

PUBLIC LAW BOARD NO. 7120

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
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(CSX TRANSPORTATION, INC.

STATEMENT OF CHARGE:

By letter dated May 15, 2008, David Clifford, Engineer Program Construction, notified H. R. Nelson ("the Claimant") to attend a formal Investigation on June 5, 2007, at the CSX Command Center in Calumet City, Illinois, "to develop the facts in connection with your disqualification as Jackson 6700 tamper operator on Program Construction Force 5PCT." After four postponements, two at the request of the Carrier and two, of the Organization, the Investigation was held on October 2, 2008, at the CSX Conference Room in Walbridge, Ohio.

FINDINGS:

Public Law Board No. 7120, 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant has been employed by the Carrier and its predecessor since February 13, 1978. He was awarded the position of Machine Operator 5PCT-067 on March 31, 2008, and given the opportunity to qualify as operator of a new or reconditioned 6700 Tamper machine. However, the machine was in Ludington, Michigan, and had to be shipped to the Claimant's work site in another city and did arrive there until around April 14, 2008.

Engineer Program Construction Clifford testified that a qualified operator worked with the Claimant to instruct him and that he explained to the Claimant that "whatever his past record or past workings with the machine, I wouldn't consider at the time[,] that he would just [have to] be able to prove that he could operate that machine and that was it."

During the first week that the Claimant was on the machine, Mr. Clifford testified, there was a problem in getting track clearance for the Tamper because the employee-in-charge could not make radio contact with the machine. The second week, Mr. Clifford stated, "I spot checked Mr. Nelson on the machine. I told him I thought he was doing a good job. We checked the crossing; he had crosslevel sprayed on it, everything looked good and certainly looked pretty."

At the end of that week, Mr. Clifford testified, he got into the machine with the Claimant. The Claimant had to take off his safety glasses and put on reading glasses in order to be able to read the gauges. Mr. Clifford stated that he "thought this was kind of slow and I asked him if he was getting that corrected and he said he just couldn't see – he

didn't have enough light."

On May 6, 2008, Mr. Clifford testified, he was not there, but he found out later that the Claimant used the wrong reference rail in surfacing tangent track as a result of which there was a six or eight inch line spot. Mr. Clifford testified that the Foreman said that there was a previous incident where the Claimant went through a Maple Street crossing and had the same issue that he had to correct. The Claimant could have avoided the mistake on May 6th, Mr. Clifford testified, by learning a lesson from his first mistake. Production was slowed down on May 6th because of the mistake, Mr. Clifford stated, and he thought that the Claimant "got maybe only a couple of passes with that 6700 that day."

On May 7, 2008, Mr. Clifford told the Claimant that "with the ample time given that he was not progressing with the training on 6700 as expected" and that "after yesterday's failure to solve the problem in a timely manner, I was taking him off the machine for failure to qualify." According to Mr. Clifford, he informed the Claimant that there was a vacancy on a Ballast Regulator that he could fill, and he agreed to take it.

In reply to questioning by the Organization representative Mr. Clifford testified as follows. He has had 38 years of railroad experience and has been in management since 1976. He has not run a 6700 Tamper machine. As a manager he has had several teams working with different tampers and knows what efficient operations are. You should get over a mile a day with a tamper without too much problem. The Claimant could not maintain focus. He should have been able to move forward and learned from his

previous mistake, but it seems as if he had to be trained on a weekly basis.

Questioned by the Organization's representative whether the Claimant can or cannot operate a 6700, Mr. Clifford stated, "In my opinion he cannot fully operate a 6700. I have not seen him work a curve, a switch by himself to be able to set up the machine, to be able [to] put the correct spiral the correct elevation, so I would say he is still not qualified."

Mike Wilkewitz testified as follows. He has been a surfacing force foreman for CSX for about two years. The Claimant had already been on the force when the team started this production year. He [the Claimant] was the regular operator. Adam Willis presently operates the 6700 Tamper. He started his machine rights on that machine. The Claimant trained Mr. Willis. The Claimant's training of Mr. Willis "has been very thorough and adequate for the position with being a new Operator." The Claimant "has gone over every aspect with him from setting up the equipment; things to look for while it is in operation; how to looking [sic] at the track as you go; at everything you could for repairing it; setting it up; putting it away. Mr. Nelson has gone over with Mr. Willis."

According to Foreman Wilkewitz, Adam Willis has performed all functions with the 6700 Tamper, including switches, lining, tangent track, and yard track. He has taken no exception, Mr. Wilkewitz testified, to the training that the Claimant has provided to Mr. Willis. The only in-depth training provided to Mr. Willis, Mr. Wilkewitz stated, has come from Claimant Nelson.

Foreman Wilkewitz testified that when Mr. Willis was not present, the Claimant operated the 6700 Tamper. No exception was taken to the work performed by the Claimant, Foreman Wilkewitz stated. He became Foreman of his present gang around June, 2008, Mr. Wilkewitz stated, but he indicated that he was not sure of the date. The Claimant, he testified, was then the Ballast Regulator Operator, and Adam Willis, the 6700 Tamper Operator.

In addition to the training he received from the Claimant, Foreman Wilkewitz testified, Adam Willis was put with Jerry Mowka for half a day of training, but Mr. Mowka did not really give him any training. Mr. Mowka, Mr. Wilkewitz stated, set up the machine, showed Mr. Willis how to put the head in the ground, and said, "Have at it." That was the only training Mr. Mowka provided, Mr. Wilkewitz stated. Since then, according to Mr. Wilkewitz, the Claimant has done everything from setting up the machine, checking the line, the lift, and the crosslevel, making necessary adjustments, and setting everything so that you can run good track.

Mr. Wilkewitz testified that the computer has been down on the 6700 Tamper since he became Foreman of the gang. As a result, he stated, curves had to be done by plotting them with graph paper. Art Maust, Mr. Wilkewitz testified, came up one day to work with Adam Willis to show him how to do curves. When Mr. Maust was not there, Mr. Wilkewitz stated, the Claimant worked with Mr. Willis on a second curve. He told his supervisor, Foreman Wilkewitz testified, that he and Mr. Nelson would assist Mr.

Willis the best that they could because he (Willis) had never been on a 6700.

Foreman Wilkewitz testified that most recently the Claimant had operated the 6700 Tamper on the Toledo Branch at QT 21.9 to 22.3 the Tuesday before the Investigation. It was on tangent track and not on a curve. The Claimant has also operated the Tamper on tangent track previously, Foreman Wilkewitz stated. According to Foreman Wilkewitz, he did not request Mr. Maust to come and train Mr. Willis on curves; he was told that Mr.

Maust was coming for that purpose.

After Foreman Wilkewitz's testimony the hearing officer recalled Engineer Program Construction Clifford to testify. Mr. Clifford testified that the Claimant was put with the previous Tamper Foreman, Mr. Haff, for training, who was well qualified in working the 6700. Mr. Haff's job, Mr. Clifford stated, was to mentor Mr. Nelson. Asked how long the mentor worked with the Claimant, Mr. Clifford testified, "Ah, I believe Mr. Nelson was only on the machine about three weeks which isn't in my opinion enough to get every aspect of that 6700 down as far as being real confident with it." Mr. Clifford explained that "with Mr. Nelson's focus and ability, I didn't think it was progressing any more in being a production team. . . . I didn't think we could afford to have somebody with Mr. Nelson on a continuing basis." Mr. Clifford testified that the mentor was assigned to work with the Claimant for the entire period of three weeks that the Claimant was on the 6700 Tamper.

The Claimant, Mr. Clifford testified, would set the machine up in the morning.

During the three week period that the Claimant was on the machine, Mr. Clifford stated, the Tamper did a curve, but Mr. Haff was running the machine at the time. Asked whether Mr. Haff explained to the Claimant how to manually plot and operate a 6700 through a curve without the benefit of the computer, Mr. Clifford testified, "No I didn't get into that so I couldn't tell you. We only made it up to as far as working tangent track and the results I didn't think was satisfactory so we didn't progress any further."

Mr. Clifford was asked by the hearing officer what the norm generally was for teaching someone to operate a tamp of the caliber of the 6700. He stated, "It would take, I would say a minimum of a month, but you have got to have the right individual. Someone that . . . can retain, someone that as far as more aggressive, as far as learning be able to take the book out and go through the manual to be able to be a self-motivator. . . ."

Mr. Clifford was asked by the Organization's representative to state what other problems he had with the Claimant besides the line issue he previously testified about. He stated, "I thought the biggest issue was staying focused on a particular task. It seems like if he would come to a problem or if it got into a situation that he couldn't readily figure out, he would get more confused or more of an issue of trying to get it resolved. I am saying it would progressively get worse." Asked for an example of what he was describing, Mr. Clifford testified, "He would in my opinion if he would do something that it would be a mistake and it was corrected, he would stew on that or that occupy his

thoughts more than carrying on to just drop it and go forward and build up with that and just lose focus on what he was doing.”

The Organization representative questioned Mr. Clifford, “Is it your opinion that when you disqualified him that he was incapable of operating a 6700 or was incapable of performing the work for the 6700 on that particular force?” He answered, “He did not demonstrate that he could qualify, in my opinion, to run a 6700. If he has more time, I am not saying that he would be disqualified on it. He could be able [to] run a 6700 in the future, but, at that time he was not qualified and I wouldn’t accept him as a 6700 Operator.” The Organization’s representative followed up, “Based on your answer you are saying, given sufficient time he should have qualified on the 6700 or could qualify on the 6700?” Mr. Clifford replied, “I am saying he may. I can’t say that he couldn’t.”

Adam Willis testified as follows. He has been with the Carrier for a little over a year and has been on the 6700 Tamper since the first week of August. Prior thereto he had not had any experience on a 6700. The only instruction he received was from Mr. Mocha¹ who “explained about what they did and had me run it through and he set everything up for me and just had me run it for the day.” After Willis ran it for an hour or two, he testified, Mr. Mocha “had me read the book that was it.”

When he began day-to-day operation of the Tamper, Mr. Willis testified, Claimant Nelson instructed him in the operation of the machine. The only other person who gave

¹Most likely Mr. Mocha is the same person as the one who was referred to as Jerry

him instruction, Mr. Willis stated, was Jim Griffin, who spent an hour or two with him to show him the basics of tamping a switch. According to Mr. Willis, Claimant Nelson was also with him when he received instruction from Mr. Griffin, and all three of them were on the machine, with both of them helping him. Mr. Willis estimated that 90 percent of his instruction on the 6700 Tamper came from Claimant Nelson and the information that he read in the manual. There were a couple of days when he did not feel good, Mr. Willis stated, and Claimant Nelson ran the Tamper.

About two weeks before the present Investigation, Mr. Willis testified, he plotted a curve for the first time and did it by hand because the computer was down on his machine. Art Maust, he stated, showed him how to plot it by hand.

Harold R. Nelson, the Claimant, testified as follows. He has been with CSX since April, 1978. He was awarded the 6700 Tamper machine in March. After the machine arrived, he worked with Foreman Tim Haff, who was experienced on the 6700. The first week there was a problem where the Claimant did not answer the radio. Mr. Whitehurst complained that the Claimant did not answer his radio, and the Claimant explained to him that he was with the factory man programming the machine.

Regarding the crossing mentioned by Mr. Clifford, the Claimant testified that he had asked for a foreman to come out with him to do the work because it was a delicate situation but that Mr. Clifford said that he had no one. He and Rod Jared, who was

Mowka in Foreman Wilkewitz's testimony.

operating the Regulator, went out and did the crossing, the Claimant stated. Mr. Clifford came down after the crossing was completed, the Claimant testified, and said that it was a perfect job, that the crosslevel was perfect. Then it went from the second week to the third week, the Claimant testified, and everything changed. He could not do anything right.

The Claimant was afforded three consecutive weeks to train on and operate the 6700 Tamper. Foreman Tim Haff, the Claimant stated, said to him, "Mr. Nelson, I know you know how to run the machine." Mr. Haff, the Claimant testified, "spent a lot of his time outside instructing me what I should do operating."

According to the Claimant he first started operating a 6700 Tamper in 2004 and operated it for about six months, gaining experience on a very technical machine. In 2008, the Claimant stated, the factory man worked with him for one day on the computer, dialing it in. The 6700 Tamper that he worked on in 2004, the Claimant testified, had a smaller cab and did not have a winch but was similar to the machine he operated in 2008. In 2004, the Claimant stated, he tamped tangent track and curves. In 2008 the Claimant did not tamp any curves, only tangent track and one switch. In 2008, according to the Claimant, he did not receive any assistance in tamping the switch. He set that up on his own, he stated.

The third week, the Claimant testified, Mr. Clifford came onto the machine and said to the Claimant, "I think you are having problems setting it up." According to the

Claimant, he questioned what Mr. Clifford had reference to and said that the machine seemed to be running. The next day, the Claimant stated, Mr. Clifford came again and stood around watching the Claimant as if he was bothered by something. "We did have an issue with the tangent track coming off of the crossing," the Claimant stated. "I had pushed the button and I had lift on and . . . I had a little sway but after we quite [sic] tamping we come back and we fixed it – lined it back through the three or four pops"

The Claimant testified that he never asked assistance in setting up his machine. Mr. Haff, the Claimant stated, never expressed the opinion to the Claimant that he (the Claimant) was having trouble setting up the machine. Once or twice, the Claimant testified, Mr. Haff assisted him in setting up the machine, but his remark was, "There is no need me helping you, you already know." In the third week, according to the Claimant, he never asked Mr. Haff or Mr. Clifford for any additional training on the 6700. Previously, the Claimant testified, he ran the 6700 Tamper from August, 2004, to March, 2005. He was not disqualified from that machine.

The Claimant identified a written statement that he received from Denny English, his foreman when he worked for the Carrier in Indianapolis. The statement said, "Rick Nelson ran a Jackson 6700 for me from the fall 2007 to spring 2008. He raises switches and curves. Rick did all the plotting on curves." The Claimant testified that Mr. English's dates were correct, not the 2004-2005 dates that he (the Claimant) mistakenly

gave in his testimony.

The Claimant identified a second written statement dated September 27, 2008, signed by Rodney Jared, who, the Claimant testified, ran the Regulator at the time that the Claimant was disqualified on the 6700 Tamper. The statement said, "I, Rod Jared, worked with Rick Nelson on the Cat gang at the beginning of the summer of 2008. Rick ran the 6700 and I ran the Regulator behind him. I sometimes had to work as Foreman and I saw Rick run the 6700 under bridges and into crossings. He always did a fine job."

A third written statement identified by the Claimant was signed by Steve Simmons, who the Claimant said was a Section Foreman with whom he did a couple of crossings.

It stated, "I have observed Mr. Rick Nelson both running & training a new employee on the 6700 Tamper. No exceptions noted."

After he was disqualified on the 6700 Tamper, the Claimant testified, he bid for a Tie Unloader. He was laid off that machine, the Claimant stated, and he went onto another surface smoothing gang as the Regulator Operator. The operator of the Tamper machine, Mr. Willis, the Claimant testified, was on the track and "wasn't familiar with the procedure, so I was there. Nobody told me to do it but . . . you always try to help."

When Mr. Willis wasn't present, the Claimant stated, he (the Claimant) asked to operate the 6700. No one, according to the Claimant, took exception to his operation of the machine. The Claimant testified that he feels that he is qualified to operate the 6700.

It is the position of the Carrier that it produced sufficient evidence to demonstrate that Claimant Nelson failed to qualify to operate the 6700 Tamper machine and that his disqualification was therefore fully justified. Engineer Program Construction Clifford's testimony, the Carrier argues, showed the basis for the Claimant's disqualification.

Because the Organization was unable to produce evidence to show otherwise, the Carrier contends, the disqualification was clearly justified. It has long been held, the Carrier asserts, that a carrier has the unfettered right to determine employee qualification to perform work safely and properly. Experience and tenure, the Carrier states, do not serve to offset demonstrated malfeasance and indifference to responsible performance of work. It produced substantial evidence of Claimant Nelson's failure to qualify on the machine, the Carrier contends, and the Board should uphold the disqualification assessed.

The Organization contends that the evidence shows that the Claimant has operated the 6700 Tamper previously. In addition, the Organization argues, the record shows that the Claimant was used to train a new employee in the operation of the 6700 Tamper. This evidence, the Organization maintains, amply establishes that the Claimant is capable of operating the 6700 machine.

Regarding the question of burden of proof, there are many awards that hold that the burden of proof in a disqualification case is on the organization which, to prevail, must show that the carrier acted in an arbitrary, capricious, or discriminatory manner in disqualifying the claimant. See, for example, Third Division Awards Nos. 31072 and

30950. Those cases, however, involve Unjust Treatment hearings or other non-disciplinary proceedings. Where the carrier chooses to handle the disqualification as a disciplinary matter, however, then a different standard applies. See Third Division Award No. 31327.

In the present case the disqualification was handled as a disciplinary case. Thus the Claimant was given notice of a formal investigation and the option of signing a waiver, which normally are associated with disciplinary proceedings. Under these circumstances the burden falls on the Carrier to establish by substantial evidence that the disqualification of the Claimant was proper. Moreover, the Carrier appears to accept that burden because it argues in its submission that “the Carrier produced substantial evidence of Claimant Nelson’s failure to qualify on the machine.”

The Board believes that there was not substantial evidence to support the disqualification of the Claimant. The only specific evidence of deficient performance that Engineer Program Construction David Clifford cited was that on May 6, 2008, the Claimant used the wrong reference rail in surfacing tangent track resulting in a six to eight inch line spot. According to Mr. Clifford, the Claimant had made the same mistake once before at a Maple Street crossing. Engineer Program Construction Clifford was specifically questioned by the Organization Representative to cite any additional examples, but was unable to come up with any. He testified in generalities about lack of focus or stewing about a mistake but gave no specific example of deficient performance

on the Claimant's part other than using the wrong reference rail. The Claimant testified without challenge about the incident involving the wrong reference rail and stated that later "we come [sic] back and we fixed it – lined it back through the three or four pops"

Mr. Clifford testified that the norm for qualifying on the 6700 Tamper was a minimum of a month. The Claimant was given only three weeks to qualify, and in the week prior to his disqualification was praised by Mr. Clifford for an excellent job in tamping a crossing. Mr. Clifford further testified, ". . . If he has more time, I am not saying that he would be disqualified on it. . . ." Yet he did not provide the additional time to the Claimant.

From his own testimony, moreover, it is clear that Engineer Program Construction Clifford did not personally spend a lot of time with the Claimant during the latter's training period. The person who spent the time with him was Foreman Tim Haff, an experienced Tamper operator who was assigned to train the Claimant and worked with him for approximately three weeks for that purpose. Foreman Haff was not called as a witness by the Carrier.

The Board finds that there was not substantial evidence in the record to support the disqualification of the Claimant on the 6700 Tamper machine. The Board does not believe that the May 6, 2008, incident was a sufficient basis for disqualifying the Claimant. Yet it is the only specific incident relied on by the Carrier. The Claimant was

The Board is not persuaded that the fact that the Claimant repeated a mistake during his training period was a sufficient basis for disqualifying him on the Tamper machine where the previous week he had been complimented by the Engineer Program Construction for an excellent job on a substantial tamping assignment; the Claimant had y received only three weeks of training, the norm for qualifying on the 6700 Tamper was a minimum of a month, and the Engineer Program Construction indicated that with more time the Claimant possibly could qualify; and where the mistake involved was correctable without any permanent damage and, in fact, was corrected by the Claimant. The totality of the record does not establish by substantial evidence that the Carrier had a proper basis for disqualifying the Claimant from operation of the 6700 Tamper machine.

The Board directs the Carrier to remove any reference to the disqualification from the Claimant's personnel file and to provide him another opportunity within a reasonable period of time to qualify on the 6700 Tamper machine. Since the Claimant was still in the process of attempting to qualify on the machine, there is no basis in the record for directing the Carrier to designate the Claimant as a qualified 6700 Tamper machine operator.

A W A R D

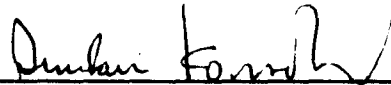
Claim sustained in accordance with the findings.

A W A R D

Claim sustained in accordance with the findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

A handwritten signature in dark ink, appearing to read "Sinclair Kossoff", is written over a horizontal line.

Sinclair Kossoff, Referee & Neutral Member

Chicago, Illinois
May 4, 2009