

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 37700  
Docket No. MW-38013  
06-3-03-3-448

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(National Railroad Passenger Corporation (Amtrak) –  
( Northeast Corridor

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier awarded a swivel dump truck driver position (Advertisement No. 206-NET-0901) to junior employee R. Winslow effective October 1, 2001 and then to junior employee J. Kennedy by Correction of Award Notice dated October 3, 2001, instead of Mr. S. Paprocki (System File NEC-BMWE-SD-4188 AMT).
- (2) As a consequence of the violation referred to in Part (1) hereof, Claimant S. Paprocki shall be compensated for all lost time that he would have earned if he was awarded the aforesaid advertisement correctly, beginning October 1, 2001 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.**

**This claim protests the Carrier's failure to award the Claimant the Swivel Dump Truck Driver position on Rock Cut Excavation Gang S041 effective October 1, 2001 as a violation of Rules 1, 2 and 3 of the Agreement.**

**Relevant facts establish that Advertisement 206-NET-0991 for the Swivel Dump Truck Driver position in issue was posted on September 10, 2001 and contained a qualification requirement on that piece of equipment. The Claimant applied for the position. Neither his qualification card nor the Carrier's records indicated that he had any qualification as a Swivel Dump Truck Driver. The position was awarded to a junior employee with such qualification by notice of September 25, 2001. A corrected award notice was issued on October 3, 2001 designating a different employee who was still junior to the Claimant to the position. On October 1, 2001 the Claimant informed the Carrier that he should have been awarded this position and that he had driven a swivel dump truck in 1982 for two years. The Claimant's qualification card was stamped with his grapple truck qualification, the position he held at the time, but had no similar indication that he had ever been qualified in swivel dump truck operation. The Carrier agreed to permit the Claimant to demonstrate his proficiency, and he passed the test doing so on October 10, 2001, at which time the Carrier allowed the Claimant to displace onto the position. The Swivel Dump Truck Driver position in issue was abolished effective November 1, 2001. This claim seeks all lost time the Claimant would have earned had he been awarded the position effective October 1, 2001.**

**The Organization argues that it was the Carrier's failure to properly maintain its records that was the cause for the Claimant being denied the job posting to which his seniority entitled him under Rule 1. The Organization notes that in its October 8 claim it provides a written statement from an employee who witnessed the Claimant driving the swivel dump truck in 1982 as well as the name of the Foreman who supervised him on that position, but the Carrier failed to adequately check these sources and required the Claimant to once again**

demonstrate his proficiency, which he was able to do when given the opportunity. The Organization asserts that the Claimant was denied his valuable seniority right, citing Third Division Awards 2994, 20310 and 24480 among others, and should be granted a monetary make whole remedy for any resulting loss, relying on Third Division Awards 9395, 19814, 25601, 27335 and 29816.

The Carrier contends that for over 19 years the Claimant failed to keep his qualification card accurate or to take issue with the fact that his swivel dump truck qualification was not listed on the document relied upon by it to assess qualifications. It asserts that it cannot be faulted for not immediately awarding the Claimant the position in the absence of any listing that he had such qualification, and notes that it did not unduly delay in permitting him to demonstrate his proficiency and displace onto the position once he had established his qualification, despite his waiting many days after the award of the position to request such review. The Carrier argues that it is its prerogative to determine fitness and ability of an employee for a position, and once it has determined that such is lacking the burden shifts to the employee to establish his fitness and ability, citing Third Division Awards 26433, 27709, 31998 and 34983. The Carrier contends that it should not be penalized monetarily for the Claimant's failure to maintain a record of his qualifications, relying on Third Division Award 20203 and First Division Award 11772, and posits that the Organization failed to establish that the Claimant suffered any loss in compensation because he was working in a similarly rated classification, citing Third Division Awards 28311, 32008 and 36046.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of proving that the Carrier violated Rules 1, 2 or 3 by denying the Claimant the Swivel Dump Truck Driver job advertisement effective October 1, 2001. When the job was awarded there were no records establishing that the Claimant was qualified as a Swivel Dump Truck Operator. The Claimant waited from the time of the job award posting on September 25 to its effective date on October 1, 2001 to come forward and assert that he was qualified, but could not prove the assertion that he had performed that work in 1982 by his qualification card, relied upon by the Carrier and updated and maintained by the employee for this very purpose. While the Claimant had stamped on his qualification card that he had grapple truck qualification, he had no similar indication for the swivel dump truck. It was his responsibility to assure that his qualification card was accurate,

and his failure to object to the absence of the swivel dump truck qualification for 19 years cannot form the underlying basis of assessing blame on the Carrier for the absence of this qualification from its own records. In this case, once the Claimant requested the opportunity to demonstrate his qualifications, he was permitted to do so within a reasonable period of time and the Carrier allowed him to displace onto the disputed position on October 10, 2001. The Organization has not shown that the Carrier abused its discretion in making its initial award to a junior employee who had established the necessary qualification. See Third Division Awards 31998 and 34983. Nor has it established that the Carrier unduly delayed in permitting the Claimant the opportunity to establish his proficiency. For all of these reasons, as well as the fact that no loss of earnings has been established on this record, the claim must fail.

**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 30th day of January 2006.