

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(Bessemer and Lake Erie Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Organization (GL-10424) that:

1. Carrier violated the effective agreement when it failed and refused to assign Mr. A. R. DiSalvo to the position of Relief Machine Operator-Assistant Machine Operator effective May 14, 1989.

2. Carrier shall now compensate Mr. DiSalvo for the difference between the rate of the position of Relief Machine Operator-Assistant Machine Operator and that of Janitor for May 14, 1989, and for each and every day thereafter that a like violation exists."

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 April 24, 1989, the Carrier posted a temporary position of Machine Operator/Assistant Machine Operator to be effective May 14, 1989. The Carrier received four (4) bids and awarded the position to the most junior applicant. The Organization then filed this claim contending none of the four applicants was qualified under Rule 35 and, accordingly, the position should have been awarded to the senior applicant. The Carrier contends it properly awarded the position to the junior applicant since she had the requisite thirty (30) days of experience while the Claimant did not. The Carrier insists that in circumstances where one bidder has the requisite ability and the other(s) do not, seniority may be ignored. The Carrier points out it is a well established and recognized practice that thirty (30) days of prior work experience doing Machine Operator/Assistant Machine Operator work is necessary in order for an employee to be considered as having fitness and ability.

The Carrier stresses the Monroeville Data Center and computer equipment contained therein are shared by itself and the Union Railroad. The Carrier contends the employees of the two carriers work on the same equipment. The Carrier asserts the junior applicant, who was hired on August 22, 1984, became a qualified Machine Operator while employed with the Union Railroad. The Carrier, therefore, maintains she had over thirty (30) days of experience doing Machine Operator and Assistant Machine Operator work on the very same equipment.

The Organization notes the Carrier's position with regard to past practice in awarding Assistant Machine Operator and Machine Operator positions to employees who had thirty (30) or more days of actual experience. The Organization acknowledges it took exception to this position in Third Division Award 23241, but, likewise, acknowledges the Carrier position was upheld by that Award. The Organization argues the Carrier has disregarded its prior position and past practice in this case because the junior employee's prior experience was obtained through a different carrier. The Organization insists the parties' practice did not envision that outside employment would satisfy the thirty (30) day experience requirement. Lastly, the Organization avers the Carrier previously recognized the junior employee's previous experience did not qualify her for such an assignment.

This latter contention deserves examination. On August 11, 1989, a conference was held by the parties, and this case, along with another claim, was discussed. The record of that conference indicates the Carrier was questioned over why the junior employee was not called to work as an Assistant Machine Operator (temporary) in September 1987, if, in fact, she was considered qualified. The Carrier briefly addresses this point claiming it is not relevant because she did not bid on the position. This response misses the point in that the record clearly shows the junior applicant was on furlough and had no right to bid on the position.

This Board fully endorses the finding of Award 23241. However, under the narrow fact situation of this case, the Carrier has taken inconsistent positions with regard to its assessment of the fitness and ability of the junior applicant. The record clearly shows that on September 24, 1987, the Carrier awarded the Assistant Machine Operator position to an employee who was "untrained." If the Carrier believed the junior applicant possessed the requisite fitness and ability by reason of her employment with Union Railroad prior to 1984, it has not reasonably explained why it did not assign her to that 1987 temporary vacancy, but instead chose to fill the position with an untrained employee. Following the filling of that 1987 vacancy, the record establishes the junior applicant did not work as an Assistant Machine Operator or a Machine Operator for thirty (30) days. Given this fact, the Carrier's present position is in opposition to its earlier actions and must be considered arbitrary.

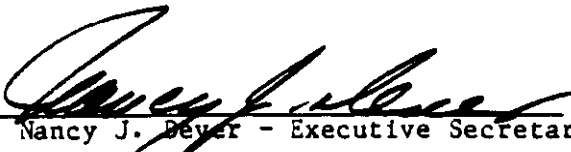
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Award No. 28929
Docket No. CL-29248
91-3-90-3-167

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Bever - Executive Secretary

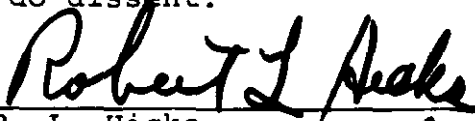
Dated at Chicago, Illinois, this 29th day of August 1991.

CARRIERS' DISSENT
TO
THIRD DIVISION AWARD 28929, DOCKET CL-29248
(Referee McAllister)


The Majority erred in finding Carrier adopted inconsistent positions. To the contrary, when the 1987 event occurred, the employee who bid and was awarded the position in lieu of the Claimant in this dispute was then furloughed and did not bid the vacancy. (Furloughed as well as assigned employees do have the right to bid on any and all positions bulletined, contrary to the Majority's Findings.) Carrier, in the 1987 incident, assigned the senior untrained applicant to the position.


In the dispute adjudicated in Award 28929, the same junior employee who did not bid in 1987, bid and was assigned in 1989, consistent with Carrier's Board-supported practice of assigning employees to bulletined vacancies who have at least 30 days prior experience performing the work required of the bulletined position.

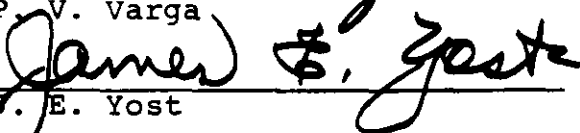
The Majority erred. We do dissent.


R. L. Hicks


M. W. Fingerhut


M. C. Lesnik


P. V. Varga


J. E. Yost