

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33939
Docket No. MW-32457
00-3-95-3-372**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation (Amtrak) -
(Northeast Corridor)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow Mr. K. Kuhns to exercise his seniority to the spike puller's or spiker's positions held by junior employes on the tie/rail unit headquartered at Lyonville, Pennsylvania on January 20, 1994 (System File NEC-BMWE-SD-3381 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be allowed ' . . . 8 hours pay at the pro rata rate, including any possible overtime, for each work day lost in behalf of Mr. Kuhns.***' In addition, claim is herein made for all vacation credits and any lost benefits or similar credits that would make the Claimant whole for any loss because of the violation.”**

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.

At the time this dispute arose, Mr. K. Kuhns (Claimant) and Messrs. C. Martz and J. Lewis all had established and held seniority as Engineer Work Equipment (EWE) Machine Operators. Specifically, the Claimant held the position of Backhoe Operator, while Messrs, Martz, and Lewis held positions, respectively, as Spike Puller and Spiker Operators.

In early January 1994, the Claimant learned he was being displaced from the Backhoe position, effective January 20, 1994. On Wednesday afternoon, January 19, Mr. Kuhns contacted Engineer Track Construction M. Moore and stated that he wanted to make a Rule 2 displacement on Spike Puller Martz. Mr. Moore reminded the Claimant that in order to displace Mr. Martz, he would have to be qualified on the machine onto which he desired to displace. The Claimant stated that the test would have to be done on the following day, January 20, as it was the last day for him to make the displacement. Mr. Moore assured the Claimant that he would arrange a qualification test with the Equipment Engineer "as soon as possible."

After conferring with the Equipment Engineer, Mr. Moore notified the Claimant that "the earliest date available" for him to be tested for proficiency on the Spike Puller was Monday, January 24, 1994. Notwithstanding that he had not yet demonstrated proficiency, January 20, 1994, the Claimant went to the Tie/Rail Unit headquarters and attempted to make a Rule 2 displacement on Mr. Martz. Supervisor Tie/Rail J. Soete denied the Claimant the bump because he had not previously qualified for the Spike Puller.

Shortly thereafter, the Organization filed a claim on behalf of the Claimant asserting that Mr. Soete had "refused to allow" the Claimant an opportunity to exercise his seniority to the Spike Puller or Spiker. According to the Claimant, he had made "numerous" calls to Mr. Soete, but those efforts were "fruitless." The Vice Chairman went on to assert that the Claimant, who is senior to both Mr. Martz and Mr. Lewis, was qualified on "similar machines" and "can and could" operate both machines had he been allowed the opportunity.

The Carrier denied the claim, contending at the outset that it should not be held responsible for the fact that the Claimant waited until the “last possible moment” to attempt a Rule 2 displacement on the Tie/Rail Unit. The Carrier went on to assert that it requires the Equipment Engineers to ascertain an employee's qualifications on any equipment before allowing a displacement, “in order to keep qualification criteria uniform.” Finally, the Carrier pointed out: “At no time did Mr. Kuhns make any reference to displacing Mr. J. Lewis as your claim indicates. However, the same criteria would have been required on Mr. Lewis’ machine as was required on Mr. Martz’ machine.”

While this claim was being processed, the Spike Puller position held by Mr. Martz was abolished, effective March 3, 1994. On March 10, 1994, the Claimant was tested and found to be qualified for the Nordberg Super Bee Spike Puller and the Nordberg Spiker and he was then recalled from furlough on March 28, 1994. Careful review of the record evidence leaves the Board persuaded that this claim must be sustained for the period that the Claimant was in furlough status.

Under Rule 2 the Carrier may, in the exercise of managerial discretion, condition the senior employee’s exercise of displacement rights on a “practical demonstration of his qualifications to perform the duties of the position”, provided the Carrier can demonstrate a reasonable basis for doubt about such qualifications. But this does not give the Carrier the license to require such proficiency testing where there is no reasonable basis for doing so or to eviscerate the senior employee’s bumping rights by scheduling his “proficiency test” to occur after the displacement deadline has expired. Throughout handling, the Claimant and the Organization maintained that he was in fact qualified to operate the Spike Puller because he had operated “similar equipment” in the past. The Carrier never produced any evidence to refute those assertions and when he finally was tested the Claimant demonstrated that he was indeed qualified on the Spike Puller and Spiker. Based on the unique facts of this record, we shall sustain the claim for the period January 20 through March 27, 1994.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 22nd day of February, 2000.