

Award No. 11004
Docket No. MW-10404

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Robert O. Boyd, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
ATLANTIC COAST LINE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it refused to allow Machine Operator C. Flowers to displace junior Machine Operator H. Estep on May 6, 1957 and, as a consequence thereof

(2) Machine Operator C. Flowers be allowed a day's pay at Machine Operator's rate for each of the dates of May 6, 7, 8, 9, 10, 13, 14 and 15, 1957.

EMPLOYEES' STATEMENT OF FACTS: Mr. C. Flowers is employed by the Carrier as a Machine Operator and is senior as such to Mr. H. Estep.

As of April 27, 1957, Mr. Flowers was assigned to operate a ballast regulator while Mr. Estep was assigned to operate a new Caterpillar D-9 tractor.

Mr. Flowers' position as operator of the Ballast Regulator was abolished in accordance with a notice reading:

"Waycross, Ga. April 27, 1957

Mr. C. Flowers,

Effective close work Wednesday May 1st, ballast regulator that you are now working will be cut off. Arrange to move this machine into supply yard and store at close of day's work.

J. L. Stone

cc: Mr. T. W. Garner

Mr. Keen—Arrange to dress ballast in line with conversation Saturday 27th."

shall, within a period of thirty (30) calendar days from date of his displacement, displace any junior employe in the rank in which the reduction is made. If there be no junior employe in that rank, he may displace any junior employe in the lower ranks in sequence. An employe failing to comply with the above will forfeit his rights to place himself in any rank in which he holds seniority; except by successfully bidding on and being assigned to a new position or vacancy, or by resuming active service through recall to duty in accordance with the provisions of Section 6 of this Rule. In the event displacement rights are lost through failure to displace a junior employe within the specified time, such rights may only be regained by successfully bidding on and being assigned to a new position or vacancy, or by resuming active service through recall to duty in accordance with the provisions of Section 6 of this Rule."

It is the Carrier's position that this rule is not here involved as the only right any employe in this group has, so long as a vacancy exists on a gang, is to fill that vacancy. When Mr. Flowers attempted to displace Mr. Estep, the eight positions bulletined had not been filled; therefore, all he could do was to apply for one of the positions.

This principle is no different from that followed, which is in accordance with the agreement, on other gangs such as carpenter, paint and metal bridge gangs. A displaced mechanic desiring to place himself on a gang that already has a vacancy for a mechanic, merely takes the vacancy without displacing anyone. No mechanic is ever permitted, in submitting his bid or placing himself, to select a certain phase of the work, tool or machine, to which he must be assigned. This contention of the organization is only a subterfuge to obtain from your Board a rule which is not in the agreement.

Carrier complied with the provisions of the agreement in every respect, whereas that cannot be said for Mr. Flowers, and Carrier respectfully requests that the claim be declined.

The respondent Carrier reserves the right, when it is furnished ex parte submission filed by the petitioner in this case, to make such further answer and defense as it may deem necessary and proper in relation to all allegations and claims as may be advanced by the petitioner in such petition and which has not been answered herein.

Data in support of the Carrier's position have been presented to the employes' representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: The Claimant was a machine operator holding seniority in Group 4, Rule 2, Section 3, of the current agreement and on April 27, 1957, was operating a ballast regulator. His position was abolished effective May 1, 1957. On May 6, 1957, he notified machine operator Estep, who was junior to Claimant in the same group, that he would displace him as "Operator, push Cat, Temple Terrace, Florida." He reported to work on May 6, 1957, but was not permitted to displace Operator Estep. He was advised that there was a vacancy on the gang and that he could operate one of the machines assigned to the project. The Claimant declined this, and on May 10, 1957, he was assigned by bulletin to one of the vacancies on the project. The Carrier had pre-

viously on April 29, 1957, bulletined 8 positions as bulldozer and/or Tractor and pan operators. The rate of pay for all machine operators was the same. The Claimant did not assume the bulletined position until May 16, 1957.

It is the contention of the Claimant that Rule 7, Section 3, entitled him to displace Machine Operator Estep; while the Carrier contends that it is the prerogative of Management to assign the machines to employes within the same class and that the Claimant could have worked because there was a vacancy, from May 6, 1957.

The pertinent part of the Rule in question reads:

"An employe, except as covered by Section 7 of this Rule, affected by a force reduction or abolishment of a gang, shall, within a period of thirty (30) calendar days from date of his displacement, displace any junior employe in the rank in which reduction is made. . . . An employe failing to comply with the above will forfeit his rights to place himself in any rank in which he holds seniority; except by successfully bidding on and being assigned to a new position or vacancy, . . ."

The Rule is specific. Claimant Flowers had the contractual right to displace the junior machine operator Estep. But the Carrier insists that with a vacancy existing in the gang, the request of Claimant to displace Operator Estep was in fact an effort on his part to select the particular machine upon which he would work; that so long as a vacancy existed in the gang he was required to take such position, leaving to the Carrier the prerogative of assigning the members of the gang to the different machines. It is clear that as to those responding to the bulletin of April 29, 1957, (Carrier's Exhibit 1) for a position of bulldozer and/or Tractor and Pan Operators, the Carrier could assign the machines as its judgment dictated. But that is not the situation here. On May 6, the bulletin was not closed; a junior operator was working in Claimant's class and he had, under the rule, a right to displace him. The fact that the junior operator was working a particular machine is incidental to the paramount right to displace him. This was work being performed by a junior pending appointment to jobs pursuant to the bulletin. The Carrier was in error in not permitting the Claimant to displace the junior operator on May 6, 1957.

On May 10, 1957, the temporary position disappeared when the Carrier made appointments to the permanent jobs listed in the bulletin and the Claimant was assigned a Bulldozer Operator position. It was the duty of the Claimant to respond thereto if he wanted the work. He could not stay off the job and claim pay. We do not know and it is not pertinent here what machines at that time were assigned to individual operators. By the terms of the bulletin the assignment of machines was reserved to management.

As indicated above we have concluded that Claim (1) is sustained and Claim (2) is sustained for the days of May 6, 7, 8 and 9, 1957.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim (1) is sustained.

Claim (2) is sustained for the days of May 6, 7, 8 and 9, 1957.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 20th day of December 1962.