

**NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 6402
AWARD NO. 185, (Case No. 206)**

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

vs

**UNION PACIFIC RAILROAD COMPANY (Former Missouri Pacific
Railroad Company**

William R. Miller, Chairman & Neutral Member
K. D. Evanski, Employee Member
K. N. Novak, Carrier Member

Hearing Date: September 18, 2012

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

- 1. The April 7, 2011 disqualification of Mr. L. Shimchick from the position of BUC Undercutter Operator (SYS BUC UC 902050) on Gang 9394 and the Carrier's failure to provide Mr. Shimchick with equal and fair instruction and training as outlined in Rule 19 was in violation of the Agreement (System File C110427/1554481).**
- 2. As a consequence of the violation referred to in Part 1 above, Mr. Shimchick must be allowed the difference between his current rate of pay and the rate of pay of the BUC Undercutter for all hours worked until such time as he is returned to his position on the BUC Undercutter and provided proper instruction and training."**

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 and did participate therein.

Claimant entered the service of the Carrier on November 9, 1992, and has held a variety of positions including that of BUC Undercutter Operator that he was assigned to on April 1, 2011. Six days later Claimant was disqualified from the position.

It is the Organization's position that the Carrier violated Rule 19 (Promotion) when they disqualified the Claimant. It argued that the Claimant was not given sufficient training and time to learn a new position and should have been allowed up to 30 days to become fully qualified

It concluded by requesting that the disqualification be set aside and the claim sustained as presented.

It is the position of the Carrier the Claimant was given equal and fair instruction and training in the same manner as other employees. It argued that nothing in the Rule or the Agreement requires the Carrier to keep an employee in a position when they repeatedly demonstrate that they cannot perform work safely or efficiently. It asserted that the Claimant continued to work in an unsafe manner after being coached several times. According to the Carrier Claimant demonstrated to his Manager J. F. Hendricks, and his Engineering Supervisor, D. M. Sealey, that he could not perform his work in a safe manner and because a BUC Undercutter is an expensive and critical piece of equipment and is dangerous to operate it was imperative to disqualify the Claimant. It closed by asking that the claim remain denied.

The Board notes that in Award No. 82 of this tribunal it was determined in pertinent part:

"It is well established that Carrier determines whether an employee has the requisite fitness and ability to perform a job, subject to limited review as to whether Carrier's determination was arbitrary. See, e.g., Third Division Award No. 36957 and awards cited therein. The burden of proving arbitrariness is on the Organization."

The question at issue in this case is did the Organization prove arbitrariness on the part of the Carrier when it disqualified the Claimant. The Carrier offered a statement from Manager J. F. Hendricks in support of its disqualification of the Claimant which stated in pertinent part the following:

"After being coached several times Mr. Shimchick refused to work in a safe manner. Rule 19 states Up to 30 days depending on the position. In this position you cannot do unsafe acts. He has problems following instructions."

In its submission the Organization countered the Carrier's argument by asserting that the aforementioned exhibit was nothing more than supposition and secondhand information that should not be relied upon because Manager Hendricks was not present to witness or observe the Claimant while he attempted to learn and train on his newly assigned undercutter machine. It argued that is evident because a review of the record indicates that Engineering Supervisor D. Sealey was the only Carrier Officer that had firsthand knowledge of the Claimant's attempt to qualify. The Carrier rebutted that argument before the Board arguing that the Organization's argument was not admissible because it was not made on the property during the handling of the claim. Review of the record indicates that the Carrier was correct that argument was not made

on the property, therefore, it is *de novo* and will not be considered in the resolution of the dispute.

The record indicates that Engineering Supervisor D. Sealy issued the disqualification letter of the Claimant on April 7, 2011, for the following reason:

"...Account failure to demonstrate necessary fitness and ability required to operate the equipment in a safe and efficient manner...."

Subsequently, Manager Hendrick offered his statement, quoted above, that reiterated Sealy's disqualification of the Claimant for allegedly working unsafely.

When the Organization appealed the Carrier's denial of the claim it asserted that the training that was provided to the Claimant while he was assigned to his new undercutter position on System Gang 9394 was inadequate and the Claimant should have been afforded additional time and sufficient training to qualify. Attached to that appeal was a written statement from the Claimant that refuted Sealy's and Hendrick's statements. The Claimant asserted that he did not receive any instruction or training from his superiors or fellow gang members in regard to the functional operation on his newly assigned position. He wrote in part:

"I told my co-workers the first day I started on the undercutter that they would have to explain and show me what was expected of me because I have never worked on the undercutter. I was not given details of what was expected of me on this job. When I would ask on how to do something, I would get a smart answer. When they would tell me something from a distance, I could not hear from the noise of the machine and would go up to them and ask to repeat, they would get ticked. The only thing they were spacific (sic) about was their attitude and telling me over and over they would not go home for me.

*** * ***

I can take constructive criticism but let's be honest, a man needs to know what his job is about and how to perform to his best ability. I was not given a fair shot at the undercutter. I was talked down to when asking questions..."

Regarding the allegation that he worked unsafely the Claimant wrote in his statement the following:

"As for working unsafe that would be because of the lack of directions

on what I was told to do. On one instance, I was told to check the level board behind the wheels of the undercutter. I was uncomfortable about that because of safety. Then I was told from other guys and a supervisor from another gang that was unsafe and you are to check the level board behind the buck car. I did not understand their hand signals they were using and explained to them how do I know what they want if they don't show me what the hand signals mean."

Claimant went on to state:

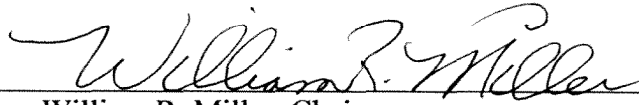
"You need to ask the men on Gang 9160 and 9116 on what they were hearing. They will tell you I was not going to get qualified on under-cutter before I started. When co-workers found out that I got the bid on the under-cutter they were telling me to watch my back. The guys on undercutter did not want me to get qualified because then I would have more time on them and if someone had to go it would not be me."

The Claimant's statement was never rebutted. It is apparent from the record that the Claimant may not have operated his undercutter in the safest and most efficient manner at all times because he was not provided proper instruction and training by co-workers that might of had an underlying reason not to assist in his qualification. The Organization as the moving party had the responsibility to affirm its position and it has established that the Carrier did not give the Claimant fair and equal instruction and training. After careful consideration the Board has determined that the Carrier erred in its disqualification of the Claimant.

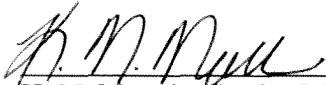
Having found that the disqualification was in error the Board turns to the remedy. While the claim was being handled on the property the Carrier raised the argument that the Claimant voluntarily bid a new position on May 13, 2011, after immediately displacing following his disqualification on April 7, 2011, thus, the continuing claim had an ending date of May 13, 2011. That argument was not refuted, therefore, the Board finds and holds that the Claimant shall be compensated as requested in part 2 of the claim from April 7 through and including May 13, 2011.

AWARD

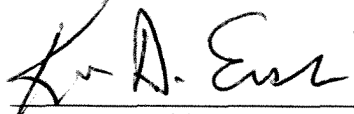
Claim partially sustained in accordance with the Findings and the Carrier is directed to make the Award effective on or before 30 days following the date the Award was signed.



William R. Miller, Chairman



K. N. Novak, Carrier Member



K. D. Evanski, Employee Member

Award Date: 11/11/12