

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 7258

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES)	
)	Case No. 23
and)	
)	Award No. 23
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: "Claim of the System Committee of the Brotherhood that:

1. The disqualification of Mr. Gregory F. Martinez from his position as foreman material distribution in connection with his failure to adequately perform his duties is based on unproven charges, unjust, unwarranted and in violation of the Agreement (Carrier's File 1504339 SPW).
2. As a consequence of Part 1 above, we request that Mr. Martinez be immediately reinstated to the position of material foreman distribution and that he be further compensated for all earnings lost, straight time and overtime, respective to the material foreman distribution position. Payment shall be in addition to any compensation he may have already received."

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 awarded the position of foreman material distribution pursuant to a Letter of Agreement in February, 2007. Pursuant to the parties' agreement, the position is restricted to a one year tour of duty and no seniority is established until the employee works the position for a full year. Shortly before Claimant's one year anniversary in that position, on January 7, 2008, Carrier disqualified him from that position.

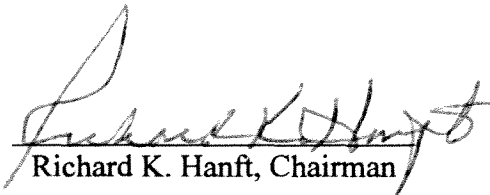
Pursuant to Rule 46, an Unjust Treatment Hearing was requested and scheduled for February 19, 2008. A postponement by mutual consent of the parties was agreed to, and the hearing was held on March 3, 2008. On March 18, 2008, the Manager of Track Maintenance rendered his decision upholding the disqualification. The Organization, on May 2, 2008, filed a claim based on Carrier's decision, arguing that the Carrier offered no documented proof to substantiate the disqualification and that the disqualification was highly suspect in that Claimant was disqualified just two weeks short of being fully qualified as a foreman material distribution. That claim was denied on June 25, 2008. The denial was appealed on August 12, 2008 and denied on October 1, 2008. A conference concerning this matter was held on February 3, 2009 without resolution.

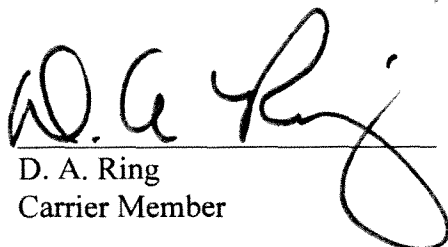
The problem with the Organization's argument is that it is well established on this property that the Carrier has the right to determine whether an employee possesses the requisite fitness and ability to perform a given job, subject only to limited review as to whether Carrier's decision was arbitrary. PLB 6402, Award 82 (Malin). Here, Claimant's manager reviewed Claimant's performance over a three week period after almost eleven months of experience in the position and determined that he had not acquired the requisite fitness and ability to adequately perform the job. The manager cited several specific instances where his performance was sub-par. In short, she felt that she couldn't depend on him to do the job correctly. That determination is clearly management's right to make and does not violate the Agreement.

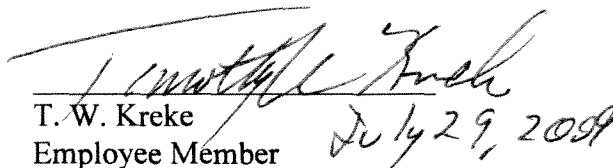
When management has made that determination, it then becomes the Organization's burden to come forward and show that Carrier's decision was arbitrary, capricious or improperly motivated. Our reading of the record does not provide a basis to show that Carrier's determination was arbitrary, capricious or in any way improperly motivated. Accordingly, there is no basis to disturb the Carrier's decision.

AWARD

Claim denied.


Richard K. Hanft, Chairman


D. A. Ring
Carrier Member


T. W. Kreke
Employee Member July 29, 2009

Dated at Chicago, Illinois, June 22, 2009

7-29-09