

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 39735  
Docket No. MW-38603  
09-3-NRAB-00003-040617  
(04-3-617)

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

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(CP Rail System (former Delaware and Hudson  
( Railway Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign System Equipment Operator R. Lindsay to fill a temporary vacancy (excavator operator) on September 29, 2003 and instead assigned junior employe and B&B Mechanic J. Crandall (Carrier’s File 8-00390 DHR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Lindsay shall now be compensated for eight (8) hours at the applicable operator’s straight time rate of pay.”

**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 Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it assigned a junior employee, and not the Claimant, to fill a temporary Excavator Operator vacancy.

The Organization initially contends that the Carrier violated the Agreement when it assigned work accruing to the System Equipment Operator (SEO) class in the Track Department to an employee holding no such seniority, instead of assigning this work to the Claimant. The Organization asserts that the Claimant was senior, qualified, and available. The Organization argues that there is no dispute that B&B Mechanic J. Crandall did not possess seniority in the SEO class, but he performed SEO Excavator Operator work for the entire claim date, not merely an incidental portion of the day.

The Organization maintains that the Agreement specifically identifies SEO as a classification of employee, and it lists the types of machines assigned to and operated by SEOs. The Organization emphasizes that when the parties negotiated the Rules for the various classes and sub-departments of employees, they recognized that certain and particular duties belonged to each of those classifications. The Organization points out that the Board has held that to preserve the sanctity and integrity of the Agreement, consideration of proper classification of work to be performed must be enforced.

The Organization insists that the Carrier violated the Agreement when it assigned work belonging to an SEO to an employee who held no seniority in this class. The Organization argues that it is well established that where seniority is confined, work also is confined to those holding seniority therein. The Organization contends that this Division frequently has held that when seniority is restricted to a sub-department group, all work of that classification likewise is restricted.

The Organization goes on to assert that it is well established that seniority rights are included in agreements for the benefit of the senior employees. The Organization submits that seniority rights protect and give senior employees preference in jobs, promotions, and other opportunities relative to junior employees. These rights flow to regular, overtime, and extra work, as has been found in a number of prior Awards, along with the principle that the seniority rights of employees restricted to groups and/or classes protect the right of those employees to perform the work falling within those rosters. The Organization contends that the Carrier violated the Agreement when it failed to assign the Claimant to perform the work in question in accordance with his established seniority.

As for the Carrier's assertion that B&B Mechanic Crandall utilized an excavator of less than 8000 pounds capacity, in accordance with Rule 28, the Organization insists that this is patently false. The Organization contends that the machine used on the claim date was a full-size excavator, well in excess of 8000 pounds.

With regard to the Carrier's contention that an SEO's absence prompted the assignment of work to Crandall, the Organization argues that this defense also must be rejected. The Organization asserts that the Carrier's change in defenses demonstrates the Carrier's recognition of the futility of its earlier defense, but this new defense came too late for the Board to consider. The Organization maintains that by failing to timely raise this defense, the Carrier effectively waived any right to rely on this defense. The Organization further argues that this defense is wrong. Not only was Crandall not a qualified SEO, but he performed SEO work for the entire work day at issue. The Organization points out that the Carrier did not offer any evidence to the contrary, while the Organization flatly refuted the Carrier's "incidental" work assertion. The Organization maintains that mere assertions, once challenged, must be supported by evidence to be accepted as fact, and mere repetition of a basic assertion does not make it a fact. The Carrier failed to offer any such evidence in support of its assertion.

The Organization further contends that the Carrier previously attempted to justify the improper assignment of work on the basis of alleged incidental work, and

this has been rejected. Moreover, the Organization asserts that Rule 17 does not operate to abrogate an employee's seniority rights. The Organization insists that it obviously never was the parties' intent that Rule 17 would be used to destroy the seniority rights of employees. Instead, the only reasonable interpretation of the Rules is that they were intended to allow the Carrier to assign employees across seniority lines only in special circumstances. Otherwise, the ultimate result would be the destruction of seniority class lines. Moreover, such Rules no longer would be needed.

The Organization maintains that the Board consistently has held that Rules should not be interpreted in a manner that would abrogate another Rule. The Organization points out that the work at issue was SEO work that accrues to employees holding seniority in that class, specifically the Claimant.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that that no Rule violation occurred in connection with this matter. The Carrier does not dispute that B&B Mechanic Crandall did, in fact, operate an excavator on the claim date, along with the Kubota that he had operated in the past. The Carrier asserts, however, that the events that led to Crandall's operation of the excavator demonstrate that no violation of the Agreement occurred.

The Carrier emphasizes that there is no question that the excavator in question was assigned to an SEO who did not report for work and did not mark off before his assigned shift on the claim date. In addition, the local SEO was not available on this date. The Carrier argues that it assigned B&B Mechanic Crandall to operate the rented excavator in full compliance with Rule 17.1. The Carrier points out that the Organization never disputed these facts, and it is barred from doing so at this time.

The Carrier argues that in connection with this matter, it had a rented piece of equipment and a major project to keep on schedule. The Carrier insists that in the absence of the SEO who had been assigned to operate the excavator, it assigned

B&B Mechanic Crandall to operate the excavator on one day, and it did so in full compliance with Rule 17.1.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to provide sufficient evidence that the Carrier violated the Agreement when it did not call System Equipment Operator R. Lindsay, the Claimant, to fill a temporary vacancy and instead assigned a junior employee to perform that work. Therefore, the claim must be denied.

The record reveals that there was a need to have an employee operate the rented excavator on the date in question, and the assigned SEO did not report for work or report off. The local SEO was not available. Consequently, the Carrier took its action pursuant to Section 17.1 of the Agreement.

Section 17.1 states the following:

“An employee may be temporarily assigned to different classes of work within the range of his ability. In filling the position which pays a higher rate, he shall receive such rate for the time thus employed. If assigned a lower-rated position, he will be paid the rate of his regular position.”

The record makes it clear that this was a temporary vacancy. The Carrier was working on a large project and it needed the equipment operated that day. Moreover, there was an inadequate showing in the record that the Claimant was available to perform the work.

For all of the above reasons, the claim must be denied.

**AWARD**

Claim denied.

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**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 26th day of June 2009.**