

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6302
AWARD NO. 207, (Case No. 213)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
DIVISION - IBT RAIL CONFERENCE**

vs

UNION PACIFIC RAILROAD COMPANY

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
P. Jeyaram, Carrier Member

Hearing Date: April 10, 2012

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- 1. The disqualification of Mr. L. G. Jackson from his position of Union Pacific Railroad System crawler back hoe operator by letter dated April 15, 2010, is unjust, unwarranted and in violation of Rule 48 of the Agreement (System File R-1048U-303/1537280).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Jackson shall have the disqualification removed from his record and be allowed to return to the crawler back hoe position and be compensated the differential in pay from the lower rated position(s) he has held since the disqualification until he is allowed to return to the position."**

FINDINGS:

Public Law Board No. 6302, upon the whole record and all 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.

The Claimant entered the service of the Carrier on June 24, 1996, and holds seniority in various positions including REO Crawler Hoe Operator. On April 15, 2010, Claimant was sent a letter from Gang Supervisor, C. Chrastil which stated in pertinent part:

"This letter is to inform you are hereby disqualified from the position of System Crawler Back Hoe Operator on Gang 8838.

As a system crawler operator on gang 8838 you failed to demonstrate the

ability and knowledge to safely perform the duties of a Union Pacific System Crawler Back Hoe. You lack the ability to ask for instruction on operation of the assigned equipment. As a result of not asking for instruction you caused damage to Public property and personal property.

Therefore, System Crawler Back Hoe Operator. You should arrange to exercise your seniority as allowed in accordance with the BMW Agreement."

The facts indicate that at the time of the disqualification Claimant was assigned as a Crawler Back Hoe Operator on Gang 8838. There is no dispute that on April 15, 2010, he chose to drive the crawler back hoe from one work site to another on public roads instead of transporting the machine via tractor trailer. It was alleged that in doing such he caused damage to roads and other property and disqualification was proper.

It is the position of the Organization that the Claimant was entitled to a formal Investigation to fully present his position and cross-examine his accusers as the disqualification was tantamount to discipline. It further argued that a review of the record reveals there is absolutely zero evidence present in the record (i.e., a Carrier Rule was violated, proof of property damage or an accident/incident report) that supports the Carrier's contention that the Claimant failed to perform his duties in a satisfactory manner when traveling his crawler backhoe roadside to the road crossing on April 15, 2010. The Organization concluded the Carrier had erred in its disqualification of the Claimant and it requested that it be removed from his record and he be reinstated to the position of Crawler Back Hoe Operator on Gang 8838 and the claim sustained as presented.

It is the Carrier's position the Claimant was not entitled to a formal Investigation as the disqualification was not discipline. It argued that it is a change in status that can be subsequently regained at a later time if the employee can demonstrate the fitness, ability and capacity to perform all aspects of the position. It stated that the Organization's contention that Claimant's disqualification was based on the fact he did not load his machine for transportation and had nothing to do with the way he operated the machine was in error. The Carrier disagreed with that assessment and argued that Claimant's action had everything to do with "the way Claimant was operating the machine". According to it, the operation of the machine includes its transportation and Claimant's actions clearly demonstrated that he was unable to properly operate the crawler backhoe in a safe and efficient manner and its disqualification was reasonable and justifiable. It closed by asking that the claim remain denied.

The Board has thoroughly reviewed the record and will first address the Organization's argument the disqualification amounted to discipline and because of that a formal Investigation was required. That same argument has been rejected in the past (See Third Division Award Nos. 29307 and 36957) wherein it was determined a disqualification was not discipline and there was

no requirement for an Investigation. Based upon those prior Awards the Board is compelled to find that in this instance there was no necessity for a formal Investigation.

Additionally, the Organization asserted there was another reason why the Claimant was entitled to a formal Investigation, that being if the Claimant had erred, which he did not, the incident was not a question of disqualification, but instead was a disciplinary matter. The Carrier argued that the aforementioned argument is "*de novo*". The Board is not persuaded that the Organization's argument is inadmissible as it was set forth on the property in its letter of August 30, 2010, and is properly before the Board, however, we are not convinced that the incident was subject to disciplinary handling because it is a question of whether reasonable judgment and/or decision making was exercised in fulfilling the responsibilities of the Claimant's position. The dispute will be resolved as a disqualification issue.

The Organization argued that moving a crawler back hoe on city streets was proper and the Claimant had made similar moves many times in the past, however, Manager Stahlnecker's countered the Organization's position on June 9, 2010, wherein he stated in pertinent part the following:

"...After hearing everyone's statement on April 21, 2010. I have to point out Mr. Jackson acknowledged the fact he put the public in danger by making a move with a crawler backhoe on public roads and property. In addition he acknowledged he placed the company at risk for the same roads and property. He acknowledged he was aware there was a company truck and trailer to move this machine safely. This same truck has made similar moves in the past and is the method of moving these machines under the circumstance presented in this incident. All of the decisions to move this machine on these roads and public property were made by Mr. Jackson. The poor decision making on Mr. Jackson's parts is enough circumstances to stay with the decision for disqualification. Mr. Jackson, per agreement can bid a future bulletin of this type of machine in an attempt to show he can operate and make good safe decisions in connection with operating this type of equipment."

(Underlining Board's emphasis)

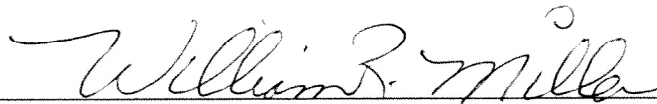
Having "fitness and ability" to operate a crawler backhoe requires physical ability and knowledge to operate the machine and the exercise of good decision making. The record substantiates that the Claimant has the knowledge and ability to operate a crawler backhoe, the question in this instance was did he make an appropriate decision when he chose to travel the machine rather than load and haul it to another site. The Organization suggested there was a

practice to travel the machines from one work site to another whereas the Carrier argued that the machine should have been transported. This is not a question of equally viable arguments because Manager Stahlnecker's statement was not effectively refuted wherein he stated that the Claimant acknowledged he put the public in danger by traveling his crawler backhoe on public roads and property.

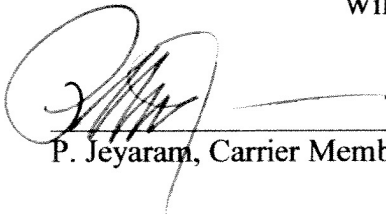
The Board finds and holds that the Carrier had the managerial right to disqualify the Claimant because of his decision to traverse the REO Crawler Hoe rather than transport it. Making good judgment calls are a factor in demonstrating continued "fitness and ability" for a position and in this instance the Claimant's choice for movement of his machine to a different work site was not the safest practice in the performance of his duties. The Claimant, as the operator of the REO Crawler Hoe, had the duty and obligation to operate, including the proper transportation, of the machine to the new work site in the safest manner which he failed to exercise. The disqualification will not be rescinded and the claim will remain denied. The Board also notes that Claimant's disqualification is not permanent, as a disqualification is a change in status that can be subsequently regained provided the employee can demonstrate the "fitness and ability" to perform a position.

AWARD

Claim denied.



William R. Miller, Chairman



P. Jeyaram, Carrier Member



K. D. Evanski, Employee Member

Award Date: August 1, 2012