

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23179
Docket Number MW-2318

John J. Mikrut, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(The Belt Railway Company of Chicago

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when Laborer Daniel Gudino was used to operate a power tamper beginning September 18, 1978 instead of using Claimant Victor Sanchez who was available to perform such service (Carrier's File 450-MofW).

(2) As a consequence of the aforesaid violation, Claimant Sanchez shall be allowed pay at the Power Tamper Operator's appropriate rate for a number of hours equal to the total expended by Laborer Gudino in performing such work beginning September 18, 1978 and continuing until said violation is discontinued."

OPINION OF BOARD: On September 18, 1978, Carrier assigned D. Gudino, a Laborer, seniority date March 13, 1978, to operate the Power Tamper. Said work, which was a higher rated job than regular Laborers' work, was only to be a temporary assignment and thus, in accordance with Rule 13 of the parties' Agreement, it was not bulletined.

On October 9, 1978, a claim was filed on behalf of V. Sanchez, also a Laborer, seniority date October 5, 1954, alleging that he was improperly denied the opportunity to perform the Power Tamper Operator work. According to Organization, Claimant holds seniority as a Power Tamper Operator dating from April 1, 1976, having successfully bid on and been assigned to perform such work on a temporary basis on four (4) separate occasions previously.

Organization's position in this instant dispute is that Claimant had superior seniority to Employee Gudino; was available and fully qualified to operate the power tamper; and, Carrier's failure to assign Claimant to perform power tamper work was in violation of "Rule 17-Filling Non-Bulletined Positions" which reads:

"Consideration in filling preferable positions in regard to location or otherwise, not bulletined, will be given to senior employees."

Organization further contends that Rule 17 is clear and unequivocal and that the disputed position is a preferable position as contemplated by said Rule (First Division Award No. 15128; Third Division Awards 11959, 2716, 6136, 14491 and 17559). Continuing, Organization also argues that Carrier's allegation that Employee Gudino was the "most qualified" employe is irrelevant because, according to Organization, Rule 17 contemplates only "sufficient ability" (Third Division Awards 2638, 5857, 11279 and 14762) and Claimant's ability to operate a power tamper has never been questioned by Carrier (Third Division Award 6892 and Second Division Award 3776).

As its initial contention, Carrier argues that Organization's "claim should be denied because it has been modified and is a new claim." Accordingly, Carrier maintains that "(T)hroughout the handling on the property, the Union consistently claimed eight (8) hours pay for each work day, at the straight time rate, including overtime work," but "(I)n their submission, the Union now claims pay for a number of hours equal to the total expended by Laborer D. Gudino."

In addition to the foregoing, Carrier also maintains that Organization erroneously contends that Claimant has seniority as a Power Tamper Operator as of April 1, 1976, and that the parties' "Agreement requires Carrier to bulletin these various Machine Operator positions when there is work for such equipment." According to Carrier, the use of road equipment is usually irregular and intermittent work and "(I)t has been a long standing practice...for Supervision to simply 'assign' the most qualified and senior employee to the machine." Carrier further maintains that Claimant was not assigned to perform tamper work because, though assigned in previous years, "he failed to demonstrate that he had any proficiency or could meet standards of production," and "he had been repeatedly warned about his rough handling of the Power Tamper resulting in unnecessary and costly repairs having to be made."

As its final series of arguments Carrier contends that: (1) the current Agreement does not require the bulletining of jobs such as that which is involved in this instant dispute; (2) that seniority accrues to an employe on the basis of longevity within the higher rated classification and not within the sub-classification such as "power tamper operator"; and lastly (3) Organization is seeking to amend the existing Agreement by Board award rather than by the "appropriate procedure prescribed by the Railway Labor Act."

Having carefully read and studied the complete record in this dispute, it becomes quite apparent to this Board that neither party is without some degree of error in their argumentation regarding both the merits of this case as well as various of the procedural irregularities which have alleged. Of the numerous arguments which have been proffered, however, only those which are significant and which have a major bearing upon the resolution of this dispute will be discussed. In this regard, only two (2) of the procedural questions warrant comment. The first is Carrier's contention concerning Organization's alleged modification of its initial claim; and the second is Organization's contention that Carrier did not raise the issue of Claimant's alleged mistreatment of equipment when the dispute was handled on the property.

Regarding the first of these two (2) questions, the Board can find no serious procedural defect which would serve to constitute a waiver for the consideration of Organization's basic claim. Indeed, though Organization did restate the "remedy" portion of its claim, such restatement did not change either the essence or the rationale of the claim itself, and, moreover, if there was any change, it was merely a matter of form rather than substance (Third Division Awards 6645, 13229 and 20024). Insofar as the second of the two (2) issues is concerned, the Board concurs with Organization's contention that Carrier failed to raise the issue of Claimant's alleged improper handling of the power tamper when the dispute was discussed on Carrier's property; and, hence, said contention is not a proper matter for consideration by this Board and will be disregarded (Third Division Award 20841). A careful reading of the record in this matter clearly supports this conclusion since the evidence demonstrates that the issue of Claimant's alleged inability to properly operate the power tamper was raised by Carrier for the first time in its written Submission; and prior to that time, the thrust of Carrier's argument was limited to the assertion that "Laborer D. Gudino was the most qualified to work the Power Tamper Machine..." (Carrier's Exhibit No. 5, p. 2).

Having disposed of the significant procedural issues which have been raised in this matter, our attention now turns to the merits of the dispute itself. In this regard, the fact that the award in this instant dispute could potentially affect, either directly or indirectly, several critical contractual issues, is a consideration which has not been viewed casually by this Board. This factor is of particular concern since there are many critical elements which have not been addressed by the parties in their respective arguments, and, more importantly, as a general proposition, such determinations are best resolved by the parties themselves through direct negotiations rather than through any form of outside intervention. Be this as it may, however, there is a dispute before us which must be resolved; the basis for the resolution does appear to be grounded within the terms of the parties' existing agreement; and,

given the aforesated concerns, the Board will endeavor to effectuate a decision within the narrowest frame of reference as possible.

Returning again to the record, Claimant was an employe with some twenty-four (24) years seniority with Carrier, and since 1975 he has been assigned to operate the Power Tamper on four (4) separate occasions. Although Carrier now alleges that said power tamper work was performed improperly, the record shows that Claimant was neither disciplined or counseled regarding this particular job performance, and, as was noted previously, Carrier did subsequently reassign Claimant to perform said work on four (4) occasions. The record also shows that Employe Gudino, who was assigned by Carrier to perform the disputed power tamper work, has a seniority date as Laborer since March 13, 1978, but did work previously for Carrier in 1974.

Carrier contends that "...it has been a long standing practice...for Supervisors to simply 'assign' the most qualified and senior employe to the machine" (Emphasis added by Board). This Board can find no evidence whatsoever in the existing record which would support this contention. Without any probative or substantive evidence to demonstrate otherwise, Carrier's assertion, simply stated, lacks credibility. More significantly, however, a careful examination of the applicable language of the Agreement at no time even hints that the very rigid criterion of "most qualified" is the necessary evaluative standard which is to be applied in these particular types of situations. Said language merely speaks of the more common of ability applications such as "sufficient" ability, and thus this Board sees no reason to direct an award which not only appears to be in conflict with the existing Agreement, but one which also appears to be significantly divergent from commonly held standards currently in existence within our system of labor/management relations (Third Division Awards 13928, 14491 and 14583). Furthermore, this Board is quite confident that had the parties wished to be bound by the extremely restrictive type of language such as that which Carrier suggests herein, then the parties would have undoubtedly seen fit to express that desire in as explicit and unambiguous a manner as possible.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained; Claimant will receive the difference in pay between his rate of pay as a Laborer and the rate which he would have received had he been assigned to operate the Power Tapper. Said difference shall be calculated from September 18, 1978, up to and including the particular date upon which the disputed assignment was completed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 18th day of February 1981.