

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39734
Docket No. MW-38602
09-3-NRAB-00003-040616
(04-3-616)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(CP Rail System (former Delaware and Hudson
(Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign System Equipment Operator T. Conley to fill a temporary vacancy (loader operator) on October 1 and 20, 2003 and instead assigned junior employee and B&B Mechanic P. Jerdo (Carrier’s File 8-00389 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Conley shall now be compensated for sixteen (16) hours at the applicable load operator’s straight time rate of pay.”**

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 employee 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 were given due notice of hearing thereon.

The Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it assigned a junior employee, and not the Claimant, to fill a temporary Loader Operator vacancy.

The Organization initially contends that the Carrier violated the Agreement when it assigned work accruing to the System Equipment Operator (SEO) class in the Track Department to an employee holding no such seniority, instead of assigning this work to the Claimant. The Organization asserts that the Claimant was senior, qualified, and available. The Organization argues that there is no dispute that B&B Mechanic P. Jerdo did not possess seniority in the SEO class, but he performed SEO Loader Operator work for two full days.

The Organization maintains that the Agreement specifically identifies SEO as a classification of employee, and it lists the types of machines assigned to and operated by SEOs. The Organization emphasizes that when the parties negotiated the Rules for the various classes and sub-departments of employees, they recognized that certain and particular duties belonged to each of those classifications. The Organization points out that the Board has held that to preserve the sanctity and integrity of the Agreement, consideration of proper classification of work to be performed must be enforced.

The Organization insists that the Carrier violated the Agreement when it assigned work belonging to an SEO to an employee who held no seniority in this class. The Organization argues that it is well established that where seniority is confined, work also is confined to those holding seniority therein. The Organization contends that this Division frequently has held that when seniority is restricted to a sub-department group, all work of that classification likewise is restricted.

The Organization goes on to assert that it is well established that seniority rights are included in agreements for the benefit of the senior employees. The

Organization submits that seniority rights protect and give senior employees preference in jobs, promotions, and other opportunities relative to junior employees. These rights flow to regular, overtime, and extra work, as has been found in a number of prior Awards, along with the principle that the seniority rights of employees restricted to groups and/or classes protect the right of those employees to perform the work falling within those rosters. The Organization contends that the Carrier violated the Agreement when it failed to assign the Claimant to perform the work in question in accordance with his established seniority.

The Organization then argues that there is no validity to the Carrier's position that the work in question was merely incidental to the job that Jerdo was performing. The Organization emphasizes that although Jerdo was not a qualified SEO, he performed SEO work for the entire work day on October 1 and 20, 2003. The Organization points out that the Carrier did not offer any evidence to the contrary, while the Organization flatly refuted the Carrier's "incidental" work assertion. The Organization maintains that mere assertions, once challenged, must be supported by evidence to be accepted as fact, and mere repetition of a basic assertion does not make it a fact. The Carrier failed to offer any such evidence in support of its assertion.

The Organization further contends that the Carrier previously attempted to justify the improper assignment of work on the basis of alleged incidental work, and this has been rejected. Moreover, the Organization asserts that Rule 17 does not operate to abrogate an employee's seniority rights. The Organization insists that it obviously never was the parties' intent that Rule 17 would be used to destroy the seniority rights of employees. Instead, the only reasonable interpretation of the Rules is that they were intended to allow the Carrier to assign employees across seniority lines only in special circumstances. Otherwise, the ultimate result would be the destruction of seniority class lines. Moreover, such Rules no longer would be needed. The Organization argues that a plain and ordinary reading of the Agreement's provisions supports its position on this issue.

The Organization maintains that the Board consistently has held that Rules should not be interpreted in a manner that would abrogate another Rule. The

Organization points out that the work at issue was SEO work that accrues to employees holding seniority in that class, specifically the Claimant.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that no Rule violation occurred in connection with this matter. It does not dispute that B&B Mechanic Jerdo did, in fact, operate a loader on the claim dates. The Carrier asserts that Rule 17.1 is controlling in this matter. It disputes the Organization's position here, and it argues that there is nothing in Rule 17.1 that supports the Organization's contention.

The Carrier emphasizes that it, and not the Organization, has the authority to determine if an employee is qualified. The Carrier points out that this determination involves more than a mere seniority roster date. The Carrier insists that it clearly was within Jerdo's ability to operate the equipment that he utilized on the claim dates, and this was done in full compliance with Rule 17.1. The Carrier contends that Jerdo could not have operated this equipment if he had not been qualified to do so.

The Carrier asserts that it did not eliminate any SEO position and give the work to B&B Mechanics. It argues that the Organization has not provided any evidence to support such an assertion. The Carrier further emphasizes that only two days are at issue. Moreover, the record indicates that the SEO position that ultimately would operate the equipment in question was then up for bid and had yet to be awarded.

As for the Organization's suggestion that Rule 17.2 somehow applies to Rule 17.1, the Carrier argues that these two provisions were negotiated separate and apart from each other. The Carrier insists that Rule 17.2 has no application to Rule 17.1. The Carrier argues that no Rule violation occurred in this matter, and Rule 17.1 supports the Carrier's position here.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record in this case and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it failed to call and assign the Claimant to fill a temporary vacancy as a Loader Operator and instead assigned a junior employee to that position. Therefore, the claim must be denied.

This case turns on Rule 17.1, which states the following:

“An employee may be temporarily assigned to different classes of work within the range of his ability. In filling the position which pays a higher rate, he shall receive such rate for the time thus employed. If assigned to a lower-rated position, he will be paid the rate of his regular position.”

The record reveals that on two days, the Carrier required the use of a front-end loader for filling in ditches. The Claimant was not available to perform that job. The junior employee, Jerdo, had the ability to operate a front-end loader. The Carrier has a right to determine if an employee is qualified, and, according to the Carrier, Jerdo was qualified.

This was only a two-day job, and the Carrier filled the job with an employee who could operate the equipment. The Carrier has that right under Rule 17.1.

The Organization failed to prove any violation of the Agreement. Therefore, the claim must be denied.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of June 2009.