

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36332
Docket No. MW-36448
02-3-00-3-720

The Third Division consisted of the regular members and in addition Referee Nancy F. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee that:

- (1) The discipline [withheld and disqualified as a regularly assigned machine operator] imposed upon Mr. S. L. Hopkins, effective July 27, 1999 while assigned as a Gallion crane operator on Gang RP-06, was without just and sufficient cause and in violation of the Agreement (System File B-2526-1/1200-0001 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. S. L. Hopkins shall now be reinstated to his assigned machine operator position, compensated for all time lost and the charges shall be removed from his service record.”

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.

The Claimant has established and holds seniority a Trackman, Foreman, and Machine Operator. The Claimant was assigned and working on Production Gang RP-06 as a Group 2 Machine Operator under the supervision of Assistant Roadmaster R. Flynn and Foreman B. Lee when this dispute arose.

Commencing February 1, 1999 the Claimant was assigned to the position operating the Gallion Crane, and had been operating same for approximately five months prior to July 14, 1999. Throughout that period of time, the Claimant's superiors allege that they received "numerous" complaints from employees working with the Claimant indicating that he frequently placed them in "unsafe situations." Specifically, the employees stated that the Claimant "moved the machine without being given instructions to do so," and "would not pay attention to the employees working on the ground hooking rail to the crane for movement."

As a result, Assistant Roadmaster Flynn and Foreman Lee approached the Claimant and requested that he "step down off of the Gallion" and if he did so, the Carrier would continue to pay him at the Gallion Operator rate of pay. The Claimant agreed to the proposal, and commencing July 15, 1999 Machine Operator J. Neal replaced the Claimant on the Gallion Crane.

Thereafter, from July 15 until July 26, 1999, the Claimant performed various Trackman duties while receiving the Group 2 Machine Operator rate of pay. However, on July 26, the Claimant informed his superiors that he had "made the decision too soon" and "didn't think about backing off the machine long enough," and therefore, wanted to be put back on the Gallion Crane. Assistant Roadmaster Flynn refused the Claimant's request, stating that he could not reinstate him to the "highly dangerous" machine because the Claimant continued to "make moves when your ground man don't know what's going on."

On July 28, 1999 the Organization submitted a claim in which it was alleged that the Carrier did not comply with Rule 40 of the Agreement when it removed the Claimant from his assigned Machine Operator position and "forced" him to work as a Laborer.

The Organization sought an Unjust Treatment Hearing. That Hearing was held on August 26 and on September 3, 1999, the Carrier notified the Claimant as follows:

"As result of investigation held on August 26, 1999, it was determined that no harassment occurred and Mr. Hopkins was disqualified off the Gallion Crane and would be denied the rate of pay accordingly. Our payroll records indicate that Mr. Hopkins was paid at machine operator rate since July 27, 1999 and continuing, and not at the laborer rate as you contend. Therefore, he did not suffer a monetary loss."

On October 19, 1999, the General Chairman sent additional correspondence on the Claimant's behalf, in which he stated:

"Per the above and the facts of the transcript of the investigation it is the Organization's position that Mr. Hopkins was unjustly treated and

harassed by removing him from his assigned machine. Therefore, we request that he be reinstated back to his machine, paid for all time lost, and the charges be removed from his service record."

The issue remained unresolved, and is now before the Board for adjudication.

At the outset, we must set the parameters for our review of this record. It is well established that we must confine arbitral review to matters joined on the record on the property. Therefore, the Organization's de novo invocation of Rule 23 will play no role in our decision.

The two questions before us are; 1) Was the Claimant "harassed" by Assistant Roadmaster Flynn during a July 14, 1999 discussion? and, 2) Was the Claimant's removal as operator of the Gallion Crane justified?

There is no evidence on this record which convinces us that the Claimant was harassed, in any way, during the July 14, 1999 discussions with Assistant Roadmaster Flynn and Foreman Lee. Flynn and Lee each testified that during the "very brief" discussion, Flynn informed the Claimant that: "We have another operator who ran that type of machine last year and is very familiar with it." Both Flynn and Lee assured the Claimant that he would continue to receive the Machine Operator, or greater, rate of pay, if he was willing to voluntarily "step down" from the Gallion Crane. There is no dispute that the Claimant accepted the proposal. For his part, the Claimant admitted that he did accept the Assistant Roadmaster's July 14 proposal, but later thought that he had made the decision "too quickly."

With respect to the issue of safety, the record demonstrates that, on numerous occasions during the Claimant's five month tenure on the Gallion crane, co-workers complained that he "made movements without warning" and that he "did not pay attention to hand signals." The employees also asserted that they were "scared" to work with the Claimant, and "fearful" of being injured. In that regard, Assistant Roadmaster Flynn testified that several employees stated that the Claimant repeatedly failed to properly communicate with his Groundman who was assigned to coordinate all movements of the Gallion crane.

Although the Carrier discussed its safety concerns with the Claimant on "several occasions" and made "every effort to coach and counsel him," it was to no avail. In these circumstances, the Carrier successfully demonstrated that the Claimant was properly removed from his position operating the Gallion crane and the Organization failed to provide any evidence in support of its allegation that the Claimant was treated unjustly.

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 26th day of December 2002.