

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6402

AWARD NO. 144, (Case No. 165)

**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

B. W. Hanquist, Carrier Member

Hearing Date: August 17, 2010

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

1. The Carrier's decision to impose discipline in the form of disqualification of Mr. D. T. Mauldin from a truck operator position on System Rail Gang 9479, for allegedly failing to maintain proper maintenance and pre-trip inspections as required for truck drivers, beginning on July 3, 2008 and continuing, is unjust, unwarranted and in direct violation of the Agreement (System File MW-08-102/1510077).
2. As a consequence of the violation outlined in Part 1 above, we request that the disqualification as a truck operator position on System Rail Gang 9479 be immediately removed from Claimant's record and the Carrier shall return Claimant to his former position of system truck driver operator. Additionally, Claimant Mauldin shall be paid two hundred and thirty-two (232) hours as well as any overtime hours in connection with said position, for the loss of wages he has incurred because of his improper disqualification as truck operator on System Rail Gang 9479, in accordance with Rule 48(h) of our Agreement."

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.

On July 3, 2008, Carrier notified Claimant that he had been disqualified as a Truck Operator on System Rail Gang 9479. This is another case in a continuing dispute between the parties over whether or not a disqualification of an employee without benefit of a fair and impartial Hearing is in accordance with the Agreement. The issue is not new to Public Law Board No. 6402 and in Award No. 6 it considered the parties arguments and their respective cited Awards many of which are again raised in this case, and it determined the following:

"We agree with PLB 526. When Carrier disqualifies an employee from a position based on a determination that the employee is incapable of performing in the position, the disqualification is not disciplinary in nature and no investigation is required. When Carrier disqualifies an employee from a position based on the employee's misconduct or failure to perform in the position despite being capable of performance, the disqualification is disciplinary in nature and an investigation is required. Each case must be examined on its facts to determine on which side of the line it falls."
(Underlining Board's emphasis)

Award Nos. 57, 74 and 123 of this Board have adhered to the aforementioned logic and the Board in this instance finds no reason to deviate from its past rationale, therefore, this case will be **"...examined on its facts to determine on which side of the line it falls."**

The record indicates that prior to June 8, 2008, Claimant recognized that the rear banjo axle housing of Truck 63602 was leaking fluids, after which he contacted Supervisor Craig and made arrangements with a mechanical shop to have the repairs made to the truck. On June 8th the Claimant drove the truck to the mechanical shop and dropped it off for repair.

Subsequently, Claimant was absent with permission from June 9 through 13, 2008, after which he took vacation time from June 16 through 20, 2008. During that time period employee T. Lewis was instructed by Supervisor Craig to remove the truck on June 16th from the repair shop, even though it had not been repaired, as it was determined that it was needed on the job. The truck was used until June 20th when it broke down while being returned to the mechanical repair shop in Monroe, Louisiana. In the Organization's letter of November 3, 2008, it discussed the removal of Truck 63602 from the shop prior to being repaired and said in pertinent part the following:

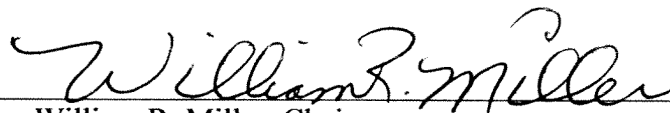
"...while it was in the shop for repairs instead of letting the repair shop fix the problem it was taken in for in Bastrop, Texas, the Union Pacific Railroad Company allowed a Mr. Terry Lewis and Mr. Eric Moore to pick-up the truck and remove it from the freight liner shop and worked the truck..."

That statement was not rebutted, therefore, it is clear that Claimant arranged for Truck 63602 to be removed from service for repair and while he was absent a Carrier Supervisor determined that the truck was needed despite its lack of repair and during that absence the truck broke down. Was the Claimant negligent prior to June 8th in the upkeep and care of the truck, before it was sent to the shop? That question will never be answered because this is a case in accordance with Award No. 6 that should of had a formal Investigation to determine whether or not there was a **"...failure to perform in the position despite being capable of performance,..."** as it is clear that Claimant understood the responsibilities of his assignment and had the requisite fitness and ability for the position. Claimant's fitness and ability for the job is further underscored by the fact that a review of the Employee's Record verifies that after being disqualified from a Truck Operator position on Gang 9479 he exercised his seniority to a Truck Operator position on Gang 462.

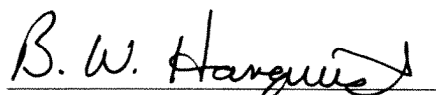
The Board finds and holds that the disqualification is set aside and removed from the Claimant's record. The Claimant will be made whole for any loss of monies between those positions he has held since July 3, 2008, and until he is returned to the Truck Operator position on Gang 9479. If the Claimant declines to return to that position or his seniority is not superior to the present incumbent any monies owed by the Carrier cease on the date the Award is finalized; and if that position may have been abolished, the date of the job abolishment will end the Carrier's liability.

AWARD

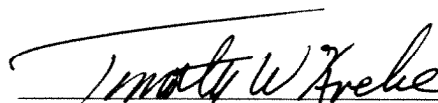
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed by the parties.



William R. Miller, Chairman



B. W. Hanquist, Carrier Member



T. W. Kreke, Employee Member

Award Date: October 4, 2010