

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23222  
Docket Number M1-23182

John J. Mikrut, Jr., Referee

**PARTIES TO DISPUTE:** ( **Brotherhood of Maintenance of Way Employees**  
(The Belt Railway Company of Chicago

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

(1) The Agreement was violated when Mario Gonzales was used to operate a swing loader beginning July 31, 1978 instead of wing Claimant J. L. Jimenez who was available to perform such service (Carrier's File 393-MofW).

(2) As a consequence of the aforesaid violation, Claimant J. L. Jimenez be allowed pay at the swing loader operator's appropriate rate for a number of hours equal to the total expended by Mario Gonzales in performing such work beginning July 31, 1978 and continuing until said violation is discontinued."

**OPINION OF BOARD:** On July 31, 1978, Carrier, without bulletin, assigned M. Gonzales, a Laborer in the Track Department, seniority date December 2, 1974, to operate a swing loader. The position of Swing Loader Operator is a higher rated position than that of Laborer, paying approximately ninety cents (\$.90) per hour more. According to Carrier, Employee Gonzales "... made a request of the Track Supervisor to qualify as a Swing Loader Operator and was therefore, assigned to the machine effective June 12, 1978."

Claimant, J. L. Jimenez, an Assistant Foreman, seniority date April 26, 1974, filed a time claim on September 12, 1978, alleging that Employee Gonzales had been improperly assigned to operate the swing loader on July 31, 1978, and that Carrier's action was in violation of "Rule 17 - Filling Non-Bulletined Positions" of the parties' Agreement which states as follow:

'Consideration in filling preferable positions in regard to location or otherwise, not bulletined, will be given to senior employees.'

Organization's basic position in this instant dispute is that since Claimant was senior to Employee Gonzales, and since the position of Swing Loader Operator was a preferable position, then, in accordance with Rule 17, Claimant should have been assigned to said Position (First Division Award 15128 and Third Division Awards 2716, 6136, 14491 and 17559). Continuing, Organization also

argues that Carrier's allegation that **Employee** Gonzales was "**most** qualified" **is** irrelevant in **this matter** because, according to Organization, Rule 17 "... clearly provides that senior employees will be given consideration in filling preferable **positions**" and "**claimant's** ability need only be sufficient for the purpose" (Third Division Awards 2638, 5857, 11279 and 14792) (Emphasis added by Organization).

Turning next to a related **issue**, Organization **contends** that Carrier's failure to bulletin the Swing loader Operator position **was** a violation of "Rule **13 - Filling Positions by Bulletin**", and, therefore, **was** improper. According to Organization, said **Rule** "... is clear and unambiguous in that it excepts only the position of **Laborer** from being bulletined" (**Employees'** Exhibit A-5, p. 1) (Emphasis added by Organization).

As its final area of argumentation, Organization, in response to Carrier's assertion, **maintains** that though "another laborer may have had a better right to **make a claim**" in this instant **dispute**, Claimant properly filed the **claim**, and, **moreover**, who Organization **names** "... as claimants is **immaterial** insofar **as** the violation **is** concerned" (Third Division Awards 17801 and 18557).

Carrier's position in this matter **is** predicated upon several interrelated factors. Initially, Carrier **maintains** that there **has** been no **Rule** violation in **this** dispute **because** it (Carrier) **is** not required to bulletin roadway **machine** operator jobs as per Rule **13**, and that the Agreement has always been interpreted and applied to give preference for such work to **employees** within the laborers classification. In **such situations**, Carrier contends that "(I)t has been a long standing practice on **this** property for **Supervisors** to simply 'assign' the most qualified and senior laborer to (operate) the **machine**."

Though **Carrier acknowledges** that it may have bulletined **various** machine operator jobs previously, this particular procedure **was** utilized when a major track construction program **was** anticipated and when the work could be scheduled far **enough** in the future **so** as to **make** such advanced bulletining feasible. Carrier **contends**, however, that **most** machine operator work **is** irregular and intermittent, is usually of a short-run duration and **is** assigned **as** needed, **thus** making such bulletining impractical. Lastly in this **same** context, Carrier **maintains** that there is no contractual requirement to bulletin such jobs, even though Carrier may have done so **in a** few previous, isolated **instances**.

**As its second major area of argumentation**, Carrier contends that under the existing **rules**, **Claimant** did not have seniority preference to bid **on** the Swing Loader job and that he would not have been assigned to perform the disputed work because he is an **Assistant Foreman 1(b)** and he **is** not in the track laborers classification rank which **is** the classification to which such work has historically and traditionally been assigned. In support of the aforesaid argument, Carrier maintains that the Track Sub-Department contains only **specialized classifications for Crane Operators** and Crane Operator Helpers and that all other miscellaneous

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machine operation work (Motor Car Operator, Swing Loader Operator, Power Tamper Operator, Power Ballaster Operator, Power Track Liner Operator, and Jet Snow Blower Operator) has been assigned within the classification rank of Laborer. Furthermore, Carrier also maintains that, in addition to the fact that Claimant was not in the classification rank from which machine operators are to be called, Claimant "has not worked as a Swing Loader Operator (and) he has no prior experience on any roadway equipment." However, in regard to this latter point, Carrier asserts that because 'Claimant's qualifications, or lack thereof, has not heretofore been discussed or made part of the Employees position during the handling of this case on the property, . . . it is, therefore, not a matter of consideration for this Board."

There are any number of significant directions which this award could take. The record, however, is replete with a multiplicity of arguments -- many of which are contradictory -- and a dearth of substantive or probative evidence. Indeed, in this particular case there appears to be more that is unknown than is known. Rather than blundering ahead, however, and deciding upon issues which will have no real bearing on the resolution of the dispute itself, suffice it to say that, absent any other considerations, the two (2) most basic questions of this dispute are: (1) did Claimant possess sufficient seniority within the appropriate classification in order to bid on the Swing Loader Operator job; and (2) did Claimant possess sufficient ability/qualification to perform the requisite duties of said job.

In regard to the first question, given the facts of the record herein, an answer is indeterminable. While Claimant may have had a greater number of years of service within the Track-Sub Department, Claimant's present position of Assistant Foreman raises concerns on the part of this Board regarding the applicability of that particular service to that of a lower rated position, such as Swing Loader Operator, when making seniority determinations. In view of this critical question, as well as others which, on the basis of the foregoing, need not be specified at this time, the Board cannot determine with any degree of certainty if Claimant possessed sufficient seniority or the contractual right to bid upon the disputed job.

Turning next to the question of Claimant's "ability/qualifications" to perform the work of Swing Load Operator, Carrier maintains that the employee assigned must be "most qualified and senior" whereas Organization, apparently, argues that said employee needs only to be "senior and sufficiently qualified." While this Board supports Organization's basic position on the issue of "sufficiently qualified" as opposed to "most qualified" in matters of promotion and/or assignment to a preferred position, this particular determination cannot be applied in this instant dispute because there is insufficient evidence in the record with which to prove or to even suggest that Claimant was qualified ~~Because of the to operate swing loader.~~ f a c t , ~~therefore, the~~ Board concludes that such a lack of apparent qualification -- "sufficient" or otherwise -- was proper justification for Carrier's refusal to assign Claimant to perform the disputed work. Said refusal was neither arbitrary, capricious nor improper, and, therefore, shall not be disturbed.

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 denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

A. W. Paulson  
Executive Secretary

Dated at Chicago, Illinois, this 16th day of March 1981.

