

The Third Division consisted of the regular members and in addition Referee Edwin H. **Benn** when award was rendered.

(Brotherhood of Maintenance of Way Employees  
PARTIES TO DISPUTE: (  
(The Chesapeake and Ohio Railway Company (Southern Region)

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

(1) The Carrier violated the Agreement when it assigned junior **Trackman** E. Peters to fill a temporary vacancy as machine operator (Rail Gauger) on May 3, 4, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 20, 21, 22, 23 and 24, 1984, instead of assigning and **using Trackman** A. R. Puckett, who was senior, available, willing and qualified to fill that vacancy (System File C-TC-2343/MG-4717).

(2) Because of the aforesaid violation, Mr. A. R. Puckett shall be allowed the difference between **what** he should have been paid at the rail gauger operator's rate and what he was paid at the trackman's rate for one hundred thirty-one (131) straight time hours and three and three-fourths (3-3/4) overtime hours."

FINDINGS:

The Third Division of the Adjustment Board 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 employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant and E. Peters held regular assignments on the Carrier's Clifton Forge Division as Track Laborers. Claimant was senior **to** Peters. On the dates listed in the Claim, the Carrier needed an employee to fill a temporary vacancy as an Equipment Operator for a **Norberg** Rail Gauger Machine pending the assignment of a" employee to the bulletined position. No Equipment Operator was available and the Carrier assigned Peters rather than Claimant asserting that Claimant was not qualified. Claimant seeks the differential in pay for the cited dates.

While the Carrier asserts that Claimant was not qualified to fill the position at issue for the time involved, the record demonstrates that Claimant previously worked with the Rail Gauger as a Laborer from April 2, 1984 until May 1, 1984, and had an opportunity to learn the operation of the machine; Claimant trained Peters (for seven working days) as well as another employee in operating certain aspects of the machine; and the Assistant Foreman was of the opinion that Claimant was the only qualified person that could operate the machine. Even Peters stated that he was trained by Claimant "because I knew nothing about the gaging (sic) system when I was put on it Kay 3, 1984." The Carrier further admits that Claimant "demonstrated the basic mechanical functions of how to start, move and maintain the rail gauger."

Rule 13 states:

"(a) . . . [P]romotion shall be based on ability and seniority. Ability being sufficient, seniority shall prevail, the management to be the judge.

\* \* \*

(d) . . . [V]acancies or new positions as roadway machine operator will be filled from the ranks of employees covered by **the...Agreement** on the particular division or seniority territory if there is an employee who bids for and is qualified to fill such position...."

Giving the Carrier's determination that Claimant was not qualified the initial appropriate weight as required by the Rule and precedent of this Board (see e.g., Third Division Awards 22462, 22029, **19123**), as set forth above, this record demonstrates that the Organization has met its shifted burden and has shown that Claimant was qualified to perform the work at issue. While asserting that Claimant was not qualified, the Carrier has failed to refute the Organization's showing with citation to facts or evidence to demonstrate Claimant's lack of qualification. In light of the record and the showings made, we conclude that the Carrier's action was sufficiently arbitrary to require us to sustain the Claim. Claimant was qualified and was senior to Peters and was therefore entitled to fill the temporary vacancy. Claimant shall be compensated for the pay differential between his position and the Rail **Gauger** Operator's position for the dates claimed.

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Award No. 26998  
Docket No. MW-26550  
88-3-85-3-293

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 25th day of April 1988.