

****CORRECTED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36369
Docket No. MW-36274
03-3-00-3-448**

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly removed, disqualified and withheld Mr. E. L. Teatsworth from a track machine operator (TMO) position on System Rail Gang 9013 on February 18, 1999 and continuing (System File UPSGRM-9042G/1192799).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. L. Teatsworth shall now be made whole for the differential in wages lost, from the rate of pay a TMO receives and what he was paid while not on the TMO position, from February 18, 1999, up to and until the day he is restored to the position of speed swing operator on gang 9013."**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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 were given due notice of hearing thereon.

On January 25, 1999 the Claimant exercised his seniority to a Speed Swing position on System Gang 9011. On February 16, 1999 he was displaced from that position and he exercised his seniority to a similar position on System Gang 9013. On February 18, 1999 the Claimant was notified that he was disqualified from the Speed Swing Operator position on Gang 9013 for reasons of safety. He subsequently placed himself on an anchor applicator machine.

Under Rule 48(n) of the parties' Agreement, if an employee feels that he or she has been unjustly treated he or she may request a conference provided the request is made within 20 calendar days of the cause of complaint. The Organization contends that on March 10, 1999 it requested a conference to determine the facts involved in the Claimant's disqualification. The Carrier maintains that it never received such a request.

On April 17, 1999 the Organization filed a grievance on the Claimant's behalf asserting that his disqualification was unjust. It was the Organization's contention that the purported reason given for the Claimant's disqualification ("safety") was insufficient.

The Organization requested that the Claimant be returned to the Speed Swing position on Gang 9013 and be compensated the difference in wages between that position and the position the Claimant occupied until he was returned to the Speed Swing position on System Gang 9013.

The Carrier denied the grievance contending that the Claimant was unable to operate the machine in a safe and productive manner on the large gang.

On October 4, 1999 the Carrier furnished the Organization a statement from his supervisor on System Gang 9013 in which he asserted that the Claimant was disqualified as a Speed Swing Operator because it was necessary for the Assistant Foreman to help him set the machine on and off every morning. He also did not have control of the machine, according to Supervisor Swore.

As noted above, the Organization argues that the Carrier violated Article 48(n) when it failed to hold a conference to discuss the Claimant's disqualification. The Carrier insists that it never received any request for a conference.

After reputedly requesting a conference on March 10, 1999 the Organization never contacted the Carrier to ascertain the status of its request. Rather, approximately six

weeks later it filed a grievance protesting the Carrier's failure to hold a conference. Moreover, the Carrier offered to hold a conference to discuss the Claimant's disqualification but the Organization declined that offer. In the light of these circumstances, the Board finds that the Carrier did not violate Rule 48(n) of the applicable Agreement.

The Organization also avers that the Claimant's disqualification constituted discipline and that he was disciplined without being given a fair and impartial Hearing. The Board respectfully disagrees with the Organization's contention. In our view, the Claimant was disqualified in accordance with Rule 20(d) of the parties' Agreement. This disqualification was not constitute discipline and therefore Rule 48(a) and (c) of the Agreement were inapplicable.

According to the Claimant's supervisor on system gang 9013, the Claimant was disqualified as a Speed Swing Operator since he required assistance every morning setting the machine on and off and he did not operate it safely. The Claimant never denied the supervisor's opinion of his ability to operate the Speed Swing. Therefore, it stands unrefuted.

There is no evidence in the record before the Board that the Carrier's determination of the Claimant's capability to operate the Speed Swing safely was arbitrary, capricious or unreasonable. Accordingly, there is no basis to vacate his February 18, 1999 disqualification and the claim is denied as a result.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 14th day of January 2003.