

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39322
Docket No. MW-37939
08-3-NRAB-00003-0030350
(03-3-350)

The Third Division consisted of the regular members and in addition Referee Robert E. Peterson 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 failed to assign Tie Gang 9163 employee S. Banks to a machine helper position on May 31, 2002 and continuing and instead assigned junior employee W. Christmas. (System File MW-02-87/1328350 MPR)
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Banks shall now be compensated for three hundred sixty (360) hours' pay at the respective straight time 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.

As stated above, the question for determination is whether the Carrier violated the terms of Agreement Rules when it passed over the Claimant and awarded or assigned a bulletined position of Machine Operator Helper on a dual spike driver to an employee junior in seniority to the Claimant. Although Part (1) of the claim says it is "continuing," Part (2) requests the Claimant be awarded 360 hours at the straight time rate of pay for the alleged violation.

Rule 19, Promotion governs the awarding or promotion of employees to bulletined positions. It reads in part here pertinent as follows:

- "(a) Promotion shall be based on ability, merit and seniority. Ability and merit being sufficient, seniority will prevail, the management to be the judge subject to appeal.
- (b) In the application of this Rule, the senior employee in the next lower classification within the sub-department will be given preference with due regard to their ability and merit in filling vacancies in higher classifications.
- (c) Employees entitled to promotion will be given consideration before hiring new men. Employees declining promotion will not lose their seniority.

Employees accepting promotion and failing to qualify within thirty (30) days may return to their former positions without loss of seniority."

The job functions of the Machine Operator Helper on the dual spike driver are described by the Carrier to be as follows:

"[The Dual Spike Driver] requires three (3) individuals to operate; the Machine Operator, the Machine Operator Helper and a Trackman (who feeds the spikes into the machine during production). Both the Machine Operator Helper and the Machine Operator's functions on this piece of equipment are essentially identical. Both control and

operate mechanisms on their respective sides of the machine (reciprocating driving guns), by which spikes are driven through the tie plates into the wooden ties. Both the Machine Operator and the Machine Operator Helper are responsible for maintenance and minor repairs to the Dual Spike Driver. The only distinguishable difference in their duties is that the Machine Operator controls the movement of the Dual Spike Driver traveling down the track. In the absence of the Machine Operator, the Machine Operator Helper also assumes those duties.”

It is the position of the Carrier that there has been no violation of Rule 19 or any other Rule. The Carrier contends that Rule 19 clearly gives it the right to judge ability and merit, as well as seniority, in promotions and establishment of new seniority, pending qualification.

In this latter regard, an August 8, 2002 electronic statement to Manager Special Projects Tausz from Track Supervisor J. Ramirez, who was said to have made the decision to award the position to Trackman Christmas instead of the Claimant, reads as follows when asked to comment upon the claim at issue:

“Mr. Christmas has been working the job on the spiker, and has been working the job.”

The Board will here note that study of the work assignments of Trackman Christmas show him to have worked on only four days as the Trackman Spiker on the dual spike driver (feeding spikes into the machine during production), i.e., March 19 and 21 and April 3 and 4, 2002. The bulletin advertising the position was posted on May 17 and at the time Trackman Christmas was awarded the assignment, May 28, 2002, he had been working as a Trackman.

Manager Special Projects Tausz subsequently offered the following rationale in a letter of August 27, 2002 to the Organization as the basis for a denial of the claim:

“As a result of my investigation into the merits of your claim, I have determined that the assignment of the position for which your claim for payment is made would have resulted in a promotion of either Claimant Banks or Mr. Christmas. At the time of the bulletin

assignment, neither employee held seniority in the class. The Carrier reserves the right to determine who will be assigned the position under these circumstances.”

Notwithstanding the above abbreviated and questionable statement of Track Supervisor Ramirez, and the claim having been denied by Manager Special Projects Tausz in a contention that the Carrier basically has an unfettered right to determine who will be assigned a position, the Carrier submits that some 65 days later, on November 1, 2002, at 8:05 P.M., Track Supervisor Ramirez dispatched a further electronic message to the Labor Relations section of the Maintenance of Way Department that reads as follows:

“Ray, confirming our conversation this morning, Mr. Christmas from the day that he was hired showed an interest of wanting to operate machines. Under supervision of other operators Mr. Christmas was allowed to operate various machines. Mr. Banks was reserved in the beginning and never expressed an interest in operating machines to me. It was not until Mr. Christmas was assigned as a helper, that Mr. Banks started to express an interest.”

In a letter of this same date, November 1, 2002, in denial of appeal of the claim to the Organization, Carrier’s Director Labor Relations - Maintenance of Way, averred that Track Supervisor Ramirez had “advised this office” as follows:

“[Both] claimant and Mr. Christmas were new hires which started as “extra-unassigned” Trackmen on Eastern District Tie Gang 9163 on the same date; February 27, 2002. Early on, Trackman Christmas expressed an interest in learning to operate various Tie Gang equipment, and commenced operating such equipment such as Tie Cranes, Spikers and Spike Pullers as early as March 8, 2002. Claimant Banks, on the other hand, expressed no such interest and worked solely as a Trackman except for one (1) instance on April 10, 2002, when he was compensated as an Anchor Applicator Operator.”

The Carrier letter of November 1, 2002 goes on to state:

“Accordingly, when Bulletin GSED02597 advertised Operator Helper (SDAG0103), Eastern District Tie Gang 9163 during the period May 17-27, 2002, and both Claimant and Trackman Christmas applied, Track Supervisor Ramierez determined that Christmas had already demonstrated his fitness and ability as Machine Operator Helper on the Spiker equipment in question. Claimant, on the other hand, who had expressed no interest and therefore never operated the equipment, had not. Therefore Trackman Christmas, as the senior qualified applicant, was assigned the position and established March 31, 2002 Eastern District Tie Gang Machine Operator Helpers’ seniority, pending qualification. (Emphasis as contained in the original letter.)”

Further, as concerns its selection of Trackman Christmas, the Carrier says that affording him the opportunity to work on and attempt to qualify on various Tie Gang on-track equipment once he had expressed the interest was consistent with its “Engineering Department Training and Testing Policy” which was developed in the SACP (Safety Assurance and Compliance Program) process through the collaboration of Carrier management, rail labor, and the FRA (Federal Railroad Administration).

In study of the SACP it is noted that the Introduction to such program contains a statement that reads: “This document should serve as a guideline for all Engineering Department employees with matters regarding training and testing but, in no way, supersedes or alters any collective bargaining agreements.”

While the SACP states management will work with those employees seeking advancement to obtain additional training, it further states: “Employees may request training by completing the Engineering Department Employee Training Request (Attachment A).” Nothing of record shows that Trackman Christmas was, in fact, subject to SACP when allegedly allowed to operate various track equipment or that he had filed an Attachment A request to obtain additional training. The Board thus finds it difficult to accept the Carrier’s argument that in affording Trackman Christmas the opportunity to work on and attempt to qualify on various Tie Gang on-track equipment once he had purportedly expressed the interest, that such actions were consistent with the SACP process.

It is the position of the Organization that the Claimant was willing, available and more than fully qualified to perform all aspects of the above mentioned work, but was not afforded the opportunity to do so. It thus says the Claimant was deprived of valuable seniority rights along with the inherent monetary benefits.

The Organization says that if it was to be held that the Carrier had an unfettered right to select any employee it chose for assignments or promotion there would be no need for seniority Rules.

Further, the Organization says that the Carrier has not presented a single shred of probative evidence that Claimant Bank's ability and merit were not sufficient, and that a Carrier Bulletin Inquiry Screen Print showed all six candidates who placed bids for the Machine Operator Helper position to be "Qualified." Consequently, the Organization says, the Claimant having been the senior qualified applicant for the position was entitled to it in accordance with Rule 19.

In view of the above considerations, the Board is not persuaded that because Trackman Christmas is said to have been provided or allowed work opportunities to operate certain machines and had worked four days as a Trackman feeding spikes into the dual spike driver, that this constitutes sufficient reason to conclude that he had a right to move ahead of the Claimant for the position of Machine Operator Helper here at issue.

As concerns compensation for the violation, the Board finds that the Claimant be allowed, as claimed, 360 hours at the straight time rate of the position of Machine Operator Helper, less any and all compensation meantime received during the period of time at issue.

AWARD

Claim sustained in accordance with the Findings.

**Form 1
Page 7**

**Award No. 39322
Docket No. MW-37939
08-3-NRAB-00003-0030350
(03-3-350)**

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 29th day of September 2008.