

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37988
Docket No. MW-36886
06-3-01-3-492

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

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Mr. R. J. Fiebiger for a production tamper operator short vacancy position with Production Crew No. 3 Rail Gang working in the vicinity of Belgrade, Minnesota in connection with installing a new detector site beginning on April 3 and continuing through April 6, 2000 (System File R1.603/8-00403).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. J. Fiebiger shall now be compensated ‘. . . for the equivalent of forty (40) hours at the Production Tamper Operator rate of pay (\$701.60) and have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above 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.

On May 1, 1997, the parties executed a Memorandum of Agreement designating the position of Production Tamper Operator within the Engineering Services Equipment and Machine Sub-department as Group 3, Rank A. The Agreement also provides in Rule 14 (Increasing Forces):

“(b) ‘Call lists’ to protect short vacancies will be established within each sub-department of the Maintenance of Way Department. Each employee may place himself on as many ‘call lists’ as he chooses by written notice . . . to the applicable Personnel Department. Employees placing themselves on a ‘call list’ must specify the groups and ranks in which they wish to protect work but are limited to those groups and ranks in which they are qualified. For purposes of this rule employees who do not retain seniority in a particular group and rank must have worked in the group and rank for at least 30 days to be considered qualified to protect that group and rank from a call list. . . .

(d) Production tamper operators and crane operators who establish seniority in the respective sub-department subsequent to formal training conducted in conjunction with this agreement must protect vacancies in inverse seniority order as a condition of maintaining seniority. See Side Letter No. 10.”

Side Letter No. 10, also executed on May 1, 1997, provides:

“In consideration of the need for additional qualified production tamper operators . . . the Carrier will, in 1997, establish an ongoing formalized training program for the purpose of establishing a sufficient reserve of qualified production tamper operators. . . .

Positions in this training program will be bulletined and assigned in accordance with the applicable seniority rules. Employees who complete this program will thereby establish seniority in the respective group/rank for which trained...."

Rule 9 (Qualifying for Promotion) of the parties' Agreement provides in pertinent part:

"(a) An employee accepting promotion will be allowed thirty (30) working days in which to qualify, and failing shall retain all previously established seniority rights. Upon evidence of employee's inability to qualify, he may be removed from the position at any time before the expiration of thirty (30) working days."

By System Bulletin 175A, dated August 7, 1997, the Claimant was assigned to the position of Relief Production Tamper Operator. Bulletin 175A stated:

"Please refer to my Bulletin No. 175 . . . for the following temporary relief positions per the new union agreement. Senior applicants will receive classroom training followed with a written test. Those passing will be qualified according to their performance on safety, control, maintenance and quality of work."

The Claimant worked on this position from mid-August through late November 1997. He subsequently placed his name on the call list for Production Tamper Operator (Group 3, Rank A) short-term vacancy positions, listing a seniority date of May 1, 1997.

In April 2000, a short term vacancy for a Production Tamper Operator arose in connection with the installation of a detector site near Belgrade, Minnesota. The Carrier called Production Tamper Operator T. P. Greco to perform the work. He worked four ten-hour days, from April 3 through April 6, 2000. The Organization filed the instant claim on the Claimant's behalf on April 27, 2000, alleging that the Claimant rather than Greco, who was not on the short vacancy call list, should have been called for the work in question. The Carrier denied the claim on the basis that the Claimant was not fully qualified to operate a production tamper on his own, had

not yet passed a qualification test, had yet to establish a seniority date as a Production Tamper Operator, and in fact should not have been added to the call list. Having failed to reach a satisfactory resolution of the issues on the property, the parties submitted the dispute to the Board for final and binding resolution.

The Organization contends that the Claimant fulfilled the qualification requirements of Rules 9 and 14 by working as a Production Tamper Operator from mid-August to late-November in 1997, a period far exceeding Rule 9 and 14's required 30 working days, and that the Claimant therefore received a seniority date of May 1, 1997 under Side Letter No. 10. According to the Organization, the Claimant thus properly placed himself on the short vacancy call list for Production Tamper Operator. Asserting that the Claimant worked as a Production Tamper Operator on numerous occasions during the two years following his three-month assignment in 1997, the Organization argues that the Carrier failed to produce documentation supporting its assertion that the Claimant was still in training in April 2000 and his unsupervised operation of a tamper would have jeopardized safety.

The Board finds the Organization's argument to be without merit. It is undisputed that the Claimant was not notified that he had qualified to work as a Production Tamper Operator until September 2000. Bulletin 175A, in which the Claimant was awarded a temporary position of Relief Production Tamper Operator, explicitly stated that such position would be subject to training, as well as a written test, and that ". . . those passing will be qualified according to their performance on safety, control, maintenance and quality of work." (Emphasis added.) Bulletin 175A's reference to "the new union agreement" makes clear that by the Bulletin the Claimant was merely appointed to take part in the training program established by Side Letter No. 10, and was not awarded a promotion governed by Rule 9 of the parties' Agreement.

There is no evidence supporting the Organization's assertion that the Claimant worked "on numerous occasions" as a Production Tamper Operator during 1998 and 1999; nor is there evidence that the Claimant ever operated a production tamper without supervision as of April 2000. To the contrary, the Carrier provided statements from trainer R. Evje establishing that Evje had worked with the Claimant on all Relief Production Tamper Operator duties up to April

2000, and that the Claimant required more training and had not yet taken the qualification test. With regard to the Claimant's three months' training in 1997, Evje stated, "After exposing [the Claimant] for three months to a [t]amping crew consist, he was not ready to be qualified. . . ."

Side Letter No. 10 explicitly states that those "... who complete this program will thereby establish seniority in the respective group/rank for which trained." (Emphasis added.) The Organization presented no evidence that the Claimant had completed the training program, or passed the qualifying test, by April 2000. Only by completing the program and passing the qualifying test could the Claimant have established seniority as a Production Tamper Operator. Rule 14(b) requires employees to place themselves on the list only for "those groups and ranks in which they are qualified." (Emphasis added.) Because the Claimant had not yet been qualified as a Production Tamper Operator, he was not entitled to place his name on the short-term vacancy list, and his inclusion on that list was an error.

Having been included on the list improperly, the Claimant was not entitled thereby to be called for any Production Tamper Operator short term vacancies, and the Board must deny the instant claim.

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 October 2006.