

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern 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 bulletin a vacancy as machine operator (Tampers MS-007) on Roadmaster M. Brown's territory which existed for over thirty (30) days (System File B-1602-4/EMWC 85-7-18B).

(2) Mr. J. P. Williams shall be allowed compensation for all time worked on the position referred to in Part (1) hereof beginning sixty (60) days retroactive from May 16, 1985 continuing until said position is bulletined and assigned to the successful applicant."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On May 1, 1985, Carrier placed in service, on Mobile Gang No. 182, Cameron Switch Tampers MS-007. Carrier initially assigned Mr. J. D. Shores, a qualified machine operator assigned to Rail Gang No. 2, as the tamper operator. On May 16, 1985, the Organization filed a Claim concerning the operator of the equipment and the fact that the job had not been bulletined. On June 12, 1985, by Bulletin No. ND-36-85, a permanent position was advertised for an operator of the Tampers. At that time Mr. J. R. Deaton was temporarily assigned. Mr. Deaton was the only bidder for the vacancy and was awarded the assignment, by bulletin, on July 10, 1985.

The May 16, 1985, Claim contended that Rules 2, 31, 32, 36, 38(a)(6) and 79 were violated when Carrier worked the Tampers over 30 days without bulletining and when it permitted an employee holding a permanent job to operate the equipment.

Rule 2 deals with establishing seniority. Rule 31 covers promotions to higher classes. Rule 32 restricts promotions to the seniority district and sub-department in which employees have seniority. Rule 33 provides that promotions shall be based on ability, seniority and merit.

Rule 36 deals with filing vacancies and new positions. Two paragraphs, (a)(2) and (a)(3), are important to our consideration here. They read:

"(2) Except as otherwise provided, a new regular position, or regular vacancy on existing position, will be bulletined within 30 days previous to or within 20 days following the date such position is established or such vacancy occurs.

(3) A temporary vacancy on an existing position need not be bulletined until it is determined such vacancy will exist for 30 or more days."

Rule 38 is titled "Assignment of Employees." Paragraph (a)(6) deals with temporary positions. It reads:

"(6) Except as otherwise provided, employees will not be permitted to work unbulletined temporary positions or vacancies in class where they hold sufficient seniority to entitle them to a regular position."

Rule 79, the last Rule relied on by the Organization, deals with recalling furloughed employees.

The first question we must answer is when was Carrier, under the Rules, required to post a bulletin for the new Tamper position? From our reading of the Agreement, we can only conclude that this should have occurred no later than 20 days following the date the position was established or by May 21, 1985. The language of Rule 36(a)(2) seems clear and unambiguous on this point and not susceptible to any other construction. The facts before us demonstrate that the Tamper assignment was "a new regular position" which will "be bulletined ... within 20 days following the date such position is established."

It has been suggested that the more flexible time provisions of Rule 36(a)(3) might control, but we think not. The language of Rule 38(a)(3) does not deal with new positions, temporary or regular, as some have suggested. Specifically it only covers one subject - temporary vacancies on existing positions. Regular vacancies on existing positions being covered in 38(a)(2). And the way Rule 38(a)(3) deals with such temporary vacancies on existing positions is to except them from the time frame within which they must be bulletined. Rule 38(a)(3) provides that a temporary vacancy of an existing position need not be bulletined until it is determined that the vacancy will exist for 30 days or more.

It is obvious that Rule 36(a)(3) is not applicable to this Claim, because, by its terms, it only covers temporary vacancies on existing positions, a situation not present here.

The next question we must consider is was it proper for Carrier to work Shores on the assignment through June 4, 1985? Rule 38(a)(4) provides that:

"New positions or vacancies may be filled temporarily pending assignment."

However, 38(a)(6), (quoted above), creates an exception to unrestricted staffing in the case of unbulletined positions or vacancies. The language used here seems to prohibit employees from working such assignments occurring in a class when their seniority entitles them to a regular job in that class. From this it would appear to the Board that while Carrier had license to fill the new Tamper job temporarily it was improper under the Rule to use Shores on the assignment while the job was in an unbulletined status.

Accordingly, the Board must conclude that the Agreement was violated when Carrier did not bulletin the assignment within 20 days following the date it was established. Also, we conclude that the Agreement was violated when Carrier used Shores to fill the assignment when it was in an unbulletined status.

On the matter of appropriate reparations, Carrier has argued that the Organization's Claim is excessive and it also questions Claimant's entitlements. The Organization contends that Carrier's excessive claim argument comes too late, being articulated for the first time in its Submission to this Board. We do note, though, that the original Claim was filed on May 16, 1985, and seeks compensation retroactive 60 days from that date until the assignment was bulletined and assigned. Obviously, compensation cannot be awarded for days earlier than the date Shores first worked the assignment. From the material in this record we conclude that this date was May 1, 1985.

It is also obvious that when Carrier got around to bulletining the assignment on June 12, 1985, it was no longer unbulletined and thus the restrictions of Rule 38(a)(6) would no longer apply. Carrier was free to temporarily fill the vacancy pending assignment under the terms of Rule 38(a)(4). We have no evidence in this record that subsequent to bulletining the assignment was not properly filled, thus, the date of bulletining will be the terminating date of Carrier's liability.

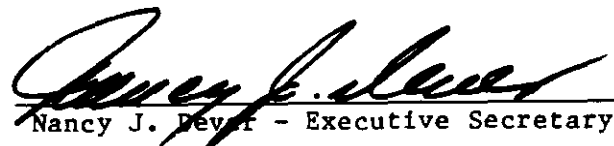
In view of the above the Claim will be sustained, on the basis that the Agreement was violated when Shores was improperly permitted to work the assignment and Carrier failed to timely bulletin the vacancy, for a day's pay at straight time rates for each day the assignment worked between May 1, 1985, and June 12, 1985.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1989.