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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37140
Docket No. MW-36087
04-3-00-3-209**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Duluth, Missabe and Iron Range Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior employe M. Highland to machine operator overtime service on December 2 and 3, 1998, instead of calling and assigning Machine Operator B. Berglund (Claim No. 01-99).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Berglund shall now be compensated for seventeen (17) hours' pay at the Class B Machine Operator's time and one-half 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.

This overtime claim involves the operation of a Mark III Tamper to tamp and line the Fairlane crude tracks on the Minntac bridge construction project at Keenan, Minnesota. The Claimant was working as a Class B Machine Operator assigned by bid at Keenan on the claim dates, and was senior in that classification to M. Highland, who was assigned and working as a Foreman at Keenan at the relevant time. The Carrier assigned Highland to the overtime in issue based upon its assertion that the Claimant was not qualified to perform the complicated work within the time constraints involved.

The record reflects that the Claimant had bid to, and was awarded, a Class B Machine Tamper Operator position in March 1998 and occupied it between April 8 and 27, 1998, after which it was abolished. According to the Carrier's records, the Claimant worked a total of 15 days raising track with seven days actually operating the TM-20, the tamper involved in the overtime in dispute. The Carrier denied the Organization's appeals on the basis that it determined that the Claimant lacked the skill and ability to perform the necessary overtime work because his minimal experience on the equipment over eight months earlier did not make him proficient in its use, while Highland had used the tamper consistently over the summer months and was experienced in operating it.

The Organization contends that the Carrier violated Rule 20(b) requiring overtime to be offered to the senior qualified employee working in the classification at the headquarters point where the overtime is performed, because the Claimant met those requirements and Highland, who was junior to the Claimant and working in a Foreman classification at the time, did not. The Organization queries how the Carrier could find the Claimant qualified to hold a Tamper Operator position in April 1998, but unqualified to perform overtime on it in December 1998. It notes that the Carrier changed its defense, initially claiming that the Claimant never performed the work in question and then, when it proved otherwise, to an assertion that he was not "proficient" in its use. It relies upon Third Division Awards 14161, 27628, and 29664, in urging the Board to uphold the Claimant's seniority entitlement to the disputed overtime.

The Carrier argues that this is a fitness and ability case, and that once it makes the determination that the Claimant was not qualified to perform this overtime assignment, the burden shifts to the Organization to show that such decision is arbitrary, irrational or without proper basis, citing Third Division Awards 10345, 12650, 26090, 27073, 27844, 36888 and 36902. The Carrier notes that it was established that the Claimant was inexperienced in the operation of the tamper in question, having worked with it for only seven days over eight months earlier, and that the position was abolished before he could become qualified in its use. It asserts that the Minntac bridge tie-in required a proficient operator due to the overtime setting and time constraints involved, facts not rebutted by the Organization and that its determination that the Claimant did not meet such qualification level was reasonable under the circumstances.

A careful review of the record convinces the Board that, while the prior decisions concerning fitness and ability determinations relied upon by the Carrier all dealt with the awarding of a position, not a two day overtime assignment as here involved, the same analysis is relevant to the issue of whether its determination that the Claimant was not qualified under the overtime language of Rule 20(b) was justified. As noted in Third Division Award 31474, an unqualified Machine Operator would not stand for overtime until he is deemed qualified. There is no dispute that the Claimant was deemed to have sufficient skill and ability to be awarded the position of Tamper Operator some eight months earlier, but that he did not have a full 30 days within the position to become qualified in its operation. While we can understand the Organization's confusion as to why the Claimant was deemed qualified by the Carrier to obtain the position in March but unqualified to perform it on overtime in December, the Organization was unable to rebut the Carrier's contention that the job duties in issue in the overtime assignment required a proficiency that the Claimant had not demonstrated in the past due to his limited experience on the equipment. While normally the Carrier's qualification determination at one point would be convincing evidence of an employee's fitness and ability subsequently, under the specific factual context within which this overtime assignment arose we are unable to conclude that its determination that the Claimant was not qualified for this particular overtime assignment was either arbitrary or unreasonable. Accordingly, the claim must fail.

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AWARD

Claim denied.

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 25th day of August 2004.