

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 36902  
Docket No. MW-36331  
04-3-00-3-527

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(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 assigned the tamper operator position on Gang 2277 by Bulletin No. 2008 to junior employee S. S. Calhoun on May 3, 1999 instead of Machine Operator A. Young (System File MW-99-250/1197700 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Young shall now be assigned the aforesaid tamper operator position and compensated at the applicable time and one-half rate of pay for any and all overtime worked on said position beginning May 3, 1999 and continuing and all other compensation he may have received on such dates.”

**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 substance of this fitness and ability dispute was stated by the Organization when it presented its initial claim by letter of June 10, 1999. The Organization asserted that on May 3, 1999, a bulletined position to operate a Tamper was assigned to a junior Machine Operator. The Organization alleged that the Carrier ran around the Claimant even though the Claimant had more seniority; was qualified to operate a tamper; had a certificate proving he was trained to operate the a tamper, and was previously assigned to tamper operations on the former Lafayette Division. The Organization asserts that in this instance, the Carrier violated the Claimant's seniority rights (Rules 1 and 2) and failed to assign the most qualified bidder (Rules 10 and 11).**

**The Carrier's response throughout this claim was that the bulletin required a qualified operator of the Jackson 6700 Tamper. The Carrier maintained that the Claimant was qualified on a Fairmont Tamper and not a Jackson 6700 Tamper. Accordingly, because the junior employee had received training on the Jackson 6700 Tamper and the Claimant had not, the Carrier made the proper assignment under the Rules.**

**In line with consistent determinations made over many years, the Board finds that once the Carrier stated that the Claimant lacked the fitness and ability for the position, the burden of proof shifted to the Organization to demonstrate by sufficient probative evidence that the Carrier's actions were in error. We carefully looked for such proof throughout this record. The May 12, 1999 letter from the Claimant does not say he was qualified to operate the Jackson 6700 Tamper. We find no supporting documentation that these machines are similar or alike, nor any evidence to prove that operating the Fairmont Tamper makes the Machine Operator qualified to operate the Jackson 6700 Tamper.**

**During the final steps the on-property handling, the Carrier points out that the junior employee qualified on Jackson Tampers in February 1996, while the**

Claimant qualified subsequent to the date of this claim, on September 3, 1999. There is no evidentiary rebuttal beyond repetitive assertions from the Organization that the Claimant was qualified. Assertions are not proof that the Claimant had the qualifications for the bulletined positions. It is incumbent upon the Organization to prove that the Claimant had the training and qualifications to operate the Jackson 6700 Tamper. Failing to refute the Carrier's position that the Claimant lacked qualifications, there is no evidence to demonstrate that the Carrier's determination was defective. 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 25th day of February 2004.**