

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40489
Docket No. MW-39535
10-3-NRAB-00003-060307
(06-3-307)**

The Third Division consisted of the regular members and in addition Referee Daniel F. Brent when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern 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 Mr. S. Lawler to a machine operator position on the Plasser MDZ-2000 Tamper and instead assigned junior employees J. McGowan, P. Hillicker and P. Kershaw [System File C-05-S092-1/10-05-0179(MW) BNR].**
- (2) The Agreement was further violated when the Carrier failed and refused to assign Mr. J. Stewart to a machine operator position on the Plasser MDZ-2000 Tamper and instead assigned junior employees J. McGowan, P. Hillicker and P. Kershaw [System C-05-S092-2/10-05-0180(MW)]**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant S. Lawler shall now ‘. . . be assigned to an MDZ Machine Operator position immediately, paid for all time worked by the junior employees assigned to the MDZ Machine, including difference in rate of pay and overtime, beginning May 2, 2005, and continuing until the violation is corrected. I am also requesting the time lost on the MDZ Machine Operator position, account of this violation, be credited to the Claimant for determination of his bonus payment and for**

credit for prior experience on the MDZ Machine Operator position. . . .’

- (4) As a consequence of the violation referred to in Part (2) above, Claimant J. Stewart shall now ‘. . . be assigned to an MDZ Machine Operator position immediately, paid for all time worked by the junior employees assigned to the MDZ Machine, including the difference in rate of pay and overtime, beginning May 2, 2005, and continuing until the violation is corrected. I am also requesting the time lost on the MDZ Machine Operator position, account of this violation be credited to the Claimant for determination of his bonus payment and for credit for prior experience on the MDZ Machine Operator position. . . .’”

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.

Claimants S. Lawler and J. Stewart filed the instant claims contending that the Carrier improperly failed and refused to assign them to a Machine Operator position on the Plasser MDZ-2000 Tamper, instead assigning the work to junior employees. According to the Organization, there was no objective reason for bypassing or disqualifying the Claimants in the evidentiary record or communicated to the Organization, which contends that the Carrier must demonstrate persuasively that the senior employees cannot perform the disputed work.

It was uncontroverted in the evidentiary record that junior employees were assigned work as Machine Operators on the Plasser MDZ-2000 Tamper, at which time the Claimants were assigned as trainees. Although there are exceptions to seniority as the determining factor for assignment of work set forth in the Agreement, the Carrier must contact the General Chairman when senior employees are not selected for available work, and communicate "objective reasons" for their non-selection. This standard requires a showing that the senior employees cannot do the job. No such showing was made in the instant situation. Consequently, Claimants S. Lawler and J. Stewart, who had previously performed similar duties, were improperly deprived of work opportunity on the MDZ machine.

To the extent that they did not work on the date and times in question, the Claimants shall be paid the difference in rate of pay and overtime pay that they would have received had they properly been assigned to the tamper on the dates covered under the instant case commencing on May 2, 2005. Moreover, the Claimants shall be credited with the time lost on the MDZ Machine Operator position caused by this violation for purposes of determining their bonus payments and for credit for prior experience on the MDZ Machine Operator position.

AWARD

Claim sustained.

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 15th day of June 2010.