

PUBLIC LAW BOARD NO. 2960

AWARD NO. 84
CASE NO. 121

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employees

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned junior Class A machine operators as Jackson 7000 operators per Bulletin No. 346 instead of assigning Class A Operator M. Whitaker. (Organization File 9T-4141; Carrier File 81-84-17).
- (2) Claimant M. Whitaker shall be assigned to Bulletin No. 346 and compensated for all wage loss suffered from August 19, 1983 until such time that the proper assignment is made.

OPINION OF THE BOARD

This Board, upon the whole record and all of the evidence, finds and holds that the Employee and Carrier involved in this dispute are respectively Employee and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

The Claimant, M. Whitaker, holds seniority as a Class A machine operator dating from March 31, 1980. Mr. Corral has Class A seniority from August 4, 1980, and Mr. Ramirez has Class A seniority from August 21, 1980. In August 1983, Bulletin No. 346 advertised two (2) Class A

machine operator positions (the Jackson 7000 Tamper Operator) for which the Claimant, Mr. Corral and Mr. Ramirez submitted application. On August 19, 1983, the Carrier, notwithstanding the fact that Mr. Corral and Mr. Ramirez were junior to the Claimant, assigned them to the Class A operator positions.

The claim is based on Rule 4-C which reads:

"Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company."

The Union contends it is undisputed and an undisputable fact that the Claimant holds superior seniority as a Class A machine operator as between himself and Messrs. Corral and Ramirez. Moreover, in their opinion, Rule 4(c) provides that seniority entitles employees to consideration for positions in accordance with their relative length of service with the Carrier. Accordingly, the assignment of junior employees Corral and Ramirez to the positions of Jackson 7000 operators instead of the Claimant was clearly in violation of Rule 4(c).

The Carrier argues that the Claimant's lack of qualifications demonstrated by 1) the fact that the Claimant was disqualified as the operator of the 6500 Jackson Tamper without protest through the Union and 2) the fact that in June 1983 a junior employee was assigned to the Torsion Beam Tamper in lieu of the Claimant again without protest. This is significant because in the Carrier's opinion, all of the Jackson Tampers are considered Sophisticated (Class A) machines and are technically and operationally similar. Moreover, they note that while the Jackson 7000 Tamper does have a helper position, the machine can be operated with only one operator, and is often done so when the helper is not available. The Carrier also requires the helper to be qualified

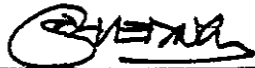
to operate the machine alone. They also assert that the applicable rules place the burden upon the Claimant to demonstrate that he is qualified. To date, they contend he has not done so as there is no evidence in the record to indicate that the Claimant was qualified. Failing to affirmatively show this, the Claimant has failed to meet his obligation under the rule.

The Union counters that the absence of a protest to incorrect assignments does not demonstrate acceptance of disqualification as ascertained by Mr. Johnson. They suggest Claimant Whitaker did not jeopardize his Class A seniority by not protesting the incorrect assignments as machines are divided into categories. Also, past practice dictates that an employee does not have to protect his Machine Operator seniority the same as other seniority classes.

The Board agrees that failure to protest a previous assignment does not per se demonstrate lack of qualification. However, in this case it is the opinion of the Board that the circumstances as a whole are insufficient to support the contention that the Claimant was qualified at the time of his application to operate the 7000 Jackson Tamper. These circumstances include the similarity of the machines and the settlement the Claimant made through the Equal Employment Opportunity Commission on his 6500 Jackson Tamper. The settlement which gave the Claimant an opportunity for training on the Tamper implicitly acknowledges his lack of qualification on at least this machine.

AWARD

In view of the foregoing, the Claim is denied.



GIL Vernon, Chairman



H. G. Harper, Employee Member



J. D. Crawford, Carrier Member

Dated: May 8, 1985