

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41448
Docket No. MW-40972
12-3-NRAB-00003-090254

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
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(CP Rail System/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 assign System Equipment Operator D. Jordan to fill a temporary vacancy (operate winch car on rail train) on June 19, 20, 21, 22, 25, 26, 27, 28, 29, July 30, 31, August 1 and 2, 2007 and instead assigned junior employee F. Howatch (Carrier’s File 8-00580 DHR).
- (2) As a consequence of the violation referred to in Parts (1) above, Claimant D. Jordan shall now be compensated for one hundred four (104) hours at his straight time rate of pay and for forty-four and one-half (44.5) hours at his overtime 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 claim was handled in a timely manner on the property consistent with the parties' protocols for claim processing up to and including the Carrier's highest designated officer.

The Claimant maintains seniority as a System Equipment Operator (SEO); he is No. 4 on the SEO seniority roster, whereas the claimed-against employee is No. 19 on the SEO seniority roster.

On June 4, 2007, the Carrier posted Bulletin SWE 52.07 for an SEO to operate the winch car. The bulletin stated "Reason: New - work with Rail Train." Two days later (June 6) the Carrier cancelled Bulletin SWE 52.07.

Beginning June 19, 2007, the Carrier assigned the junior employee to perform the duties advertised in the cancelled bulletin. The junior employee dedicated 13 days over the course of 44 days operating the winch car on the rail distribution train.

On August 8, 2007, the Claimant filed a claim for the hours worked by the junior SEO.

On September 26, 2007, the Carrier denied the claim stating as follow:

"The carrier has for the past 3 years when possible has used an operator assigned to the distribution crew in the Track Programs group. When it is not possible we advertise for an operator to fill in for a short period of time, such was the case in January and April of 2007. On the dates that you had claimed that Mr. Howatch came available due to the shortage of ties and that the carrier was not able to accommodate Track Programs and Equipment with 2 work trains on the same division. Bulletin SWE 52.07 was cancelled at this time because an operator was not needed. Mr. Howatch is assigned to the distribution crews and was doing material distribution work.

Rule 17.1 states An employee may be temporarily assigned to different class of work within the range of his ability. In filling this position which pays a higher rate, he shall receive such rate for the time employed. If assigned to a lower rated position, he will be paid the rate of his regular position. The carrier fulfilled the requirements of rule 17.1

It is the carrier claim that no rules were violated due to the carrier used a qualified sytem equipment operator assigned to the distribution crew to perform material distribution work.”

The Organization filed its appeal on December 11, 2007, stating, in part, as follows:

“... the Carrier cancelled this position to allow for the assignment of Mr. Frank Howatch to this position, although as the attached Advertisement Bulletin Number SWE 2.07 and Award Bulletin Number SWE 2.07, Mr. Howatch already owned a position with the Lucky Tie Crane unloading new cross ties. The Carrier violated this provision by canceling this position and assigning Mr. Howatch to this position, arbitrarily denying Mr. Jordan, the senior operator, to make successful bid to this position. The Organization feels that this may have been a move by the Carrier in an effort to circumvent the Agreement.”

According to the Organization, the Claimant “has bid and been successfully awarded this position when the Carrier has stayed within compliance of the Agreement between the Parties. [Attached] Award Bulletin Numbers SWE 5.07 dated February 16, 2007 and SWE 31.07 dated April 26, 2007[.]”

The Organization contends that the Carrier violated Rule 3.13 by not giving preference to the senior qualified employee. Rule 3.13 preserves preference for the senior employee “pending advertisement and award.” Instead, the Carrier assigned a junior employee and abrogated the Claimant’s seniority.

With respect to the Carrier’s reliance on Rule 17.1, the Organization asserts that the advertised position was not temporary, but permanent and arbitrarily canceled. “Claimant rightfully should have been offered the vacant position[.]” Rule 17.1 does authorize a temporary assignment to a different class of work within the employee’s “range of ability,” but the intent is to allow the Carrier flexibility in assigning employees to perform “incidental work” in connection with the employee’s position. This “incidental work” consumed 13 days.

On January 28, 2008, the Carrier denied the appeal. In addition to reiterating arguments presented in its initial declination letter, the Carrier noted that Rule 3.6 does not apply because the junior employee “is a qualified [SEO] assigned to the distribution crew to perform material distribution work” on a temporary assignment consuming only

13 days over a the course of one and one-half months. Using the Organization's logic, the Carrier argues, it would be required to bulletin this position for nine days in June, abolish the position, bulletin it again for two days in July and two days in August and abolish the position after each bulletin.

Rule 17.1 (Temporary Assignments) and Rule 17.2 (Incidental Work) the Carrier argues, are distinct and separate. According to the Organization, Rule 17.1 was not intended for incidental work. The Carrier contends that the claimed work "was not incidental," but rather was a temporary assignment.

As a preliminary matter for the Board's review, the Carrier objects in its Submission to the claim presented by the Organization. The Carrier asserts that the initial claim filed by the Claimant ("position was not advertised as per the present agreement . . . depriving opportunity to bid this position, a job [Claimant] routinely bids and works") is different from the Organization's claim ("Carrier violated [the] Agreement when it failed to assign [the Claimant] to fill a temporary vacancy").

The Board's view is that the initial claim may have been awkwardly crafted by the Claimant, but the Carrier's declination letter demonstrates that the Carrier was on notice and sufficiently informed about the allegation that a junior employee was assigned to operate the winch car rather than a senior employee (the Claimant). The manner in which the Organization framed the claim is materially compliant with the initial claim. Thus, we find that the Board is not presented with two separate claims.

Having carefully reviewed the record evidence, the Board finds that the Carrier determines when to advertise a position, as well as when to cancel an advertised position consistent with the time frames prescribed in Rule 3.6 and Rule 3.10.

The Organization asserts that Rule 3 governs this situation, whereas the Carrier asserts that Rule 17 applied. Under Rule 3 or Rule 17, the Claimant is the senior, qualified employee on the SEO roster over the junior employee and is the senior qualified employee over the junior employee on the rail distribution train. Seniority is a stated, agreed-upon preference for filling any position, unless there is an expressed exception thereto in the Agreement.

The Claimant receives preference based on seniority for work involving the operation of the winch car on the rail distribution team. Documents in the record establish that the Claimant has bid for and has been awarded this position in the past; he was available for this temporary assignment. The Carrier did not extend seniority

preference to the Claimant. To justify its action, the Carrier asserts past practice and cites to Rule 17.1 (Temporary Assignment).

As for past practice, there is insufficient evidence in this record to establish past practice beyond the assertion and, in and of itself, the assertion is not of evidentiary value. Even if the past practice is established, it shows only that the Carrier used the rail distribution team in the past. The Claimant is senior on the rail distribution team.

As for Rule 17, the Carrier proffered several Third Division Awards as support for its position. Two Awards involve situations where the incumbent, senior employee was not available and a junior employee was assigned the work. (See, Third Division Awards 38734 and 38735.) In the instant case, the Claimant was the senior qualified employee and was available to perform the work. Award 37620 involves Rule 17.2 and incidental work. The Carrier states that Rule 17.2 is not applicable to the claim in this case. Suffice to say, the Awards submitted are problematic as a line of support for the Carrier.

In the final analysis, the Board finds that inasmuch as the Carrier extended preference to a junior employee over a qualified and available employee without an established past practice or expressly stated basis in the Agreement authorizing it to do so constituted a violation of Rule 17.1. Therefore, the claim is sustained and the requested relief is granted.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 16th day of October 2012.