

**NATIONAL MEDIATION BOARD
SPECIAL BOARD OF ADJUSTMENT 1049**

Brotherhood of Maintenance of Way Employees)	
Division – IBT Rail Conference)	
)	Case No. 253
And)	
)	Award No. 253
Norfolk Southern Railway Company)	
(Former Southern Railway Company))	
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Richard K. Hanft, Chairman and Neutral Member
D. M. Pascarella, Employee Member
D. L. Kerby, Carrier Member

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Carrier’s discipline [disqualification as a tamper operator and prohibition from working on a tamper operator position for six (6) months beginning on December 10, 2014 and ending on June 10, 2015] of Mr. D. Frazier, issued by letter dated December 9, 2014, in connection with alleged failure to follow the instructions of his instructor while learning to operate the tamper and his failure to properly set up the tamper machine as well on November 3 and 4, 2014 was unjust, improper and on the basis of unproven allegations (Carrier’s File MW-GNVL-14-23-LM-732 SOU).
2. As a consequence of the violation referred to in Part 1 above, Claimant D. Frazier shall be made whole and exonerated of all charges and his records cleared.

FINDINGS:

Special Board of Adjustment 1049, upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

This Award is based on the facts and circumstances of this particular case and shall not serve as a precedent in any other cases.

After thoroughly reviewing and considering the record and the parties' presentations, the Board finds that the claim should be disposed of as follows:

Claimant in this dispute entered the Carrier's service on April 12, 2004 as a Track Laborer. In April, 2009, Claimant attained Machine Operator's Seniority by operating both a Spike Puller and Auto-Spiking machine on a Gauging Gang. Claimant bid on, and was allowed by supervision to fill, pending qualification, a vacant tamper operator position on Smoothing Gang SM-555 beginning on July 7, 2014.

Claimant was summoned to an Investigation four (4) months later on November 20, 2014 alleging that he failed to follow the instructions of his instructor and failed to properly set up the tamper machine as well on November 3rd and 4th, 2014.

At the Investigation, the charging officer who was the Track Supervisor that Claimant worked under related that Claimant needed assistance on every day from July, when he bid into the job, until November, when Claimant was charged. The Track Supervisor testified that he personally rode on the tamper on November 3rd and observed Claimant's performance and concluded from what he observed that Claimant was not competent enough to run the machine. Moreover, Claimant's foreman, who directly supervised Claimant testified at the Investigation that Claimant was not qualified to run the machine.

Further, when questioned at the Investigation, Claimant answered the question: "Did you need Mr. Murphy (Claimant's Instructor on November 3rd and 4th) there?" with "Yes, I needed him there because we were dealing with stations and it was like Chinese."

The Organization, however, argues that there is no doubt that Claimant was properly qualified as a tamper operator under the Agreement as he had not been disqualified as a tamper operator within sixty (60) calendar days per Rule 2(d).

Rule 2(d) states, in relevant part, that an employee promoted from a lower rank to a higher rank in the same sub-department may be given a maximum of sixty (60) calendar days in which to qualify after being assigned by bulletin. In the event the employee fails to show sufficient aptitude, however, he may be disqualified at any time during said sixty (60) day period... If not disqualified within a sixty (60) calendar day period, the employee shall be considered as qualified.

The Organization maintains that since the Carrier failed to timely disqualify Claimant he is a duly qualified tamper operator and cannot now be disqualified.

Claimant's foreman testified at the investigation that the Carrier allowed Claimant to remain in the position in hopes of continued improvements that failed to materialize.

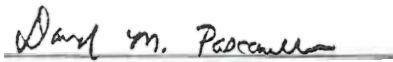
The Board finds, based on the record before us that Claimant was not intentionally negligent, but rather, lacked the knowledge, experience and skills required to operate the tamper. There is certainly no shame in trying to qualify for a position and being unable to do so. The record evidence demonstrates that Claimant here was unable to meet the expectations for the duties of the lead tamper operator: during the period of November 3 and 4, 2014. Claimant made numerous errors after several attempts to teach him the proper methods to be used. The Carrier acted appropriately in removing him from a position that he had failed to become competent in over a four (4) month trial.

Award:

The claim is denied.



Richard K. Hanft, Chairman



D. M. Pascarella, Employee Member



D. L. Kerby, Carrier Member

Dated at Chicago, Illinois, January 20, 2018