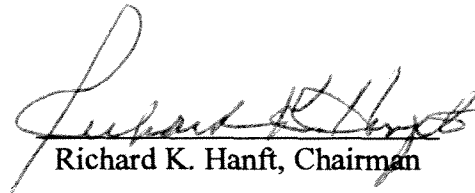
Carrier maintains that it has met its burden of providing substantial evidence that demonstrates Claimant's inability to retain the position of semi-truck driver and avers that the Claimant and the Organization, as the moving parties in this dispute, now bears the burden to overcome the Carrier's decision through the presentation of substantial and competent proof of Claimant's fitness and ability. This, the Carrier contends, the Organization has failed to do.

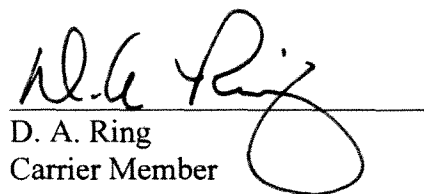
It is well established on this property that the Carrier has the right to determine whether an employee possesses the requisite fitness and ability to perform a given job, subject only to limited review as to whether Carrier's decision was arbitrary. PLB 6402, Award 82 (Malin). Here, the record shows, the Carrier exercised its right because Claimant failed to maintain the semi-truck to which he was assigned in a proper manner. Despite the Organization's argument that Claimant's shortcomings were merely de minimus oversights and that the Carrier relies on opinion and not established facts and has not met its burden to prove by probative and substantial evidence Claimant's inability to properly perform the job, it doesn't have to. It is well established that Carrier retains its right 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 the job properly, it has the

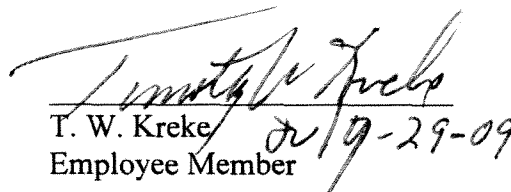
management right to disqualify that employee from the position. At that point, the burden shifts to the Organization to overcome the Carrier's decision through the presentation of substantial evidence of Claimant's fitness and ability. Only if Carrier's decision has been shown to be arbitrary or unreasonable may this Board intervene. In that case, the burden of proving arbitrariness rests with the Organization, which here, it has failed to do.

AWARD

Claim denied.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member

Dated at Chicago, Illinois, June 2, 2009

7-29-09