

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29690
Docket No. MW-29585
93-3-90-3-556

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former
(Louisville and Nashville Railroad Company)

STATEMENT OF CLAIM:

- "(1) The Organization alleges that the Carrier violated the schedule Agreement when it abolished a Backhoe Operator's position occupied by D. D. Riley and a junior employee operated a Backhoe subsequent to that abolishment on July 17, 18, 19, 20 and 21, 1989. The Organization further alleges that Mr. Riley was not permitted to work Foreman J. R. Williams' vacation vacancy on July 24, 25, 26, 27 and 28, 1989. [Carrier file 12 (89-987), Organization file 16-10-89].
- (2) As a consequence, the Organization claims that D.D. Riley should be paid an additional eight (8) hours pay at the Backhoe Operator's straight time rate for each date of July 17, 18, 19, 20 and 21, 1989; plus eight (8) hours pay at Foreman straight time rate for each date of July 24, 25, 26, 27 and 28, 1989."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

Agreement Rules pertinent to this dispute state the following:

"RULE 21. FORCE REDUCTION

21(a) When reducing force, seniority shall govern, first laying off the junior man of like classification in the gang or at the point where the reduction is to be accomplished.

* * *

21(c) Employees affected may displace junior employees in any rank and subdepartment in which they hold seniority on their seniority districts; ***

* * *

If they do not exercise their displacement rights, they must file their address, in writing within 10 days, as prescribed by Section (g) of this rule, in order to retain their seniority.

* * *

RULE 22. RETURN AFTER FORCE REDUCTION

* * *

22(c) In filling temporary positions or vacancies of section foremen and extra gang foremen, vacancies of three days or less will be filled by the Supervisor on whose district the vacancy occurs, by his using the senior man on his territory who holds foreman's seniority but is not working as a foreman at the time and who has made application for such relief work. Such vacancies known to exceed three days will be filled by the senior foreman on the seniority district who has made application for such relief work and is not engaged as foreman at the time the vacancy occurs.

* * *

22(d)(1) *** All vacancies known to be of 5 working days or more, or a vacancy that starts out on an indefinite basis and lasts 5 working days will be offered to the senior man in the rank concerned, regardless of whether he is cut off or serving in a lower rank. ****"

Claimant, with a Rank 3 seniority date of January 4, 1979, was regularly assigned to a Backhoe Operator's position on Tie Gang 5M78 headquartered at Thomaston, Alabama. On July 14, 1989, all positions on Gang 5M78, including the Claimant's, were abolished. Pursuant to Rule 21 (c) as stated above, Claimant had displacement rights over any junior employees in his seniority district. However, Claimant did not choose to exercise his seniority option until July 26, 1989, at which time he placed onto Gang 5M77.

On September 8, 1989, the General Chairman submitted a claim stating that subsequent to the abolishment of Gang 5M78, junior employee S. L. Johnson operated the backhoe from July 17-21, 1989. Further, the General Chairman stated that junior employee R. E. Bryant was called to fill a Foreman's vacation absence, also on Gang 5M78, commencing July 24 through July 28, 1989. The General Chairman asserted that the Claimant was entitled to have been called to fill both of these aforementioned positions.

On October 27, 1989, the Division Manager sent the following response:

"My investigation into the allegations made subject of your claim reveals Mr. Riley was cut off effective July 14, 1989. The backhoe was not used on the dates made subject of your allegations. Furthermore, your allegation a junior employee worked the Foreman's position is not supported. Mr. J. R. Williams worked his regular assigned job as section foreman on the dates made subject of your claim. Mr. Williams is senior to Mr. Riley and is the regular assigned occupant. The facts revealed in my investigation do not indicate any type of violation as alleged in your claim. I find your claim is based on mere conjecture. You have failed to show any merit or contractual support to your allegations."

Subsequent correspondence and a conference held May 22-24, 1990, failed to resolve the dispute.

The Organization maintains that Carrier violated Rules 21 and 22 when it assigned junior employee Johnson to perform the duties of Backhoe Operator on July 17-21, 1989. According to the Organization, the Carrier was "contractually obligated to make that assignment in accordance to seniority and the provisions of the Agreement." Further, the Organization asserts that "the fact that

the assignment involved here was made on the first working day following the abolishment of the Claimant's position,...there can be no question but that the Carrier's actions are suspect." Finally, the Organization alleges that the Claimant should have been allowed to work Foreman J. R. Williams' vacation absence on July 24, 25, 26, 27 and 28, 1989, in lieu of the junior employee.

For its part, the Carrier submits that the Claimant "chose not to exercise his seniority until July 26, 1989" when he placed himself on Gang 5M77. More importantly, however, the Carrier maintains that "there is no evidence in the record that a backhoe was operated by a junior employee on the dates claimed." Although the Organization supplied a "time sheet" to substantiate its claim, a review of the time sheet shows it to be "totally lacking in any information to support the claim," according to the Carrier.

Further, the Carrier asserts that the Organization's second allegation, which centers on the fact that the Claimant was not called for extra work on a vacation absence, "is also without merit." A review of Rule 22 reveals that it applies only to regularly assigned and "cut off" employees. The Claimant's position was abolished on July 14, 1989, and Claimant "chose to wait until July 26, 1989, to make a displacement." The Carrier submits that during that period Claimant was "neither regularly assigned nor in cut off status." Therefore, the Carrier maintains that it was not obligated to call Claimant to fill the position. Finally, notwithstanding all of the above, the Carrier asserts that the Organization "has not presented accurate information" about the time period July 24-28, 1989. According to the Carrier, "Foreman Williams worked his regular assignment from July 24-28, 1989, and was not on vacation as alleged."

A careful review of the evidence with which we have been presented shows that the Organization has failed to shoulder its burden to prove, with probative evidence, that any violation of the Agreement occurred on the cited dates. Claimant did not make an effort to displace any junior employee prior to July 26, 1989. This fact eliminates any basis for the first claim with regard to July 17-21, 1989.

Further, Carrier provided time sheets which document that Foreman Williams was on vacation July 17-21, 1989, and not the following week as the Organization has asserted. This obviously negates any necessity for the position to have been filled on July 24-28, 1989, as the regularly assigned employee, Foreman Williams, was available and, in fact, worked his position on those dates.

The Organization and Claimant have the burden of proving every material fact necessary to support the Claim of Agreement violation. That burden was not carried in this case. The record in this case is a series of allegations and conclusions, but is void of any supporting or probative evidence that Claimant was denied an opportunity to fill the positions in dispute. For the foregoing reasons, this claim will be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Nancy J. Dever, Secretary To The Board

Dated at Chicago, Illinois, this 16th day of July 1993.