

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25248  
Docket Number MW-25243

Marty E. Zusman, Referee

(Brotherhood of Maintenance of Way Employees  
(  
PARTIES TO DISPUTE: (  
(Missouri-Kansas-Texas Railroad Company

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

"(1) The Carrier violated the Agreement when it failed and refused to award a machine operator's position as advertised by Circular No. 41 dated November 9, 1981 to Mr. R. E. Chapman (System File 600-9/2579).

"(2) Because of the aforesaid violation the **afore-mentioned** machine operator's position shall be awarded to Mr. R. E. Chapman with seniority as such dating from December 8, 1981 and he shall be allowed the difference between what he would have been paid at the machine operator's rate and what he was paid at the track laborer's rate beginning December 8, 1981.'

OPINION OF BOARD: This is a dispute initiated by the Organization on behalf of Claimant R.E. Chapman. The Organization's claim is that the Carrier violated the agreement when it did not give the most senior Track Laborer the advertised position of Machine Operator in violation of Rule 1 of Article 3 which reads as follows:

"Article 3. Seniority

Rule 1. Seniority begins at time **employee's** pay starts in the respective branch or class of service in which employed, transferred or promoted and when regularly assigned. Employees are entitled to consideration for positions in accordance with their seniority ranking as provided in these rules."

In addition, among other arguments, by letter of August 24, 1982 the Organization suggested that Article 5, Rule 1 and 10 were also violated. These are as follows:

"Article 5. Bulletins and Assignments

Rule 1. All positions except those of Track Laborers will be bulletined.

Promotions shall be based on ability and seniority; ability being sufficient seniority shall govern.

Rule 10. Employees awarded bulletined positions and failing to qualify within thirty (30) days will return to their former positions without loss of seniority. If, in the meantime, their former positions are abolished they will exercise their seniority."

On November 9, -1981 Carrier issued Circular No. 41 which advertised a position of Machine Operator and requested bids from those holding Machine Operator seniority and other interested employees. No bids were received from employees holding seniority as Machine Operators. Claimant was a Track Laborer who began work for Carrier on February 1, 1974. Claimant and Mr. J.A. Montgomery who entered service on September 14, 1981, also as a Track Laborer both bid on the bulletined position. On December 8, 1981, Carrier awarded the position of Machine Operator to Mr. Montgomery. There is no dispute that Claimant held seniority in the classification of Track Laborer. Claimant disputes the award to Montgomery on the above and other rules basically arguing that the senior employee should have been assigned the position, since no one holding seniority in the classification of Machine Operator applied. Indeed, the Organization maintains that **explicitly** when it argues in its letter of December 18, 1981, that "therefore as such the employees that did not hold seniority as machine operator, but who made application for the position, those employees should have been the next individuals to be assigned in seniority order" and again by letter of June 15, 1982 "that the Carrier under the provisions of the Agreement has the burden of showing that a claimant's ability is not sufficient to perform the **work.**"

The Organization maintains that the Carrier should have awarded the Claimant the position by virtue of his seniority (Rule 1 of Article 3 and Rule 1 of Article 5) and that Claimant had sufficient ability to perform the work. As such, Carrier has failed to comply with the Agreement and has failed to explain why Claimant was not assigned the position and given thirty (30) days to qualify (Rule 10) before making the judgment against him and awarding the position to a junior employee.

A thorough review of the instant case and a complete reading of Awards cited by the Organization and Carrier documents that the Carrier was in accord with the controlling Agreement and Carrier's arguments prevail. The Carrier maintains that the issue at bar is whether the employees with seniority in a lower classification are entitled to seniority in a higher classification because of that seniority. There exists a long list of past awards of the National Railroad Adjustment Board (Third Division Awards 11587, 19707, 20085, 20206) and Award No. 19 of Public Law Board No. 76 that have consistently interpreted the working Agreement between the parties to this dispute in a consistent manner. These Awards have held that seniority in a lower classification does not apply to guarantee the right of the employee to promotion in a higher classification. While slight changes in contract language have occurred from the first award to the present, the issues, principle and interpretations hold. The Claimant by virtue of Track Laborer seniority does not have contractual rights to first consideration as Machine Operator. Given the existing contract language, these prior awards and the more recent awards that speak to the same issues between the same parties, (Third Division Awards 24622 and 25070) this Board must conclude that the Carrier has not violated the Agreement.

As such, consistent with Rule 1, Article 3 and Rules 1 and 10, Article 5, the Claimant was permitted to bid for the bulletined positions and was, by making application, considered. Claimant was not however, by virtue of his seniority in a lower classification automatically entitled to a promotion in the higher class of Machine Operator, nor was Carrier obligated to show that Claimant's abilities lacked proficiency to perform work or to provide trial period consideration. There is no rule in the **Agreement** or decisional law supporting this position. Accordingly, this Board must deny the claim.

FINDINGS: 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

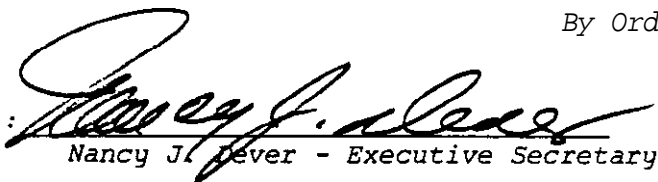
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Lever - Executive Secretary

Date at Chicago, Illinois this 31st day of January 1985.