

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 167 (Case No. 188)**

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

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company)**

William R. Miller, Chairman & Neutral Member
T. W. Kreke, Employee Member
K. N. Novak, Carrier Member

Hearing Date: July 20, 2011

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

- 1. The Carrier's disqualification of Mr. A. M. Sasser from the position of track foreman, issued by letter dated February 10, 2010, in connection with his alleged failure to show the necessary requirements to perform his duties in a safe and effective manner was unjust, harsh, unfair and in violation of the Agreement (System File UPLW410-10/1533581).**
- 2. As a consequence of the Carrier's violation outlined in Part 1 above, Mr. Sasser shall be paid the difference in pay of a Brandt truck foreman and an assistant foreman, for all straight time hours and all overtime hours beginning February 16, 2010 and reinstated to his former assigned position, Brandt truck foreman on Gang 9188."**

FINDINGS:

Public Law Board No. 6402, 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 facts indicate that this is the second in a series of two cases involving the same Claimant and is a companion case to Award No. 166 of this Board. In the aforementioned dispute the Board determined that the Claimant was properly assessed a eight day suspension for failure to properly secure his equipment and ensure the track was protected. Because of that violation the Carrier subsequently disqualified the Claimant as a Track Foreman on February 16, 2010, on the basis that he did not do his job in a safe manner and subjected other employees to potential harm and danger, which led to the present dispute.

The Carrier's letter of disqualification dated February 10, 2010, and signed by the Claimant for receipt on February 16, 2010, stated in pertinent part:

"...The following violation which you have incurred have led to your disqualification as a Track Foreman on Tie South:

November 20, 1995 - Railroad Crossings at Grade - Level Two Discipline for fouling switch interlocker.

December 03, 2009 - Main Track Authorization - Level 1 Failure to provide positive on track protection with equipment on track in conjunction with the Dispatcher attempting to shorten Yard limits.

February 07, 2010 - Equipment Tie-Up - Failure to protect equipment by not properly spiking and or tagging switches and placing derails in accordance with MOFW Rule 43.4 Equipment Tie-Up and Tie South Provisions...."

It is the position of the Organization that the disqualification was not justified. It argued that the Carrier initially tied the disqualification to three incidents going back 14 years from the most recent incident after which it was altered to the latest incident. It argued the Carrier realized that if the prior two incidents were a reason for disqualification then why wasn't it first instituted 14 years ago. According to it the Carrier recognized the foolishness of that argument and it narrowed the disqualification down to the incident that took place on February 7, 2010. It further argued to add insult to injury the Claimant was disqualified on February 10, 2010, but it did not deliver the letter until February 16th which allowed the Claimant free to work in his foreman's capacity, despite his disqualification being based upon his alleged failure to perform his duties in a safe and effective manner. Additionally, it asserted that if the disqualification was based upon "safety" concerns, such disqualification should not have waited a week before taking effect and suggests there was some other unstated reason that motivated the disqualification. It concluded that the disqualification was arbitrary, capricious and unreasonable and it requested that it be rescinded and the claim sustained as presented.

It is the Carrier's position the Claimant was assigned as a Foreman and the record proves that on February 7, 2010, he failed to follow the necessary procedures when he did not make the track, where he tied up a Brandt Truck and Tracker, inaccessible. Because of the Claimant's inability to demonstrate the requisite fitness and ability for the position, it argued he was properly disqualified as a Track Foreman on February 16th. It also argued there is ample precedent for disqualifying an employee who has held a position for a substantial period if they fail to handle their position in a safe manner. It closed by asking that the claim remain denied.

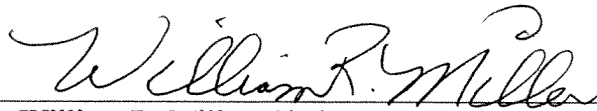
The Board has thoroughly reviewed the record and finds the Organization's arguments to be skillful, but it overlooks the fact that the three violations listed in the Claimant's disqualification letter have a recurring theme, that being failure to provide proper protection, with the latest incident being the catalyst for the disqualification. The argument concerning the date of the disqualification as being February 10th with the ability of the Claimant to work as a Foreman up to and including February 16th ignored the fact that after the Claimant left the work site on February 7th to observe his rest days the subsequent disqualification letter dated February 10, 2010, was hand delivered to him on his first day back to work on February 16, 2010.

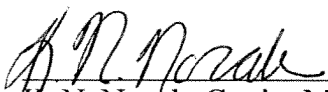
The issue then becomes whether or not the incident of February 7th was reasonable grounds for disqualification. The record included two statements from Claimant's Manager Noll and Supervisor Ehlers that explained the incident leading to the disqualification wherein the Claimant tied up a Brandt Truck on a yard track. Those statements confirm that the Claimant failed to properly secure the track and make it inaccessible. The Carrier also provided photographs of the track, proving the track was not properly secured which had the potential for damage to equipment and harm to employees. The correspondence and pictures set forth in this case are consistent with the determination made in Award No. 166 that the Claimant failed to properly provide protection for his equipment in violation of Rules 136.4.2 and 43.4.

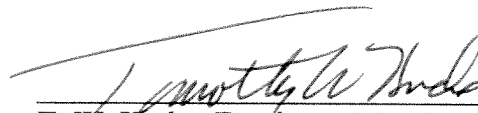
The Board finds and holds that the disqualification was appropriate, however, permanent disqualification was too severe and is reduced to lengthy disqualification that will serve as being corrective in nature and a reminder to the Claimant that he must abide by Carrier Safety Rules. Claimant is to be reinstated to his Foreman status with foreman seniority intact, but with no back-pay. Upon reinstitution of his foreman rights Claimant will be eligible to bid/make application to any open position, but will not be afforded a displacement right.

AWARD

Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.


William R. Miller, Chairman


K. N. Novak, Carrier Member


T. W. Kreke, Employee Member

Award Date: 10/18/11