

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26709
Docket Number MW-26418

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Consolidated Rail Corporation

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

(1) The Carrier violated the Agreement when it recalled and assigned junior Trackman L. Christine to fill a temporary vacancy as trackman on Rail Gang 101 beginning September 12, 1983 instead of Trackman J. L. Ray who was senior, available, willing and qualified to fill that vacancy (System Docket CR-600).

(2) The Carrier also violated the Agreement when it failed to bulletin the vacancy in the position of trackman on Rail Gang 101.

(3) Because of the aforesaid violations, Trackman J. L. Ray shall be allowed pay at his time and one-half rate for an equal number of overtime hours worked by Trackman L. Christine beginning September 12, 1983 and continuing until such violations have been corrected or discontinued."

OPINION OF BOARD: According to the record the Claimant held seniority as a Trackman and was regularly assigned to this position on Rail Gang 101 from March 8, 1983 until the gang was abolished on July 22, 1983. When the gang was abolished the Claimant exercised seniority and obtained a regularly assigned Trackman's position on the Allegheny "B" Division which was the Claimant's home division. The Claimant was occupying that position when the Carrier re-established Rail Gang 101 on or about September 12, 1983. To fill Gang 101 Trackman positions the Carrier recalled furloughed employees. This resulted in Trackman L. Christine being recalled. Since Mr. Christine had less seniority than the Claimant it is the Claimant's position that he, rather than Mr. Christine, should have been assigned to Rail Gang 101. On September 20, 1983 the Claimant wrote the following letter to his Vice Chairman, Eastern Region:

"This letter is written in protest regarding the start-up of Rail Gang 101 in Ithaca, N.Y. approximately September 12, 1983. I worked all days on Rail Gang 101 ... from March 8, 1983 through July, 1983 until abolishment of gang. When Rail Gang 101 re-started approximately September 12, 1983 it was not readvertised for bidding because younger men were recalled from furlough."

It is the position of the Claimant that the Carrier violated Agreement Rule 3. The Claimant requested "... all overtime entitled to (him) as a senior trackman on the Rail Gang."

In responding to the Claim the Carrier stated that the Gang 101 positions did not have to be advertised since they were temporary positions.

The Rule at bar reads, in pertinent part, as follows:

"Rule 3 - Selection of Positions

Section 1. Assignment to Position

In the assignment of employees to positions under this Agreement, qualification being sufficient, seniority shall govern....

Section 4. Filling Temporary Vacancies.

(a) A position or vacancy may be filled temporarily pending assignment. When new positions or vacancies occur, the senior qualified available employee will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award. When furloughed employees are to be used to fill positions under this Section the senior qualified furloughed employees in the seniority district shall be offered the opportunity to return to service. Such employees who return and are not awarded a position or assigned to another vacancy shall return to furlough status.

....

(f) Vacancies which are not advertised may be filled in like manner."

There is no question that the Claimant was qualified as Trackman. He had held this position on Gang 101 and on the Allegheny B Division. Nor is there dispute that the Claimant was senior to Mr. Christine. Although the position held by Mr. Christine was a temporary one Rule 3 at Section 1 gives priority to seniority "...qualification being sufficient." It also appears to the Board that the obligations of the Carrier were clearly outlined by Rule 3, Section 4 of the Agreement when it was question of going to either a senior Trackman already working or to the furlough list to fill positions. The Rule at that point does not say that the Carrier cannot go to the furlough list, but it states that "...the senior qualified available employee will be given preference" (emphasis added). That person was the Claimant. That part of

Rule 3, Section 4 dealing with furloughed employees is permissive: it permits the Carrier to use such employees if the position in question is not filled in the manner specified in the first paragraph of Section 4. The argument by the Carrier that the Claimant was in the wrong seniority district to be considered is one which applies to furloughed employees, not to those with the status held by the Claimant. Did it make any difference that the Claimant was already working as Trackman? Rule 3, Section 4(a) answers that question by stating in unequivocal language that seniority qualified employees will be given preference "...whether working in a lower rated position or in the same grade or class...." Prior Awards of the Board have ruled that an employee is still available even though he may be working elsewhere when a position develops (Third Division Awards 13832, 15497, 21678). On merits the Claim must be sustained.

Lastly, the question of relief must be addressed by the Board. According to the Carrier the Gang 101 Trackman's position was filled from September 12, 1983 through October 6, 1983. All relief requested must center, therefore, on that short time-frame. Mr. Christine was paid at pro rata rate. Had the Claimant been offered this position he also would have worked at pro rata rate. There are numerous Awards emanating from this Board which state that the applicable rate for Claims such as this one is the rate the Claimant would have earned had he held the position in dispute (Third Division Awards 16528, 16541, 16748). As far as the Board can ascertain from the record the position the Claimant actually held during the time-frame and the position he sought paid the same rate. While the Board has concluded here that the Carrier made a mistake of contract interpretation when it did not offer the Claimant the Gang 101 Trackman's position, it is unable to conclude that such error on the part of the Carrier was monetarily detrimental to the Claimant. The Organization speculates that the Gang 101 Trackman's position "...customarily" paid "...a large number of overtime hours." There is no evidence of record that such actually occurred in September and October of 1983. The Board must conclude that the Carrier was in technical error but that there is no reasonable basis for monetary relief in the instant case.

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.

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Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of November 1987.