

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36422
Docket No. MW-36273
03-3-00-3-447**

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. B. L. Glenn from a track machine operator (TMO) position on System Rail Gang 9013 on March 16, 1999 and continuing (System File UPSG-9041G/1192464).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. L. Glenn shall now be made whole for the differential in wages lost, from the pay that TMO made on System Gang 9013, and what he made on whatever position(s) he held after the disqualification. This will include all straight time, pro rata time, overtime and per diem. This must start from the date of his disqualification, March 16, 1999, and continue until this issue is settled."**

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 August 27, 1974, the Claimant hired out on the Chicago and Northwestern Transportation Company (C&NW). He holds seniority as a Track Machine Operator (TMO) since July 28, 1975. The Claimant subsequently established seniority as a system Track Machine Operator on the Union Pacific Railroad system gangs.

On February 25, 1999, the Claimant was assigned to a Speed Swing position on System Rail Gang 9013. The gang was under the supervision of Engineering Supervisor J. D. Swore. On March 16, 1999, Supervisor Swore advised the Claimant that he was disqualified as a Speed Swing Operator due to "safety."

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 23, 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 May 11, 1999, the Organization filed a claim 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 too vague to have any meaning.

The Carrier denied the claim on July 5, 1999. On October 4, 1999, the Carrier gave the Organization a statement from Engineering Supervisor Swore in which he asserted that the Claimant was disqualified as a Speed Swing Operator because he had to have the Assistant Foreman 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 23, 1999, the Organization never contacted the Carrier to ascertain the status of its request. Rather, almost two months later it filed a grievance protesting the Carrier's failure to hold a conference. On November 4, 1999, the Carrier offered to hold a conference to discuss the Claimant's disqualification, but

the Organization declined that offer. In view 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 did not constitute discipline and, therefore, Rule 48(a) and (c) of the Agreement were inapplicable.

According to the Claimant's supervisor on System Rail Gang 9013, the Claimant was disqualified as a Speed Swing Operator because he required assistance every morning setting the machine on and off and he did not operate it safely. The Claimant never denied Supervisor Swore'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 March 16, 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 17th day of March 2003.