

Award No. 18534
Docket No. MW-19026

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Arthur W. Devine, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
NORFOLK AND WESTERN RAILWAY COMPANY
(Lake Region)

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned Mr. John Zehringer instead of Mr. Richard Craig, an unassigned tamper operator, to operate a tamper during the period extending from June 2 through June 8, 1969 inclusive (System File MW-MUN-69-100).

(2) Unassigned Tamper Operator Richard Craig be allowed the difference between what he would have earned if he had been assigned to operate the tamper and what he earned as a track laborer during this period because of the violation referred to within Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Claimant Richard D. Craig holds seniority on the Clover Leaf District as a Tie Tamper Operator dating from July 21, 1959. During the period involved here he was assigned to Section 15 as a trackman, with a work week extending from Monday through Friday.

The regularly assigned operator of the tie tamper working on the territory assigned to Section 15 was scheduled to be on vacation June 2, 3, 4, 5 and 6, 1969. The claimant requested assignment to operate the tamper during the regular assigned operator's vacation absence. The Carrier ignored his request and assigned Mr. Zehringer thereto. Mr. Zehringer, who has established seniority on the Lake Erie and Western District but has no seniority whatsoever on the Clover Leaf District, operated the tamper during the regular operator's vacation absence and on July 7 and 8, 1969, the two (2) rest days immediately following the vacation period.

The claimant was available and fully qualified to have performed this work if the Carrier had so desired.

Controlling here are Sections (a), (b) and (c-2) of Rule 1; Rules 24(k) and 51 which read:

The claim here advanced to the Board contemplates the allowance to the claimant of the difference between what he earned as section laborer and what Zehringer earned as tie tamper operator for the seven-day period.

Attached as Carrier Exhibits A through H are copies of correspondence exchanged on the property reflecting the positions taken by the parties.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant holds seniority as Tie Tamper Operator on Carrier's Clover Leaf District from July 21, 1959. At the time here involved he had not worked as a tamper operator for several years, having voluntarily returned to work as a trackman.

A surfacing program on the Clover Leaf District was begun on April 21, 1969, and continued about four months. Tie tamping machines, track liners and other roadway equipment made up the machine complement of the program. Beginning Monday, June 2, 1969, the operator of one of the new type electro-matic tie tampers assigned to the gang took a week's vacation. To fill the one-week absence, Carrier used a John Zehringer, an experienced tie tamper operator, who held seniority on an adjacent district, known as the Lake Erie and Western, who had been filling a track liner operator's position in the same program, no one on the Clover Leaf District having bid on the liner operator's position.

The Petitioner contends that Claimant should have been used as tie tamper operator during the vacation absence of the regular tie tamper operator.

In the handling of the dispute on the property the Carrier contended that Claimant has not worked as tamper operator for years, had never operated the equipment involved and that he was not qualified to operate the particular machine on which Zehringer was used. No probative evidence was introduced to show that Claimant was qualified on the machine involved.

Article 12(b) of the Vacation Agreement provides that absences from duty for vacation purposes will not constitute "vacancies" under the Agreement. Furthermore, numerous Awards of this Division have established the principle that the determination as to whether an employe has sufficient fitness and ability to fill a position is a prerogative of management, and that once the fitness and ability of an employe have been found by the Carrier to be lacking, the burden rests upon the Claimant to overcome that decision by substantial and competent proof. See Award 17141 and others cited therein. The Petitioner has not met the burden of proof required of it. The claim will, therefore, be denied.

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

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **THIRD DIVISION**

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of April 1971.