

**PUBLIC LAW BOARD NO. 7201
CASE NO. 5**

PARTIES TO THE DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(and
(
(Soo Line Railroad Company (former Chicago,
Milwaukee, St. Paul and Pacific Railroad
Company)

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

- (1) The Carrier violated the Agreement when it failed and refused to allow Group 2 Machine Operator J. L. Pedro to displace junior employe J. Everhart on August 24 and 27, 2001 (System File C-31-01-C060-19/8-00219-085 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. L. Pedro shall now be compensated for a total of sixteen (16) hours' pay at the applicable straight time rate of pay."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

Claimant J. L. Pedro has established and holds seniority as a Group 2 Machine Operator in the Engineering Services Equipment and Machine Subdepartment, dating from September 16, 1992. On the dates giving rise to the instant dispute, Claimant was regularly assigned to the position of Group 23 Machine Operator operating a slave tamper on a surfacing crew supervised by Foreman J. Campbell. Employee J. Everhart has established and holds seniority as a Group 2 Machine Operator. It is uncontested that Everhart is junior to Claimant.

On Thursday, August 23, 2001, Claimant was advised that he was being displaced from his Machine Operator position by a senior employee effective at the end of that work day. At that time, Claimant contacted the office of Senior Staffing Representative G. Hugo to determine where he could immediately exercise his seniority to continue earning his income. According to Claimant, Claimant informed Mr. Hugo of his desire to displace a junior machine operator working on the Latta Subdivision in Indiana, effective the following work day, Friday, August 24, 2001. Claimant contends that Mr. Hugo was uncertain as to whether that gang was still working. Claimant was instructed to call back on the following day. When Claimant did so, Mr. Hugo indicated that he would call Claimant back with the information, but did not return the call. When Claimant called back on Monday, August 27, he was eventually told by Mr. Hugo's assistant that he could bump the following day, August 28. Claimant did eventually assume the position on the Latta Subdivision on August 28.

According to the Organization, the Carrier violated the Agreement when it denied Claimant the opportunity to bump to the position on the Latta Subdivision on August 24 and August 27. He should have been given the opportunity to bump as of August 24 and when he was not so allowed, lost 2 days of pay. Claimant was the senior employee and was entitled to obtain the work in question. As a remedy, the Organization claims that Claimant should be compensated for the 16 hours at the applicable straight time rate for each day.

Conversely, the Carrier provided a statement from Mr. Hugo indicating that Claimant contacted him on August 23, 2001 inquiring about his options to work for a few days. Mr. Hugo stated that he advised Claimant of all junior employees working and positions that would meet his request. Claimant wanted time to consider his options. According to Mr. Hugo, Claimant called back on August 24, 2001 and again was advised of junior employees working and continued to consider his options. Not once on either day did Claimant advise Mr. Hugo of his desire to displace any employee including Mr. Everhart. According to the statement of Mr. Hugo, Claimant simply could not make up his mind. According to the Carrier, inasmuch as Claimant could not decide on a position, he was not entitled to a displacement until Monday, August 27, 2001. Once decided, Claimant affirmatively made his displacement for August 28, 2001. Local Chairman Gibbons was not present during any of the conversations between Claimant and Mr. Hugo.

The Carrier takes the position that the Organization cannot meet its burden of proof and that Claimant is not entitled to the work in question. According to the Carrier, Claimant did not assert his displacement rights until August 28 when he was granted the relevant position. Had he asserted this position earlier, he could have been granted said position. Therefore, the Claim should be denied. The Carrier stresses that the burden in this matter is on the Organization and the Organization cannot meet that burden of proof. Further, there is an irreconcilable

dispute of fact in this case and this Board is therefore unable to resolve said dispute. Thus, in the alternative, the matter must be dismissed.

After a review of all the relevant evidence, this Board finds that the Organization has been unable to meet its burden of proof. The burden of proof in this matter falls to the Organization to prove that Claimant should have been awarded the position on the Latta Subdivision on August 24 and 27. It is clear that the facts provided by Claimant and those provided by Mr. Hugo are directly opposing to one another and thus, there is an irreconcilable dispute of fact. When such a dispute occurs, the Board has no choice but to dismiss the matter. *See Third Division Awards 35855, 35497 and 33951.* The Claim is dismissed.

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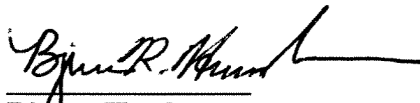
AWARD

Claim dismissed.

**Steven
Bierig**

Digitally signed by Steven Bierig
DN: cn=Steven Bierig, o,
ou=Attorney- Arbitrator-
Mediator,
email=arb438@comcast.net,
c=US
Date: 2010.06.14 16:21:45 -05'00'

Steven M. Bierig
Chairperson and Neutral Member


Bjarne Henderson
Carrier Member


Roy Robinson
Organization Member

Dated at Chicago, Illinois this 14th day of June 2010.