

PUBLIC LAW BOARD NO. 6564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

CSX TRANSPORTATION, INC.

Case No. 36

Statement of Claim: It is the claim of the System Committee of the Brotherhood that:

1. The disqualification of Machine Operator K. L. Merritt for his alleged failure to properly tie off an adzer when hauling same with a 1085 Badger Cruz Air on rail crane and failure to complete a monthly inspection report for the crane was without just and sufficient cause [System File A04833704/12(04-0399)].
2. Machine Operator K. L. Merritt shall now have the disqualification removed from his record and be compensated for any wage loss suffered as a result of the disqualification.

Background:

Claimant Keith L. Merritt was hired on September 25, 1980, by Carrier-predecessor Western Maryland Railroad Company, and in January 2004,¹ he held a machine operator position with the Carrier. On January 28, he was operating a rubber-tired 2004 1085 Badger Cruz Air crane in the Madison, Georgia area. The crane was new and being used on a test basis. Claimant had operated it for approximately two weeks. On the 28th, he was instructed to carry a non-wheel-mounted adzer approximately twelve miles. Claimant suspended the adzer from the crane boom, but did not lock the boom or tie off the adzer. Claimant encountered a curve and the adzer began to swing. In trying to correct the swinging, Claimant mistakenly lowered the boom. The adzer contacted the ground and came free. Claimant's crane, which was still traveling forward, collided with the adzer. Claimant again lifted the adzer without tying it off and continued to his

¹ All dates hereafter are 2004 unless otherwise stated.

destination. The adzer, however, had suffered extensive damage totaling over \$10,000, could not be economically repaired, and was ultimately scrapped.

The next day, the incident was evaluated by Work Equipment Supervisor Michael Aquilina and Equipment Supervisor Dennis Thompson. Merritt told Aquilina and Thompson that he had not tied off the adzer either before or after dropping it. He also told them that while he had filled out weekly inspection reports for the 1085 Badger Cruz Air, he had not filled out a federally mandated monthly inspection report. Thompson had observed Claimant operating the crane on January 26 and 27 while evaluating whether the 1085 Badger Cruz Air could replace another crane the Carrier used, and some aspects of Claimant's operation of the crane had caused Thompson to question whether Claimant had sufficient dexterity and hand-eye coordination to properly operate it.

Claimant was disqualified from the operation of rubber-tired cranes as of January 29, 2004. By letter dated February 6, the Carrier instructed Claimant to attend a hearing regarding the disqualification. After a postponement, the hearing was held on March 4, and Claimant testified on his own behalf:

As I was going through a right-hand turn at approximately 6:30 p.m. I noticed the boom was drifting to the down side of the curve. To compensate for this I took hold of the left joy stick and pushed outward to my left, and then after realizing I had locked the swing, I reached over to unlock the swing lock switch with my right hand, still holding the left joystick in my left hand. As soon as I tripped the switch the adzer lowered to the ground in front of me and became detached from the rail dogs that I was using to carry the machine, and landed in between the rails in front of me. Before I could get stopped, traveling at approximately five or 6 MPH, I ran into the adz[er].

When asked, "[W]hen you picked up this machine, this adzer, to carry it ... did you tie this machine off as was instructed and taught in ... crane class?" Claimant admitted,

"No, I did not." Asked, "Once you dropped it and you ran into it and you picked it up and then continued ... did you tie it off then?" Claimant answered, "No...."

On March 24, the Carrier confirmed its disqualification of Claimant from operating rubber-tired cranes. By letter dated April 12, the Organization appealed Claimant's disqualification. The parties discussed the matter in conference on June 30, but the matter was not resolved. It therefore is presented to this Board for final decision.

Carrier's Position:

The Carrier contends that Claimant was afforded a fair and impartial hearing, at which substantial evidence of Claimant's guilt was presented. Claimant's own testimony at hearing demonstrated that he had not locked the boom of the crane in order to transport the adzer, and had not tied off the adzer either before or after he dropped it. According to the Carrier, Claimant's failure to take proper steps in transporting the adzer resulted in substantial equipment damage and could have resulted in injury or loss of life. Claimant also admitted at hearing that he did not perform the federally mandated monthly inspection on the crane. The Carrier argues that it has been well-established by arbitral precedent that disqualifications do not constitute discipline, and that carriers possess an unfettered right to determine whether employees are qualified to perform work safely and properly. The Carrier contends that Claimant's disqualification therefore should be upheld.

Organization's Position:

The Organization contends that the Carrier failed to prove the charges against Claimant. According to the Organization, the January 28, 2004 incident occurred because the 1085 Badger Cruz Air was being used on a trial basis and the foreman who

instructed Claimant to transport the adzer suspended from the boom was unaware that the adzer could have been towed behind the crane. The Organization further argues that Claimant only failed to fill out the required monthly inspection form because he was not given such a form.

The Organization further contends that, assuming *arguendo* that Claimant did not properly secure the adzer before transporting it and that he failed to fill out the monthly inspection report as alleged, the Carrier's disqualification of Claimant from operating all rubber-tired cranes was arbitrary and capricious. Claimant has over twenty-four years of unblemished service as a machine operator, and twenty of his coworkers signed a statement that Claimant is a safe operator. In these circumstances, the Organization submits, disqualifying Claimant from the operation of all rubber-tired cranes was excessive.

Findings:

It has been well-established by arbitral precedent that it is within the Carrier's rights to determine whether an individual is qualified to assume or continue in a particular position. In addition, many arbitral boards have agreed that the disqualification of an employee from a particular position does not constitute discipline. Claimant admitted both on January 29, 2004, and at hearing that he did not properly tie off the adzer before transporting it or even after he had dropped it on January 28. A review of the evidence of record further establishes that Claimant made several other mistakes during the incident. No collision between crane and adzer would have occurred had Claimant stopped the crane rather than trying to correct the swinging of the adzer while continuing to travel forward. In addition, while working the controls to correct the

swinging, Claimant inadvertently lowered the boom, causing the adzer to make contact with the ground and come free. The Board finds that this series of errors on Claimant's part justifiably caused the Carrier serious concern regarding Claimant's ability to properly and safely operate the 1085 Badger Cruz Air. Moreover, Equipment Supervisor Thompson had previously observed issues with Claimant's operation of the crane on January 26 and 27 that had caused Thompson to question Claimant's ability to properly control it. The Board finds that in such circumstances, the Carrier was well within its rights to disqualify Claimant from operating the crane.

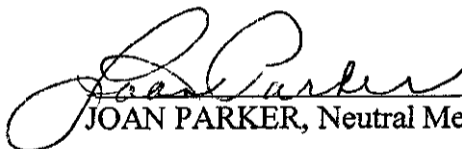
The Organization argues that the adzer should have been towed behind the crane rather than suspended from the crane boom in order to safely transport it. The Board finds this argument to be without merit. The Organization presented no evidence at hearing that suspending and carrying the adzer from the crane boom was inherently less safe than towing it behind the crane would have been. Thompson testified that the safety of either method was "about the same" (Car. Exh. B at 64), supporting Work Equipment Supervisor Aquilina's testimony that the practice of suspending and carrying equipment by crane "was fine" (Car. Exh. B at 48). Moreover, the evidence demonstrates that the practice is far from unusual. Supervisor of Curve Patch Teams Robert Ferri stated at hearing, "It's a very common practice to pick up a suspended load like an adzer, tie it off, and transport it down the track. That occurs on a daily basis." (Car. Exh. B at 70.) Equipment Supervisor Thompson similarly testified, "That's pretty much a daily function on most of the rail gangs...." (Car. Exh. B at 56.) In fact, the very 1085 Badger Cruz Air with which Claimant had trouble on January 28 was subsequently successfully used

elsewhere by the Carrier in the same manner in which Claimant attempted to use it. (Car. Exh. B at 70.)

However, the Board finds that in disqualifying Claimant from the operation of all rubber-tired cranes, the Carrier delineated a category of machines that was too broad. No evidence was presented at hearing showing that Claimant was incapable of safely and properly operating other cranes. The Carrier's own witnesses testified only that, in their opinions, Claimant could not safely operate the 1085 Badger Cruz Air (Thompson, Car. Exh. B at 59 ("*this* piece of equipment"), 69 ("*this* crane"); Ferri, Car. Exh. B at 72 ("*this* crane") (emphases added).) It is noteworthy that the 1085 Badger Cruz Air was a new type of crane being used on January 28, 2004 on a test basis. Based on the evidence presented at hearing, Claimant's inability to properly operate this distinctive crane cannot fairly be generalized to an inability to properly operate any rubber-tired crane. The Board therefore finds that while the disqualification must be upheld, such disqualification must be limited to the specific machine in question in the instant case, the 1085 Badger Cruz Air crane.

Award:

The claim is denied insofar as Claimant Keith Merritt was disqualified from the operation of the 1085 Badger Cruz Air crane. The claim is sustained insofar as Claimant was disqualified from the operation of other rubber-tired cranes.


JOAN PARKER, Neutral Member


CARRIER MEMBER


ORGANIZATION MEMBER

DATED: 05-18-05

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