

PUBLIC LAW BOARD NO. 7660
CASE NO. 9

BROTHERHOOD OF MAINTENANCE OF WAY
EMPLOYEES

PARTIES
TO DISPUTE:

and

UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier's violated the Agreement when, on approximately March 18, 2013, it removed Claimant M. Miles from service and subsequently disqualified him from holding flagging foreman positions (System File B-1348U-101/1584518 UPS).

2. As a consequence of the violation referred to in Part 1 above, Claimant M. Miles l '....must have his qualification for Flagging Foreman restored, be reinstated to the position of Flagging Foreman, Claimant must be paid Two Days of per diem and twenty hours straight time for time lost on March 19 and 20, 2013, all subsequent employees displaced as a result of the improper disqualification must be restored to their previous positions, all loss to all effected employees, as a result of the Carrier's actions, must be made whole; this may include, but not be limited to, wage differential, round trip travel, loss of per diem for days while out of work traveling, prevailing rate mileage for all miles travels (sic) from one gang to the next and return to the proper gang.”

FINDINGS:

Upon the whole record, after hearing, this Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

This claim protests Carrier's disqualification of Claimant from the position of Flagging Foreman as a result of an incident on March 18, 2013, where Claimant mistakenly got track and time for main line 1, when the gang was sent out on main line 2, causing the men and equipment to be on the track without any protection. Claimant had served as a Flagging Foreman for about 6 years, and this was the first day he was on a new territory in charge of Gang 8575, a large production gang. He was being mentored by Supervisor Johnson for 6-8 hours of that day to assure familiarity with the territory, but did not realize that there are two yards in the territory, and that he had sent his gang out from the wrong yard. Claimant was informed he was disqualified at the end of that shift and told to take two days off to think about where he would place himself. He was subsequently paid for those two days, and he displaced into a Truck Driver position on the same gang on March 21, 2013.

In its correspondence on the property, the Organization asserts that Carrier violated the Safety Analysis Process (SAP) which Claimant requested in this case since he had been sent home and disqualified as a result of a track safety violation, proving that this was discipline. It contends that Carrier disqualified Claimant prior to the holding a Labor Management Team (LMT) conference, which is the method agreed to consider the appropriate Corrective Action Plan (CAP) for the violation, and that he received written notice of the disqualification the day after the LMT meeting, during which the discussion of disqualification was never considered or recommended. The Organization maintains that Claimant did not receive equal and fair instruction and training on a new assignment, that he relied upon his supervisor to provide correct information which did not occur in this case, causing the misunderstanding, and that no adverse action was taken against the supervisor, who had input into the decision to disqualify Claimant. It asserts that Carrier is required to give sufficient time and training before disqualifying an employee, which it failed to do in this case since Claimant was disqualified on the first day of his new assignment, citing Third Division Award 31267 and Public Law Board No. 4244, Award 120. The Organization submitted a statement from Claimant in support of its contentions immediately prior to the conclusion of the processing of the claim on the property, and

notes that Carrier adjusted Claimant's pay records after-the-fact to provide compensation for the 2 days he was sent home, but that he was initially sent home without pay until the Organization got involved.

Carrier argues that Claimant's failure to assure proper track and time authority for his gang exhibited his lack of fitness and ability for the position of EIC, placed the gang members' safety in jeopardy, and supports the validity of Carrier's decision to disqualify him from the Flagging Foreman position. It points out that disqualification is consistently recognized as a managerial right so long as the determination is not arbitrary or capricious. Carrier supplied a statement from Manager Johnson indicating that he spent 6-8 hours mentoring Claimant, who indicated that he had a clear understanding of the territory and his responsibilities, asserting that the disqualification was clearly rationally based. Carrier contends that disqualification has long been held not to be discipline, that the SAP was designed as an alternative to discipline, and since no discipline was issued against Claimant and there was no accident or injury in this case, the SAP did not apply. Carrier points out that the disqualification occurred prior to Claimant requesting the SAP, and maintains that, even though a LMT was convened on April 2, 2013, the option of disqualification as part of a CAP under the SAP does not affect management's right to disqualify Claimant independently of the SAP procedure, as it did in this case. Carrier points out that the Organization did not raise the issue of proper training in its initial claim, or until the conclusion of the correspondence on the property, and should not be permitted to amend the basis for its claim at such a late date. It notes that Supervisor Johnson's statement reveals that Claimant received adequate training, and acknowledged as much to his supervisor on March 18, 2013.

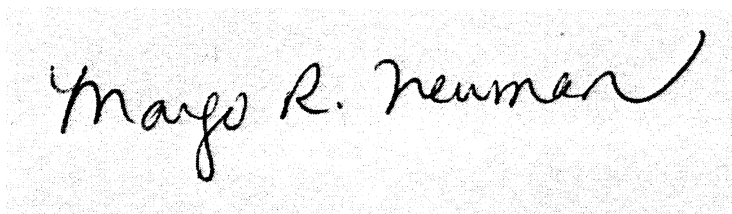
A careful review of the record convinces the Board that the Organization has failed to meet its burden of proving that Carrier's disqualification of Claimant from his Flagging Foreman position on Gang 8575 on March 18, 2013 as a result of a track safety violation was arbitrary or capricious and in violation of the Agreement. While Claimant may have preferred to have been given the time to go over the track before assuming the

position on March 18, 2013, there is no dispute that Supervisor Johnson mentored him for 6-8 hours that day in order to familiarize him with the territory, or proof that such an opportunity is allowed in each case that a Foreman bids on a new territory. There is a dispute of fact concerning whether Claimant indicated that he was familiar and comfortable with his position after his supervisor's mentoring, or whether Supervisor Johnson was in a position to advise Claimant concerning the specific location of the gang and avoid the improper track safety violation. In any event, Claimant admittedly sent his gang out without proper track protection, which is a serious safety violation, and is sufficient to show that Carrier's decision to disqualify him after such occurrence was not arbitrary.

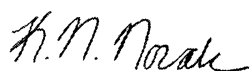
With respect to the Organization's contention that Carrier violated the SAP by disqualifying Claimant prior to holding a LMR meeting, there is nothing in the language of the SAP agreement that negates Carrier's managerial right to disqualify an employee independently of the results of that process. While disqualification is an option that the LMT can consider when arriving at an appropriate CAP in lieu of discipline in a particular circumstance, and they apparently did not include such in considering Claimant's situation, in part because he had already been disqualified from the Flagging Foreman position and had bumped into a Truck Driver position at the time they met, it is not a remedy exclusive to the LMT under the SAP. Carrier has the sole right to determine fitness and ability of an employee and qualification for a position. See Third Division Award 36957. As noted by Carrier, disqualification based on non-arbitrary considerations has been held not to constitute discipline, which is an underlying prerequisite for the institution of the SAP. Under these circumstances, the Board is unable to find that the Organization met its burden of proving that Claimant's disqualification in this case was arbitrary or capricious, lacked a rational basis, or violated the specific terms of the SAP.

AWARD:

The claim is denied.



Margo R. Newman
Neutral Chairperson



K. N. Novak
Carrier Member



Andrew Mulford
Employee Member
***** Dissent to follow *****

Dated: 09/01/2015

Dated: 09/01/2015

LABOR MEMBER'S DISSENT
TO
AWARD 9 OF PUBLIC LAW BOARD NO. 7660
(Referee Newman)

The Majority erred in this case by upholding the Carrier's inappropriate disqualification of the Claimant and thus this dissent is required.

The Majority has determined that Claimant was properly disqualified from working as a flagging foreman. The Majority reasons that the disqualification was proper because Claimant allowed other employees to go outside his actual track authority. However, the Majority's decision ultimately fails to recitfy the serious and substantive factors that existed which not only fully justify Claimant's mistake, but show that mistake was directly due to the shortcomings of the Carrier rather than lack of qualification in this position.

In conjunction with the aforementioned, the Board cavalierly overlooked or disregarded the following facts: (1) Claimant was new to the territory and did not know the layout or other pertinent details of the territory; (2) Claimant was being trained by a supervisor on the territory when the incident occurred; and (3) the supervisor was questioned on whether the track protection was correct, informed the Claimant that it was and essentially told him to stop asking questions and get moving. As it is undisputed that the Claimant was new to the territory and did not know its layout or subtle intricacies (i.e., similar named yards) he was entitled to rely on the Carrier's own supervisor for guidance and instruction. Yet, in this case when he relied and was given bad information, the Carrier suddenly found that the Claimant lacked qualification, rather than finding its training methods or supervisor had been at fault.

These issues and more were discussed during the on-property handling and also during the Organization's presentation before the Board. A review of such shows that the Carrier's purported justification that Claimant was unqualified as flagging foreman, or that he lacked the skills and ability necessary to perform the job were shown to be baseless. As such, I must dissent from the Majority's decision.

Respectfully submitted,



Andrew M. Mulford
Employee Member