

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36218
Docket No. MW-35687
02-3-99-3-628

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior employe T. Jones to operate a Class One crane beginning May 28 through June 20, 1996, instead of assigning senior Machine Operator T. D. Petty (System Docket MW-5177).
- (2) As a consequence of the violation referred to in Part (1) above, Machine Operator T. D. Petty shall now ‘ . . . be made whole for the difference in wages during the period of May 28, 1996 through June 20, 1996. Additionally, all lost credits and/or benefits must be included. ***”

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.

On Rail Gang 320, a temporary position on a Gallion crane was established from May 28 through June 20, 1996. This carries a higher wage rate than that of Class 1 Machine Operator, the classification of the Claimant and the employee assigned to the position. There is no dispute that the Claimant was the senior employee and should have been offered the temporary position on the Gallion crane.

The remaining dispute is whether the Claimant was offered the position. The Carrier states that the Claimant was offered the position and refused, as memorialized by a note from the Rail Train Engineer, which stated in part as follows:

"I Ernie Smith and Chester Craque asked (the Claimant) to run a Crane. He was at the time running a Portec Anchor Applicator. He said he would rather continue operating the same machine. . . ."

The Claimant responded with the following note:

"I . . . at (no) time did I refuse to run the Class One crane (which) Mr. Smith said I did. He lied about that because he did not even ask if I wanted the job. He just put whomever he want in the crane. . . . I ask (Assistant Foreman) Willie Jordan how come I wasn't ask to run the crane and he said he told Mr. Smith that I was the next senior man for the job. And Mr. Smith said we'll leave him on the Portec, because we don't have anyone else to run the Portec Mach."

At first impression, this would appear to be an irreconcilable difference as to the facts. The Board, however, finds sufficient basis to accept the Claimant's version. The Rail Train Engineer's note was introduced into the record two years after the event. It includes a date of "May 28, 1996" (the date the temporary position commenced), but this date appears to be in a different handwriting.

Further, the Carrier had the opportunity to confirm or dispute the alleged statement of the Assistant Foreman, as related by the Claimant, but did not do so. In addition, there was no confirmation from the other employee whom the Rail Train Engineer stated was present when the offer was allegedly refused.

The Carrier repeatedly (and accurately) reminds the Board, in this and other instances, that the burden for proving a Rule violation rests with the Organization.

However, where the Carrier on its own initiative offers information in support of its action, the burden of proof shifts. Such affirmative defense must be convincing to be accepted. Here, the Carrier introduced the Rail Train Engineer's statement; when challenged, the Carrier did not or was not able to corroborate the Rail Train Engineer's allegation.

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 24th day of September 2002.