

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40581
Docket No. MW-39012
10-3-NRAB-00003-040479
(04-3-479)**

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 Division -
(IBT Rail Conference
(
(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 Mr. P. Seiber to the tamper position advertised in Bulletin GCEN03531 effective April 4, 2003 and instead assigned junior employe J. Beasley (System File MW-03-308/1373651 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Seiber shall now be awarded the aforesaid tamper position assignment and compensated for all straight time and overtime hours worked by the junior employe on said position beginning April 4, 2003 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. A Machine Operator position was bulletined to operate a Jackson 6700 Tamper to be headquartered in El Reno, Oklahoma. The position was awarded to a person who had less Trackman seniority than the Claimant. The Claimant had approximately eight months of Trackman seniority and approximately five months as a Welder. The Claimant was working as a Welder at the time and did not have Machine Operator seniority. The Claimant had never operated the tamper. The junior employee had only approximately 45 days of service with the Carrier when he was awarded the Machine Operator position. However, he had operated same model tamper with the Fort Worth Service Unit immediately prior to the bulletining and was deemed to be qualified on the machine. The junior employee also performed well upon assuming the awarded position.

The Machine Operator position paid an hourly rate of \$18.70 at the time of the bulletin and, thereafter, during the development of the record on the property. The Claimant earned a rate of \$19.19 as a Welder during the relevant timeframe.

In addition to the foregoing, this dispute is moot to a certain degree. The Claimant was dismissed from all service for misconduct on November 25, 2003. His dismissal was upheld by Award 35 of Public Law Board No. 6402.

Although the Organization alleged that several Rules were violated by the Carrier's award of the position to the junior employee, our review of all but one does not show they are relevant to the issues in dispute. The Rule that governs the instant dispute is Rule 19, which reads, in pertinent part, as follows:

"PROMOTION

Rule 19(a). Promotions will 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.”

Prior Awards have held that the Carrier has the right to determine employee qualifications as long as its rationale is not shown to be an abuse of discretion. The instant record does not contain any evidence to rebut the evidence upon which the Carrier determined the junior employee to be qualified.

In addition, given the fact that the Claimant was in the higher paying classification of Welder at the time the position was bulletined, the record fails to establish that the Claimant’s situation fit the provisions of Rule 19(b).

Given the state of the record before the Board, we are compelled to find that the alleged violation of the Agreement has not been proven.

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 27th day of August 2010.