

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38090
Docket No. MW-37240
07-3-02-3-225**

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 Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned junior employe P. Beck to the tamper operator position at Malden, Missouri beginning December 11, 2000 and continuing, instead of Mr. D. Ruark (System File MW-01-67/1259021 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Ruark shall now be compensated for four hundred ninety-six (496) hours' straight time pay and all overtime worked by Mr. P. Beck at the respective tamper operator's rate of pay during the period beginning December 11, 2000 through January 12, 2001 and compensated for all time assigned to junior employe P. Beck on the aforesaid tamper operator position beginning January 13, 2001 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.

The basic facts are not in dispute. Claimant D. Ruark's greater seniority as a Machine Operator was not the determining factor when the Carrier assigned P. Beck to a position operating a piece of on-track equipment ATS205J, which was a Jackson Model 6700 Auto Tamper/Switch. Beck had attended training on the tamper provided by the manufacturer in 1999. He had also successfully qualified as an Operator of the machine and was experienced on it. While the Claimant had approximately four weeks of experience operating the machine in January and February 2000, he was disqualified from it by letter dated February 3, 2000. Although his disqualification was predicated upon insufficient time on the machine due to medical reasons, the record contains a statement by the Carrier's supervisor describing how the Claimant had not demonstrated that he could effectively and efficiently operate the machine during the time of his assignment. As a result, the bulletin award in question went to the junior Beck instead of the Claimant.

The Organization advanced several contentions and cited a number of prior Awards in support of its position that the Claimant should have received the bulletin award. These contentions are based on general principals of seniority and the Awards are similarly directed. A careful review of the Awards, however, shows that none of them involve the same parties, facts, rules, and/or issues.

The Carrier, on the other hand, cited Awards on point from the property. Third Division Award 31201 recognized the application of Rule 10(a) to the kind of dispute involved here. Special Board of Adjustment No. 279 Award 267 restated the proper application of Rule 10(a) from Award 204 of the same Board.

Rule 10(a) which is entitled "Promotions" reads in full as follows:

"Promotions 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." (Emphasis added)

According to Special Board of Adjustment No. 279 Award 267, ". . . a claimant must show that the management acted arbitrarily or unreasonably and that is not shown by the mere fact that the Claimant that (sic) had greater seniority than the employee chosen."

It appears from the text of Special Board of Adjustment No. 279 Award 267 that the fact pattern involved there was strongly similar to the facts of the instant dispute. A junior employee who was a qualified operator of the specific type of tamper involved was chosen over two senior applicants for the bulletin. The Award suggests that both of the more senior applicants were actually qualified operators of other types of tampers.

Special Board of Adjustment No. 279 Award 267 was issued on February 6, 1989, which was nearly 12 years prior to the emergence of the instant claim. During those years, the record does not show that either the text of Rule 10(a) or its proper application was changed by the parties through collective bargaining. As a result, the determination of Special Board of Adjustment No. 279 must be viewed as having been accepted by the parties as the proper application of the Rule.

On the record before us, we find that the Carrier had genuine, rational reasons for determining that the Claimant's ability and/or merit were not equal to or greater than that of Beck. Accordingly, we have no proper basis for disturbing the Carrier's judgment or its selection of Beck for the bulletin award in question.

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 21st day of February 2007.