

PUBLIC LAW BOARD NO. 6102

Award No. 15
Case No. 15

PARTIES TO DISPUTE: Brotherhood of Maintenance of Way Employees
and
Burlington Northern Santa Fe Railway
(Former St Louis - San Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Carrier violated the Agreement when on February 1, 1999, Mr. Dale A. Williams was disqualified as Position No. 7640, Foreman of rail gang RP-04.
 2. As a consequence of the Carrier's violation referred to in part (1) above, the disqualification shall be removed from the Claimant's personal record, and he shall be compensated for all wages lost in accordance with the Agreement."
- [Carrier's File 12-99-0111. Organization's File B-1987-8.]

FINDINGS AND OPINION:

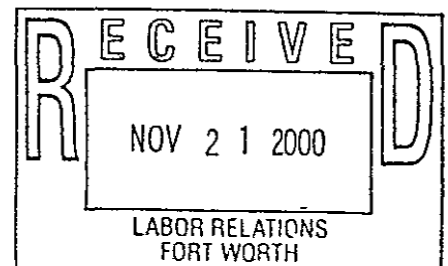
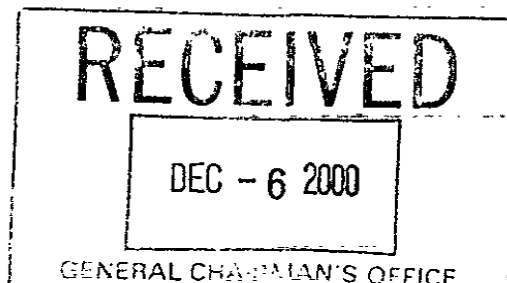
Upon the whole record and all the evidence, the Board finds that the Carrier and Employees ("Parties") herein are respectively carrier and employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction over the dispute herein.

The Claimant, Mr. Dale A. Williams, was assigned the Foreman's position on Maintenance of Way Rail Gang RP-04 on January 4, 1999. His personal record indicates that he was first hired as a Trackman in 1979, and was promoted to Assistant Foreman in 1984. He was dismissed and reinstated in 1988. The record does not show whether or not he returned to service as Assistant Foreman, but in 1993 he was transferred to a Machine Operator's position.

On February 3, 1999, the Claimant was disqualified as Foreman by Roadmaster E. E. Blackburn. As the consequence, the Claimant's General Chairman requested an unjust treatment hearing pursuant to Rule 62 of the Agreement between the Carrier and its employees represented by the Brotherhood of Maintenance of Way Employees (herein referred to as the "Agreement"). Rule 62 reads as follows, in part:

"An employee who considers himself unjustly treated in matters other than discipline, or in matters other than those arising out of the interpretation and application of the rules of this Agreement, shall have the same right of hearing and appeal as provided in Rule 40, . . ."

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Rule 40 is captioned "Investigations and Appeals," and provides the procedural rules applicable to both Parties with respect to disciplinary hearings: notices, representation, witnesses, decisions, transcripts, time limits, etc.

The General Chairman followed up with a further request that four witnesses be made available at the hearing. These witnesses were employees on Rail Gang RP-04.

The hearing was originally set for 0900 hours on Friday, March 5, 1999. Because that was a rest day for Gang RP-04, the General Chairman requested a postponement, and the hearing was reset for 1600 hours on Thursday, March 18, 1999. The General Chairman protested, on March 5, that this was near the quitting time for Gang RP-04, and the witnesses would be leaving for home after working four 10-hour days. He requested a time when the witnesses would be more readily available. His request was refused; the Division Engineer stated in his reply letter that the gang works from 0630 until 1700 hours Monday through Thursday, and the hearing was set to begin within those hours.

The Claimant requested each of the four witnesses to appear at the unjust treatment hearing. None of them did so. The Claimant and his representative attributed their absence to the hearing being convened only one hour before the end of the witnesses' four-day work week. The Board is aware that gangs such as Rail Gang RP-04 are composed of employees who are often working at locations far removed from their residences. Hence, the very purpose of the four 10-hour work days is to provide a long weekend.

The Claimant's account of his disqualification appears in the hearing transcript, as follows:

"On February 3, 1999, I requested a hardship to leave the gang to go back home, work a position, bump a position at home and work. I filled out the hardship in my own words, gave it to Ed Blackburn, roadmaster which in turn, he faxed to the union. The union approved it. Then approximately an hour later I got called at the motel by the roadmaster, Blackburn, on his cell phone requesting that I rewrite the hardship in their words which I did not agree with. At the time, that was that. Upon getting home that evening, the next morning around noon, after I got home from taking care of some business that morning, I had the message on my answering machine that I was disqualified as foreman. I knew not what the reason was why I was disqualified."

The Claimant's written hardship request, dated February 3, 1999, reads as follows:

"I Dale A. Williams am requesting a hardship for the reason of too much responsibility on me from my Roadmaster."

Roadmaster Blackburn's account appears in the form of a written statement read into the record and appended as an exhibit. It reads, in pertinent part:

"On 2/1/99 D. A. Williams did not want to get tracking time, could not handle more than one task at a time. He did not want to leave the gang to do a pre job survey for the next days work, did not use his time wisely, was to [sic] negative towards his work.

On 2/2/99 D. A. Williams did not follow my instructions to put out a 25 MPH order on the work we just finished and I instructed him to get tracking time at So. Sherman Junction to Hank. He did none of the two. RP04 followed up RP13 into Rdm. Millers tracking time which we had an agreement to work on each others tracking time. D. A. Williams threw a fit saying that the gang went outside their limit, in reality they did not. The next day 2/3/99 D. A. Williams came to work threw the clip board at me and said it was to [sic] much responsibility and stress to handle and asked for a hardship. I paid him one hours wages for that day, and disqualified him for not following his roles [sic - rules?] and responsibilities as a foreman. On 2/4/99 I gave him a personal day."

Roadmaster Blackburn's disqualification letter to the Claimant, dated February 5, 1999, reads as follows:

"Effective February 3, 1999, you are disqualified as Foreman Rail Relay Gang RP04, for your failure to properly manage and execute work on Rail Relay Gang RP04.

This is in accordance with Rule 23 of the BMW Agreement."

Following the unjust treatment hearing, on April 16, 1999, the Conducting Officer wrote the Claimant, advising that the results of the hearing confirmed his disqualification.

Agreement Rule 23, captioned "Failure to Qualify," reads as follows, in pertinent part:

"A. Employees awarded bulletined positions, or employees securing positions through exercise of seniority, in a class in which not yet qualified, will not be disqualified for lack of ability to do such work after a period of thirty (30) calendar days thereon. Employees will be given reasonable opportunity in their seniority order to qualify for such work as their seniority may entitle them to, . . .

B. An employee failing to qualify for a position secured by bulletin, or in exercise of seniority will be given notice in writing of reason for such disqualification.

C. An employee who considers himself unfairly disqualified may request, and shall thereupon be given, an investigation as to such qualifications pursuant to the provisions of Rule 62."

Agreement Rule 40, captioned "Investigations and Appeals," reads as follows, in part:

"A. An employee in service sixty (60) days or more will not be disciplined or dismissed until after a fair and impartial investigation has been held.

. . .

C. At least five (5) days advance written notice of the investigation shall be given the employee and the appropriate local organization representative, in order that the employee may arrange for representation by a duly authorized representative or an employee of his choice, and for presence of necessary witnesses he may desire. . . ."

Agreement Rule 23.A. provides that an employee will not be disqualified for lack of ability to do the work of the position after 30 calendar days on the position. The record indicates that the Claimant reported for the Foreman position on January 4, 1999, and he was disqualified on February 3, 1999, exactly 30 days later. His disqualification on that date complies with Agreement Rule 23.A. The notice of his disqualification dated February 5, 1999, gives rational reasons therefor, and appears to summarize in a few words the discussion between the Claimant and Roadmaster Blackburn on February 3.

The Claimant acted upon his rights in requesting an unjust treatment hearing, pursuant to Agreement Rules 23.C. and 62, referenced therein. Rule 62 hearings are governed by the provisions of Rule 40. The hearing on March 18, 1999, purports to be in compliance with the foregoing Rules. (At one point, the Claimant's representative pursued a line of questioning which suggested that the Claimant was unfairly disciplined by his disqualification, before his investigation, in violation of Agreement Rule 40.A. The Board does not believe that the Claimant's disqualification constituted "discipline," which under this Agreement would have required an investigation before discipline was assessed).

The Board agrees with the Organization that the Claimant was denied his right to have witnesses present by setting the hearing, in the first instance, on the Gang's rest day, and in the second instance, setting the hearing just one hour before the quitting time for the long weekend. The Claimant has no subpoena powers and cannot rely on anything more than his

persuasive powers to compel the presence of witnesses. His persuasive powers cannot overcome the understandable desire for employees far from home to take advantage of every free minute to travel to their homes. The Carrier's Division Engineer had already demonstrated that he could set the hearing at 0900 hours, albeit on a rest day. The General Chairman's observation in his protest -- "Scheduling an investigation after work on the last day of the week when everyone is wanting to go home appears to me that the carrier is not wanting to correct the complaint" -- has considerable merit.

The Board notes that some 3½ months after the hearing, additional rebuttal testimony in the form of a written statement, with exhibits, was submitted by the Claimant. The Board has given this material no consideration. The Board agrees with the Carrier's position that this material was submitted too late, and denied the Carrier any opportunity for cross-examination or rebuttal.

The Board believes that the Carrier has made a persuasive case that the Claimant was not fully qualified for the Foreman position at the time of his disqualification, which occurred within the 30-day limit prescribed in Agreement Rule 23.A. The opinions of the Claimant's immediate supervisor must be given great weight, in the absence of a showing of discrimination, partiality, or personal hostility. However, the unjust treatment hearing to which the Claimant was entitled was seriously flawed. The Claimant was denied his right to have witnesses present. The Carrier was made aware that these witnesses were deemed necessary in ample time to arrange their presence during normal working hours. Their testimony may or may not have been of benefit to either the Claimant or the Carrier, but their absence makes it impossible to know.

The Parties negotiated an arrangement whereby an employee with less than 31 days in a class in which he is not yet qualified may be disqualified for lack of ability. However, if such employee considers himself unfairly disqualified, he may avail himself of an unjust treatment hearing. Plainly, this is intended to give such employee a due process right to bring out any facts which bear upon the fairness of his disqualification. Because the Carrier scheduled the hearing at a time that, in all likelihood, would preclude the presence of the requested witnesses, and thereafter refused to reschedule the hearing when the probability of their absence was pointed out, the Claimant was not afforded the due process rights the Parties bargained for in Agreement Rules 23, 62, and 40. The disqualification, therefore, shall be removed from the Claimant's personal record.

The matter does not end at this point, however. On the same day he was disqualified, the Claimant requested a "hardship." This is a term which the Claimant defined for us in his account of the events on February 3, 1999 -- "I requested a hardship to leave the gang to go back home, work a position, bump a position at home and work." The Board understands this to mean he wanted to voluntarily relinquish his Foreman position and exercise his

seniority in his home seniority district on his former position or whatever position was available to him. The Board is persuaded that the Claimant effectively removed himself from the Foreman position. Therefore, his voluntary hardship request denies him any claim to lost wages as the result of his exercise of seniority to his former position.

AWARD

Claim sustained in accordance with the above opinion.

Robert J. Irvin

Robert J. Irvin, Referee

November 17, 2000

Date