

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 170, (Case No. 191)**

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
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: January 18, 2012

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

- 1. The Agreement was violated when the Carrier improperly disqualified and removed Mr. W. Menard from his ballast regulator machine operator position on Gang 9165 by letter dated August 18, 2010 (System File UP-523-JF-10/1543071).**
- 2. As a consequence of the violation referred to in Part 1 above, Claimant W. Menard shall have his ballast regulator machine operator qualification reinstated and he shall be compensated for the difference in pay rates between the rate he earned and the ballast regulator operator's rate for all straight time and overtime hours beginning on August 18, 2010 and continuing until he is reinstated to the ballast regulator operator position."**

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 the Claimant has been in the service of the Carrier since April 11, 1977, and on August 16, 2010, Claimant was assigned as a Ballast Regulator Operator on Gang No. 9165. While assigned to that position it was alleged that he failed to properly inspect and care for his equipment and that failure resulted in significant damage to the ballast regulator, removing it from service while it was repaired, at a substantial cost to the Carrier in terms of lost productivity from that equipment and repair costs. It was asserted by the Claimant's immediate Supervisor, Track Supervisor C. D. Earley, that on the morning of the incident he discussed with

all equipment operators that because of the long travel involved in that day's work they each needed to specifically inspect transmissions, differentials and wheel bearings for proper amounts of lubricants. Because of Claimant's alleged failure to inspect the differential on his machine he was disqualified from the position of Ballast Regulator Operator on August 18, 2010.

It is the position of the Organization that the Claimant was entitled to a formal Investigation as the disqualification was tantamount to discipline. It further argued that the machine had been used the prior two days by a different Operator and any damage to the machine was the result of the prior usage and was no fault of the Claimant who wrote in a statement the following:

"I did my normal check list and everything seem fine, until I made a movement, within the first 20 feet, I noticed that there was damage done, the front axle would not pull."

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 Ballast Regulator Operator 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 further argued that the Claimant had been given a direct order on the date of the incident to check his machine for adequate lubricants and when the machine locked up after being pulled only 20 feet it was discovered that the differential was empty of lubricant with no sign of leakage which according to it showed long term neglect and was proper grounds for disqualification. It closed by asking that the claim remain denied.

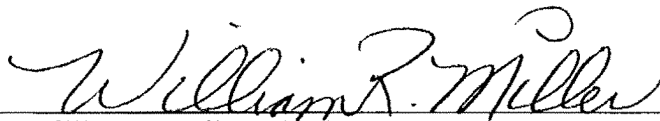
The Organization argued that the disqualification amounted to discipline and because of that a formal Investigation was required. That same argument on this property has been rejected in the past (See Third Division Award Nos. 29307 and 36957) wherein it was determined a disqualification was not discipline 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.

Turning to the merits the Organization made a strong argument in behalf of the Claimant that the reason why the differential in his machine was "bone dry" was because of its prior usage by a different Operator. That assumption by the Organization might be correct, but whether that was the cause is immaterial in this instance because it is un-refuted that Track Supervisor C. D. Earley specifically instructed all Operators on the morning of August 16, 2010, including the

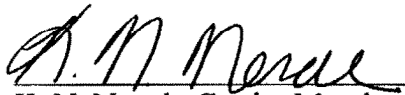
Claimant to inspect transmissions, differentials and wheel bearings for proper amounts of lubricants. Contrary to the Claimant's statement, if he had checked the differential he would have discovered it was dry with no lubricants and was not safe to pull. Claimant's failure to properly inspect his machine resulted in damage and loss of machine usage. The Board finds and holds that the disqualification will not be rescinded and the claim will remain denied.

AWARD

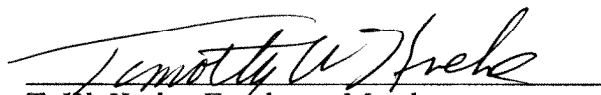
Claim denied.



William R. Miller, Chairman



K. N. Novak, Carrier Member



T. W. Kreke, Employee Member

Award Date: 4.5.2012