

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Burlington Northern Railroad Company (former St. Louis-
(San Francisco Railway Company)

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

(1) The Carrier's disqualification of Mr. R. G. Denney as machine operator on Production Tamper MT-929 while working with Surfacing Gang 2 on July 2, 1984, was capricious, unjust and unwarranted (System File B-2033-1/-EMWC 84-12-4).

(2) The Carrier shall return the claimant to the position of machine operator on Production Tamper MT-929 and shall compensate him for all wage loss suffered and all travel time and mileage from July 2, 1984 to the date he is restored to the position of machine operator on Production Tamper MT-929."

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant is employed on Carrier's Surfacing Gang 2. He commenced working as a Production Tamper Operator on this gang April 16, 1984. His duties while assigned to this capacity were to operate a MT-929 Production Tamper. According to the Claimant's Foreman and Carrier's Roadmaster, Claimant did not perform his duties satisfactorily on the MT-929 Production Tamper, and on July 2, 1984, he was disqualified on that particular machine. The instant claim alleged the disqualification and on July 20, 1984, following one postponement, an Investigation was held in accordance with Rule 91(b)(1) of the Agreement.

According to the Foreman and the Roadmaster who testified at the Investigation, numerous delays had been encountered while Claimant was operating the MT-929 Production Tamper because of repeated backing up and re-tamping track that did not meet BN standards, particularly where track ran into and out of fixed structures such as bridges and road crossings. According to their testimony, Claimant was disqualified because his operation of Tamper MT-929 diminished production and delayed the overall surfacing program.

The difficulty with this testimony, however, is that the record established that similar delays and re-tamping track occurred even after Claimant was taken off the machine. As Foreman Baker acknowledged, production was not improved when Mr. Day, who had seven years of experience on this particular production tamper, operated the machine.

While we recognize that Carriers, charged as they are with responsibility for railroad operation, have considerable latitude in determining an employee's fitness and ability, the fact remains that in this case there was no showing that the production delays caused by repeated backing up and re-tamping were attributable to Claimant's unsatisfactory performance. To the contrary, the condition and location of the track, and the machine's mechanical difficulties appear from this record to have caused both Claimant and employee Day, an experienced operator, similar difficulties in maintaining production. Under these circumstances, we must conclude that Claimant's disqualification was arbitrary and capricious and must be reversed.

As a final matter, we take note of Carrier's procedural objection that the Organization failed to cite any violation of the Agreement Rules in its Claim. We will not consider that objection. All interested parties were fully aware of the basis for the charges throughout the processing of this Claim. Furthermore, the record discloses that the issue of the lack of citation to a Rule is not properly before the Board for consideration because it was never raised on the property.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dwyer - Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1989.