

SPECIAL BOARD OF ADJUSTMENT NO. 280

Award No. 185

Case No. 272

PARTIES
TO
DISPUTE

Brotherhood of Maintenance of Way Employees
and
St. Louis, Southwestern Railway Company

STATEMENT
OF CLAIM

"Claim of the System Committee that:

1. Carrier violated the effective agreement when Machine Operator Joe P. Rogers was unjustly disqualified as a heavy duty truck operator on December 29, 1982.
2. Claimant Rogers shall now be paid the difference in the rate of pay between the rate he had been receiving since December 29, 1982, and that of a heavy duty truck operator until he is restored as a heavy duty truck operator with the charges of disqualification removed from his personal record and paid for eight (8) hours at his straight time rate of pay for attending a hearing."

FINDINGS

Upon the whole record, after hearing the 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.

Claimant herein had a seniority date of June 24, 1972. He was classified as a machine operator. Mr. Rogers took over as a heavy duty truck driver on October 30, 1982. On December 29, 1982, he was disqualified from the position of heavy duty truck operator. Subsequently he requested an unjust treatment hearing which was held on February 2, 1983. Following the hearing, Carrier reiterated its previous decision that its action was justified in the disqualification.

The evidence indicates that at the hearing testimony established that claimant had been driving a five ton boom truck with a trailer for about fifty days.

During that period of time he had received instructions on how to operate the truck. Carrier, in general, stated in its testimony that claimant did not properly follow the instructions and also failed to load the equipment safely. Carrier's witnesses at the hearing testified that Rogers did the following things which caused Carrier to reach its decision:

1. He did not take the proper route on an assignment causing a delay in the delivery of material.
2. Claimant was sent to move a bulldozer and proceeded to load the dozer in the course of which process he ran the machine off the side of the trailer and could have caused serious injury.
3. Rogers was sent to move rail laying equipment and in the process of moving the equipment it was loaded incorrectly or loaded improperly causing damage to the equipment.
4. In the process of loading equipment, Rogers damaged the boom of the truck.
5. Rogers left his truck parked at Henderson, Texas, and indicated that it was broken down and it was subsequently found that the battery had run down.

From these incidents, Carrier concluded that Claimant Rogers was not qualified to handle the position of heavy duty truck driver.

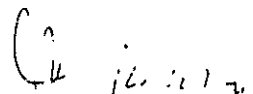
With respect to Carrier's allegations, claimant testified that the bulldozer slid off the side of the trailer and this problem occurred because he had no help in loading the trailer. Claimant also denied that he failed to tie down a load properly. Also, claimant's testimony was that the boom, which presumably had been damaged, was damaged before he ever got the truck and he had reported that fact. He also denied that there was any damage to equipment while moving equipment in the course of his activities. Concerning the delay in traveling, causing lateness in the delivery of material, claimant indicated that it was his first trip and that he took the wrong route having relied on the advice of his supervisor. The result was a three hour delay in his arrival.


It is evident from the testimony at the hearing that there is a significant divergence of both opinion and testimony as to the activities of claimant during

the fifty-day period. Several principles, however, are involved herein. First, it is clear that Carrier has the right to make the determination as to fitness and ability. In this instance, it is obvious that Carrier relied on the testimony of its supervisors with respect to claimant's ability to handle the equipment. Carrier's concern was appropriate in terms of safety and damage potential. On the other hand, it is the established principle that the petitioner, in a case such as this, has the burden of establishing, first, that claimant was qualified to perform the activity in question and, second, that Carrier's action in disqualifying the claimant was arbitrary and capricious. This latter function of establishing the qualification of claimant and the arbitrary and capricious acts of Carrier is not supported by evidence in this dispute. It is apparent, in spite of the fact that petitioner has not borne its burden of proof in this case, that the disqualification of claimant was on at least rather tenuous and marginal grounds. While this Board may not second guess Carrier with respect to its determination of fitness and ability, it is clear that claimant should have another opportunity to qualify for the position in question in accordance with his seniority. With this proviso, the claim is denied.

AWARD

Claim denied.


I. M. Lieberman, Neutral-Chairman


C. B. Goyne, Carrier Member


M. A. Christie, Employee Member

Houston, Texas

April 30, 1984