

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20203
Docket Number MW-20132

Joseph Lazar, Referee

PARTIES TO DISPUTE: { **Brotherhood of Maintenance of Way Employees**
(Burlington Northern Inc.)

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

(1) The Agreement **was** violated when junior **Machine** Operator Frank Gutierrez **was** permitted to displace Machine Operator Guy M. Gordon on September 3, 1971 (System File 22-3/MW-86, 11/30/71).

(2) Machine Operator Gordon "be paid the difference in the rate of pay between a machine operator **and** track laborer for all time worked by **Mr.** Gutierrez since . . . September 3, 1971".

OPINION OF BOARD: We concur with the Carrier's statement that:

"The sole issue in this case is whether on September 3, 1971, the claimant had greater seniority as a **Rank A**, Group 3 machine operator than Frank Gutierrez and therefore should have been allowed to place himself on the **assignment held** by the latter man at that time."

The Carrier calls our attention to the fact that **Employee's Exhibits A and B** were not presented in support of the instant claim while it **was being** handled on the property, and consequently this **Board** does not **consider** these alleged seniority rosters to be a proper part of this **record**.

The circumstances surrounding this matter are historically unique. The **Agreement** between the **parties** became effective **May 1, 1971**, and **brought** into a single document agreement⁸ covering employees of the newly merged former Great Northern Railway Company, the former **Northern Pacific** Railway Company, the former **Chicago, Burlington & Quincy** Railroad Company, and the former **Spokane, Portland & Seattle** Railway Company. Thus, the dispute arose during a transition period involving the dovetailing of seniority, rearrangement of districts, **and** acquiring of seniority in classes not heretofore held by **employees**. Clearly the consolidation possessed a magnitude and **complexity** posing difficulties **far** beyond routine **administration**. Necessarily, during the **period** of transition to the working of the new Agreement, there

would arise some misunderstanding⁸ and Some confusion concerning the new arrangements. The present dispute can be understood properly only within this context out of which it arose.

The new Agreement became effective May 1, 1971. Claimant, on the former Chicago, Burlington & Quincy Railroad Company, as well as other employees such as the Claimant, did not establish seniority as Group 3 or Group 4 machine operators although assigned to operate machines of the type listed within Rule 5 of the May 1, 1971 Agreement. However, it was clearly understood and agreed by all concerned, during negotiations of the May 1, 1971 Agreement, that insofar as former CB&Q employees were concerned, the various positions of operators would not be bulletined and that the incumbent would continue operating; and that effective with the new agreement (May 1, 1971) each would establish seniority as Group 3 and/or Group 4 machine operators within the Roadway Equipment Sub-department. Since it was obvious that a great number of employees would have the same seniority date of the class granted, the parties further provided the method for determining the senior of the employees when in conflict as here. They agreed on Section 2-D of Appendix "S" which reads:

"If two (2) or more employees have the same seniority date on a new roster established by this Agreement, their names shall be placed on the roster as follows:

(1) If such employees came from the same pre-existing seniority roster, their relative standing as between each other shall remain the same on the new roster.

(2) If such employees came from different pre-existing seniority rosters, their positions shall be determined by their attained ages, the oldest employee being placed first.

(3) If placement still cannot be determined under (1) and (2) above, the tied seniority date⁸ will be determined by drawing lots."

Claimant started Operating 8 Group 3 tamper on March 4, 1971. Employee Gutierrez started operating a Group 3 tamper on April 13, 1971. Claimant has seniority as a sectionman dating from April 1, 1955. Gutierrez has seniority as a sectionman dating from April 16, 1957. Claimant's birth date is October 18, 1913. Mr. Gutierrez's birth date is August 21, 1935.

The assignment of Claimant to the **tamper** on March 4, and the assignment of Gutierrez to the **tamper** on April 13, were not bulletined assignments. At this time, prior to the new Agreement of May 1, 1971, neither man enjoyed Group 3 seniority. On April 30, 1971, at the end of the working day (Friday), we are informed by the Carrier that "the claimant began a weeks' scheduled vacation, and the tamping machine he had been operating was sent to the site of another tamping project about 170 miles east of Fort Morgan." On Saturday, May 1, 1971, the new Agreement became effective. On Monday, May 3, 1971, while Claimant was on vacation, Gutierrez continued working on his tamping machine, a Group 3 machine. On May 10, 1971, Claimant returned from vacation and worked on an off-track weed mowing tractor, a Group 4 machine. He continued to operate this weed mowing tractor until July 6, 1971. On this date, Gutierrez went to another Group 3 machine. Gutierrez worked on this other Group 3 machine until August 26, 1971, when he went on vacation, with the abolishment of the job. On September 3, 1971, Gutierrez returned from his position and was placed on the Group 3 **tamper** being worked by Claimant, asserting a claim to an exercise of greater seniority rights than that of Claimant.

On the basis of seniority date of sectionman, on the basis of age, and on the basis of beginning date of work on tamper, it would seem clear that Claimant was senior to Gutierrez. Nevertheless, the Carrier contends that Claimant was not working on the tamper (being on vacation) on the effective date of the Agreement, May 1, 1971, whereas Gutierrez was actually working on the tamper on May 3, 1971. Thus, on this basis, Gutierrez would have Group 3 seniority beginning in May, and this would be senior to Claimant's Group 3 seniority which the Carrier argues would not have begun until July 6, 1971, when he first started actual work on the Group 3 tamper subsequent to the effective date of the May 1, 1971 Agreement.

In view of the particular circumstances surrounding the matter, this Board does not believe that negotiators who had in mind the thought of birth-dates as material factor in determining seniority date would have intended that an older employe, as here, with earlier seniority as a sectionman, and with an earlier starting date on a machine meriting a subsequently-to-be acquired Group 3 seniority, should become junior to a younger man on all of these factors solely out of a strange quirk of fate that his vacation commenced on the effective date of the new Agreement. Nor do we think Rule 8 G. supports the idea that Claimant forfeited Group 3 seniority by failing to exercise such seniority on his return from vacation on May 10, 1971, inasmuch as this Rule necessarily presupposes that such seniority has already been accorded him with the right to exercise such seniority.

In the historically unique circumstances of this particular case, and without establishing a precedent, the Board finds that Claimant's correct seniority date as a Rank A, Group 3 machine operator is the first date of such roster (May 1, May 2, or May 3, 1971), and also determines that the Carrier should not be penalized monetarily by the failure of Claimant to exercise his Group 3 seniority immediately upon his return from vacation on May 10, 1971, which failure led ultimately to the instant claim.

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 Employees involved in this dispute are respectively Carrier and Employees 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 to the extent Indicated in the Opinion.

A W A R D

Paragraph 1 of Statement of Claim is sustained.

Paragraph 2 of Statement of Claim is denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A. W. Paulsen
Executive Secretary

Dated at Chicago, Illinois, this 29th day of March 1974.