

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33487
Docket No. MW-32543
99-3-95-3-448**

The Third Division consisted of the regular members and in addition Referee Robert Perkovich when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier allowed junior employee W.L. Porter to operate a tie adzer machine on SPG Gang 5XC7 beginning August 15 through 25, 1994, instead of upgrading and assigning employe W.F. Hardaway who was senior, qualified and available (System File 21(29)(94)/12 (94-826)

(2) As a consequence of the above-stated violation, Claimant W.F. Hardaway shall be allowed '... the difference between Track Laborer and Operator A, 10 hours each day at the straight time rate of pay for the dates of August 15, 1994 through August 25, 1994 and 4 and ½ hours overtime at the Operator A rate of pay.”

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 employee 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 were given due notice of hearing thereon.

Claimant and W.L. Porter both hold seniority as Track Repairmen and were at all material times relevant herein working as such on SPG Gang 5XC7. However, Claimant has greater relative seniority than Porter. Beginning August 15 and continuing through August 25, 1994 a tie adzer machine position occurred on the gang. Carrier assigned the job to Porter rather than the Claimant, giving rise to this claim.

The Carrier contends that there was no violation because it offered the opportunity for the tie adzer position in question to the Claimant, but that he declined. Thus, although he may have been more senior and qualified, he was not, as required by the Agreement, available. In support of its argument it presented during the handling on the property a statement from Foreman Newman that the Claimant "... was asked in the company of several people if he wanted to operate the tie adzer. . ." and that he declined. Moreover, Newman added in his statement that the offer was repeated and that the Claimant again refused.

The Organization attacks the Carrier's assertion, arguing that Newman's statement should be rejected because it is vague and because it is rebutted by a statement of the Claimant to the contrary. On the first point, we simply disagree. Although it is true, as the Organization points out, that Newman's statement does not identify the witnesses to the offer of the position to the Claimant, that does not detract from the clear and explicit statement by Newman that the position was in fact offered to the Claimant. With regard to the second point, that the Claimant asserted to the contrary, such an assertion simply demonstrates that there is an irreconcilable dispute in the facts necessary to resolve this claim. In light of that fact the Board has no choice but to deny the claim.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of September 1999.