

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35403  
Docket No. MW-32817  
01-3-96-3-136**

**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 Employees**  
**(The Atchison, Topeka and Santa Fe Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier awarded a Group 7, Class 2 Burro Crane position, advertised on or about October 14, 1993, to a junior employee instead of Mr. S.L. Prough (System File 20-9-9312/94-11-38).**
- (2) AS a consequence of the aforesaid violation, Mr. S.L. Prough shall be compensated ‘ . . . for difference in rates between Group 7 Class 2 and the rate that the Claimant has been compensated at since October 25, 1993, for all hours worked by D. Akins while assigned to Burro Crane because Carrier failed to properly assign Burro Crane bid position to the Senior applicant as required by Rule 9 of our current Agreement.”**

**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.**

**The Claimant established seniority as a Group 7, Class 2 Machine Operator on the Eastern Region Seniority District No. 1. On October 14, 1993, the Carrier advertised a Group 7 Class 2 Machine Operator position to employees on the Eastern Region, Seniority District 1. The bulletin specified that the machine on the position**

would be a Model 40 Burro Crane. The bids closed on said position on October 18, 1993 and the successful bidder, D. Akins, who was junior to the Claimant, began operating the Burro Crane on October 25, 1993.

On November 24, 1993, the Organization filed a claim on behalf of Mr. Prough asserting that the Carrier had violated Rule 9 of the Agreement when it awarded the Burro Crane position to junior employee Akins in lieu of the Claimant. The Carrier denied the claim, asserting that its records showed that the Claimant had been disqualified from the Burro Crane in March 1988, due to his "inability to fully grasp the operation of the crane." In response to the Carrier's denial, both the General Chairman and Mr. Prough denied having any knowledge of the alleged disqualification. Further, it is not disputed that in January 1989, some ten months after the Claimant was allegedly disqualified, the Carrier began assigning Mr. Prough to operate the same type of Burro Crane (Model 40) which it maintains he was not qualified to operate. Moreover, in support of the Claimant's demonstrated ability to properly operate the Burro Crane, the Organization submitted statements from 13 employees, including a foreman, who worked with the Claimant in January 1989, all of whom stated that the Claimant operated the Model 40 Burro Crane in a "safe and careful manner."

The Carrier denied this claim because Mr. Prough had allegedly been disqualified on this same equipment in 1988. For their part, both the Claimant and the Organization disavow any knowledge of said notice of disqualification and presented unrefuted evidence that ten months after the alleged disqualification, the Carrier assigned the Claimant to operate a Model 40 Burro Crane on a curve relay gang at Ethel, Missouri. The Carrier did not refute the 1989 assignment, maintaining only that: "The Carrier is under no obligation to exacerbate the results of this error and endure a potential safety hazard.. ."

Even if, arguendo, the Claimant had been disqualified in March 1988 as the Carrier has alleged without proof, the subsequent 1989 assignment during which the Claimant demonstrated his ability to operate the Burro Crane in a "safe and efficient manner" would trump the earlier alleged "disqualification." See Third Division Award 33224. The Claimant and the Organization carried the evidentiary burden of showing a prima facie violation of his seniority rights in this case which has not been effectively refuted by the Carrier.

#### AWARD

Claim sustained.

**Form 1  
Page 3**

**Award No. 35403  
Docket No. MW-32817  
01-3-96-3-136**

**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 26th day of April, 2001.**