



Award No. 14241
Docket No. MW-15515

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Bernard E. Perelson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**SOUTHERN PACIFIC COMPANY
(Pacific Lines)**

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

(1) The Carrier violated the Agreement when, instead of notifying and assigning Engineer W. E. Lindner to fill Engineer vacancy on Truck-mounted Crane SPO-258 from July 15 through August 6, 1963, it used employees holding no seniority rights in the Engineer's class to fill said vacancy. (Carrier's File MofW 138-31)

(2) System Work Equipment Engineer W. E. Lindner now be reimbursed for the exact amount of monetary loss suffered because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Claimant W. E. Lindner has established and holds seniority in various classes, including the Engineer's class, within the System Work Equipment Sub-Department. Immediately prior to and during the period here involved, he was, because of force reduction, employed as Shovel Helper on SPO-49.

During the period from July 15 through August 6, 1963, the employee regularly assigned to the position of Engineer on Truck-mounted Crane SPO-258 was absent. Instead of notifying and using the claimant to fill the temporary vacancy thus created, the Carrier assigned the temporary position to a Shovel Helper (July 15 through July 19, 1963) and to a B&B employee (July 22 through August 6, 1963), neither of whom held any seniority rights as an Engineer.

The claimant was available, willing and qualified to perform the work assigned to the aforementioned Shovel Helper and B&B employee and would have done so if the Carrier had assigned him thereto.

The Agreement in effect between the two parties to this dispute dated January 1, 1953, together with supplements, amendments and interpretations thereto, is by reference made a part of this Statement of Facts.

5. The following employees were used to fill the instant vacancy on dates indicated below:

Mr. W. T. McCollom (seniority date of November 5, 1962, as Helper in the System Work Equipment Sub-Department), who held assignment as Helper on SPO-49 (2 Helper positions assigned thereon), was used to fill the instant vacancy July 16 and 17, 1963, and was paid at the helper's rate of \$2.3808 per hour.

During tour of duty July 17, 1963, Mr. McCollom voluntarily relinquished temporary assignment to the instant vacancy and was relieved by Mr. E. N. Rodriguez, who was an experienced crane operator, and held seniority rights in the Bridge and Building Sub-Department, and was currently assigned as carpenter on B&B Gang No. 3. Thereafter, Mr. Rodriguez was used to operate Crane SPO-258, each date, July 18, 19, 22, 23, 24, 25, 26, 29, 30, 31, August 1, 2 and 5, 1963, and was allowed the higher rate of pay of his carpenter's assignment, \$2.5728 per hour.

Mr. J. J. Gebhardt, Jr., who held seniority rights in the Bridge and Building Sub-Department and was also assigned to B&B Gang No. 3, was used to drive the truck on which SPO-258 was mounted, each date, July 26, 29, 30, 31, 1963. Mr. Gebhardt's statement of February 12, 1964, in connection herewith, is attached as Carrier's Exhibit C.

6. On dates of claim claimant performed the following service:

Helper on Gradall SPO-103, eight (8) hours, each date, July 15, 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30 and 31, 1963.

Helper on SPO-49, his regular assignment, each date, August 1 (10 hours), 2 (8 hours), 5 (11 hours) and 6 (11 hours), 1963.

7. By letter dated September 10, 1963 (Carrier's Exhibit D), Petitioner's General Chairman presented to Carrier's Engineer, Maintenance of Way Structures, claim essentially the same as that contained in "Statement of Claim" hereinabove. Carrier's engineer denied the claim by his letter dated October 30, 1963 (Carrier's Exhibit E) on the basis that claimant was not qualified to operate Truck-Mounted crane. Copy of General Chairman's letter of November 6, 1963, rejecting the Engineer's decision, is attached as Carrier's Exhibit F.

By letter dated December 5, 1963 (Carrier's Exhibit G), Petitioner's General Chairman appealed the claim to Carrier's Assistant Manager of Personnel who denied the claim by letter of May 19, 1964 (Carrier's Exhibit H).

(Exhibits not reproduced.)

OPINION OF BOARD: This claim involves the filling of a temporary vacancy in position of Engineer on a truck-mounted crane.

Claimant, who holds seniority as a Shovel Engineer, was available to fill the vacancy; but on the dates involved Carrier filled the vacancy with either W. T. McCollom or E. N. Rodriguez, both of whom are junior to Claimant and neither holds seniority as an Engineer.

On the record before us, we must conclude that Carrier admitted, during handling on the property, that Claimant was equally as qualified for the vacancy as either McCollom or Rodriguez. The only reason ever advanced by Carrier on the property for not assigning Claimant was that he did not have a license to operate the equipment over public highways. Carrier now frankly admits that neither McCollom nor Rodriguez had such a license.

In view of the admission, by the Carrier, that Claimant's fitness and ability were equal to the fitness and ability of the junior men who were assigned, i.e., McCollom and Rodriguez, we must sustain the claim under the express provisions of Rules 23 and 24 of the Agreement.

In its submission to the Board, Carrier contends that the Claimant was "notified" of the vacancy and that he "declined it." If such a defense had been established on the property, we would have had a different case. But it appears that during the handling on the property the General Chairman repeatedly stated in his letters to the Carrier that the Claimant was available and "would have performed the work had the Carrier's officials made an effort to call and assign it to him."

The record affirmatively shows that Carrier did not deny this statement at any time during the handling of the claim on the property. The Carrier's attempt to deny the statement in its submission to this Board comes too late.

The claim will be sustained.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds;

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee 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 sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of March 1966.

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