

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39706
Docket No. MW-38738
09-3-NRAB-00003-050149
(05-3-149)**

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 Machine Operator S. Viator to the tamper position advertised in Bulletin No. GKIV02776 on January 9, 2004 and instead assigned junior employee C. Harvey (System File MW-04-68/1397762 MPR).**
- (2) The Agreement was again violated when the Carrier failed and refused to assign Machine Operator S. Viator to the tamper position advertised in Bulletin No. GKIVO2794 on February 6, 2004 and instead assigned junior employee P. Peveto (System File MW-04-83/1393987).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant S. Viator shall now be awarded the aforesaid tamper position assignment and he shall be compensated for the difference in pay between what he earned and the compensation for all hours, both straight time and overtime, worked by the junior employees on said position beginning January 9, 2004 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 instant case involves two claims arising out of two separate instances where the Carrier advertised the position of Tamper Operator, and, on both occasions, assigned the positions to Machine Operators junior to the Claimant. The Carrier contends that the first assignment was cancelled so that claim is now moot.

In both cases, the Organization asserted that the Claimant had the skill and ability to operate the tamper and should have been afforded time to qualify on the machine. The Organization asserted that the Carrier's actions violated Rule 1, Seniority Datum, Rule 2, Seniority Rights and Rule 10, Force Reduction, of the parties' Agreement. The Carrier responded that the situation was governed by Rule 20(b) which states, "When vacancies advertised under this Rule are not filled by reason of no bids from qualified employees, the position will be filled by (1) appointment of the junior unassigned qualified employee in that classification. . . ." The Carrier contended that the Claimant did not hold the appropriate qualifications to perform the duties of the position and had not qualified as a Tamper Operator. The Carrier concludes that its assignment of the junior employee was justified because merit and ability were not equal.

Our review of the on-property handling in this matter convinces us that this claim must be denied. Well-established precedent dictates once the Carrier stated that the Claimant lacked the qualifications to perform the position at issue, the

burden of proof shifted to the Organization to demonstrate, by sufficient probative evidence, that the Carrier's assessment was incorrect. The Organization made general assertions, both in the on-property handling and before the Board, that the Claimant had the skill and ability to perform the duties of the position, but, as stated in Third Division Award 36902, such assertions do not satisfy the Organization's burden to prove that the Claimant possessed the necessary training and qualifications for the position. While the Carrier pointed to the specific training and experience possessed by the junior employee who received the assignment that went forward, the Organization never stated that the Claimant had been trained on, and possessed the necessary qualifications to operate this particular tamper. Indeed, by asserting, in its Submission to the Board, that the Carrier committed an additional Agreement violation by denying the Claimant's requests to attend tamper training while granting such requests by junior employees, the Organization tacitly concedes that the Claimant was not trained and qualified.

There has been no sufficient rebuttal by the Organization to the Carrier's position that its action was justified because the Claimant lacked the requisite qualifications for the position. Therefore, the claim must be denied.

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 26th day of May 2009.