

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 7426
AWARD NO. 23, (Case No. 23)**

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

vs

UNION PACIFIC RAILROAD COMPANY (SPWL)

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
J. T. Wayne, Carrier Member

Hearing Date: June 5, 2013

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

- 1. The disqualification of Mr. R. Morse as a foreman and track inspector was unjust, arbitrary, capricious, improper and in violation of the Agreement (System File B-1146S-103/1563871).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Morse must have his foreman and track inspector qualifications restored and compensated for any loss as a result of the Carrier's unjust treatment."**

FINDINGS:

Public Law Board No. 7426, 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.

This case involves the Carrier's decision to disqualify the Claimant from the position of Foreman and Track Inspector due to alleged substandard performance of his duties. The record indicates that on June 3, 2011, Claimant was removed from service to undergo a fitness for duty examination by his personal physician. Prior to Claimant's removal from service to undergo the examination Manager Sholl disqualified Claimant from his Track Inspector position for various alleged reasons advising the Claimant upon his return to service on or about August 25th that he had been disqualified.

It is the position of the Organization that the record shows that while the case was being handled on the property it requested that the Carrier provide FRA reports and other documentation to substantiate the numerous allegations made by Manager Sholl at the Unjust

Treatment Hearing that took place on October 26, 2011, regarding the Claimant's alleged failure to perform his duties as a Track Inspector and Foreman. According to it, if the Carrier's contentions were accurate it should have been a simple matter for the Carrier to produce the documents to back up its allegations. However, it argued that a review of the record reveals that the Carrier failed/refused to do so which affirmed the principle of negative inference. It further argued that it has consistently been held that when a party fails to produce records that contain material and relevant evidence, it does so at its own peril and in this instance the Carrier has failed to show that the Claimant was not qualified as a Track Inspector or Foreman. It concluded by requesting that the disqualification be rescinded and the claim sustained as presented.

It is the Carrier's position that Claimant was disqualified from the position of Foreman and Track Inspector due to poor performance of duties. It asserted that the Claimant was formally coached and counseled by his Supervisor, but continued to exhibit substandard performance and unprofessional personal conduct, as evidenced by the Claimant's decision to place stuffed animals on an active track with the names of Carrier Supervisors written on them. The Carrier argued that contrary to the Organization's contention that the Claimant should not have been disqualified because of a lack of evidence the record shows just the opposite that Claimant's work product and attention to detail was greatly diminished during the period leading up to his disqualification and the record reflects serious infractions regarding track inspection standards and his conduct was unprofessional as well. It closed by asking that the disqualification remain intact and the claim remain denied.

This dispute involves the Claimant being disqualified from the position of "Foreman" and "Track Inspector" due to alleged substandard performance of his duties. Due to alleged repeated violations, the Carrier held a conference with the Organization on October 26, 2011, to discuss the matter. After reviewing the evidence, Manager of Track Maintenance (MTM), Mr. Rubino found that there was sufficient evidence to disqualify the Claimant from the aforementioned positions. In an email, sent on November 4th, MTM Rubino stated that the Claimant had (1) Disregard for rule compliance; (2) Lack of understanding in protecting track and flag placement, and (3) Track inspection reports do not reflect actual condition of track after review.

The record indicates there were specific events that alerted the Carrier to the Claimant's less than satisfactory performance. It was not refuted that the Claimant failed to properly inspect track and follow directions. For example: on May 5, 2011, the Claimant was assigned to Maley East District, but was instead found at Stewart Street, which was off his assignment for inspection.

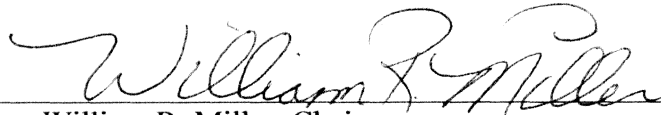
Review of the record further shows that on May 16, 2011, the Claimant placed two stuffed animals on active tracks and had written the names of two Carrier Managers Gonzales and Scholl on the toys. Manager Gonzales witnessed the Claimant placing the animals on the

track and when Gonzales notified the Claimant that he was fouling the track with the stuffed animals the Claimant became belligerent. On that same date the Claimant discussed leaving early with Managers, but did not receive authority to do so, however, at 1:21 p.m. Claimant was observed leaving the Carrier property without permission.


The Carrier documented several other events that were not rebutted including the fact that the Claimant was coached and counseled in an attempt to modify his behavior to no avail. The Carrier has the managerial right to determine whether an employee has the requisite "fitness and ability" to perform their position satisfactorily and in this instance the Carrier has shown that the disqualification of the Claimant was in accordance with the Agreement, therefore, the Board finds and holds that the claim will remain denied and upholds Claimant's disqualification.

AWARD


Claim denied.



William R. Miller, Chairman



J. T. Wayne, Carrier Member



K. D. Evanski, Employee Member

Award Date: 8.5.13