

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **22620**
Docket Number **MW-22593**

Kay **McMurray**, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(The Western Pacific Railroad Company

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

(1) The Carrier's disqualification of Machine Operator T. C. **Marin** as a tamper operator shortly after January 31, 1977 was improper, without just, sufficient or **reasonable** cause and in violation of the agreement (System File B-Case No. **10988-1977-BMWE**).

(2) The Carrier shall **return the claimant** to the position of Tamper Operator and shall reimburse him for the net wage loss* suffered **from** the **date** of disqualification until the **date** he is restored to the position of **tamper** operator.

* Net wage loss is the difference between what he would have been paid at the tamper operator's rate of pay and what he was paid by the **Carrier** at other rates of pay for the period he has been withheld from the position of tamper operator."

OPINION OF BOARD: Claimant entered the service of the Carrier as a **Track Laborer on January 26, 1970**. On March 16, 1972, he was awarded a position of Spot Tamper Operator, which he successfully filled for approximately two months, thus qualifying as a Tamping Machine Operator under **Rule 13**. During July of 1976, a similar position was awarded to an **employee** junior to Mr. **Marin** due to a misunderstanding regarding seniority dates and qualifications. **That assignment was challenged** by the **Organization and in settlement** of the claim the Carrier awarded the Claimant the position of Spot Tamper Operator, Extra Gang 425, on December 22, 1976. The Carrier's decision **in** that case, issued on January 17, 1977, reads in pertinent part:

"In view of the fact that **Claimant's** personal record contained information establishing him as the senior qualified bidder for Position * * * it is conceded that Claimant should have been awarded the. position.

"Claim is being allowed for the differential between Claimant's earnings since July 12, 1976 to date he **is** placed **on Position F-5825** and what he would have earned had he been assigned to that position on July 12, 1976."

On January 31, 1977, just thirteen (13) days later, Claimant was removed from **that** position because of his failure to perform to the minimum required standards. He exercised his seniority **under Rule 14** and remained in the service of the Carrier.

The Carrier claims that it received complaints regarding **Mr. Marin's** performance and, accordingly, instructed three experienced supervisors to observe his **performance**. This they accomplished on January 31. All reported that the Claimant's **performance** was **sub-Standard**.

To all of this the Organization objects, pointing out that the timing appears to be punitive rather than objective. It further argues that the machine had leveling buggies which were unfamiliar to the Claimant and when he asked his foreman for instruction on the buggies he was told that he was the operator and was to get **on** the machine and operate it.

On the day of disqualification it claims that the track was frozen which accounted for **some** of the problems and that several of the claimed errors simply did not happen.

The record before us is simply inconclusive with respect to either party's position. It would appear that Mr. **Marin** should be given a reasonable opportunity to qualify as a machine operator on the next job **to** which **his seniority would** entitle him, **and** we direct Carrier to do so.

However, **in** the instant case before us, the Organization did not sustain its burden of proof that the contract had been violated.

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 Employees involved in this dispute are respectively Carrier and Employees 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.

A W A R D

Claim disposed of as indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By **Order** of Third Division

ATTEST:

A. W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 9th day of November 1979.
