

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37999
Docket No. MW-36697
06-3-01-3-211**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to assign Truck Operator R. E. Crossley to the 6-ton plus truck operator position at Fort Worth, Texas beginning February 4, 2000 through March 1, 2000 and continuing and instead assigned junior employe H. Brown, Jr. (System File MW-00-85/1225298 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. E. Crossley shall now be compensated for the difference in pay between a truck operator and a Six (6) Ton Plus Truck Operator for all straight time and overtime hours worked by junior Employee H. Brown, Jr. on the aforesaid Six (6) Ton Plus Truck Operator position beginning February 4, 2000 through March 1, 2000 and continuing."

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.

In reviewing the record before us, we confined our analysis to only those matters of evidence and/or argument that were advanced by the parties during their handling of the dispute on the property.

The instant claim arose when a junior employee was awarded a 6-ton Plus Truck Operator position instead of the Claimant. It is undisputed that the junior employee had more than one year of actual experience with the loading, unloading, and operation of the Carrier's "long-haul" trucks while assigned to the Ft. Worth, Texas, track store. Although a statement from claimant in the record asserts that he "... drove them in the past . . .," this was refuted by Carrier records showing that he had no such prior experience. In the face of this irreconcilable conflict of evidence, we must find that the Organization and the Claimant have failed to sustain their burden of proof on the point of the Claimant's past experience.

The Organization contends that the Claimant had the requisite ability and merit to be awarded the position. The Carrier, to the contrary, contends that the junior employee "... knew the operation inside out." As a result, the Carrier maintains that it was within its right to judge the junior employee to have the sufficient ability and merit for the job.

While the claim and the Organization's appeal allege that some nine different Rules were violated by the Carrier's action, it did not contend that Rule 10(a) was one of them. Our review of the record shows that Rule 10(a) is the specific provision that controls over the more general Rules cited by the Organization. It reads as follows:

“Rule 10. (a) Promotion shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority shall prevail, the management to be the judge subject to appeal.”

According to the on-property Awards cited by the Carrier, Rule 10(a) has long been interpreted to recognize the Carrier's right to judge relative ability and merit when choosing between competing candidates for positions. The earliest Award cited by the Carrier that so interpreted Rule 10(a) was Award 59 of Public Law Board No. 279. That Award was issued in September 1962. Since then, the Rule has remained free of significant change that would signal a desire to overturn that interpretation. In addition, the Award used a “rational basis” test for reviewing management's judgment and upheld the judgment because there “. . . was some rational basis for the Management's decision. . . .”

The foregoing interpretation of long-standing was followed with approval in Third Division Award 31201 issued in November 1995. The dispute there involved facts startlingly similar to the instant dispute.

The Organization has not cited any on-property Awards that have applied Rule 10(a) differently.

Given the undisputed fact of the junior employee's greater ability and merit regarding the job responsibilities in question, we find that the Carrier had a rational basis for the decision that it made. Accordingly, we find that the Carrier's decision did not violate the Agreement.

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 25th day of October 2006.