

Award No. 5721

Docket No. MW-5692

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Paul N. Guthrie, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

**CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC
RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood; that

(1) The Carrier violated the effective agreement when they assigned an employee, holding no seniority as a Crane Operator, to perform service in the Crane Operator's class at Aberdeen, South Dakota on August 24, 25, 26, 27, 28, 31, September 1, 2, 3, 7, 8, 9, 10 and 11, 1950 in lieu of assigning the work to Crane Operator Cecil J. Hayes;

(2) Crane Operator Cecil J. Hayes be paid at his respective overtime rate of pay for eight (8) hours on each day referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Cecil J. Hayes is regularly employed as Crane Operator on the first shift at Aberdeen, South Dakota.

On August 24, 1950, the second shift Crane Operator at Aberdeen, Oliver Johnson, was assigned by the Carrier to operate a Crane at Bird Island, coaling engines, while the Coal Shed at Bird Island was undergoing repairs.

This action by the Carrier created a vacancy in the second shift Crane Operator's position at Aberdeen, while the occupant of that position was filling the position at Bird Island.

The Carrier assigned Section Foreman Anton Meier, of Letcher, South Dakota, to fill the second shift Crane Operator's position at Aberdeen, contending that no relief Crane Operator holding seniority as such, was available to fill the position.

The Employees contended that the Crane Operator at Aberdeen, Mr. C. J. Hayes, who was regularly assigned to perform work on the first shift at this location, should have been used to perform the work required on the second shift and compensated for this overtime service at the rate of time and one-half.

As a result, a claim was filed in favor of Operator Hayes, for eight (8) hours each on August 24, 25, 26, 27, 28, 31; September 1, 2, 3, 7, 8, 9, 10 and 11, 1950.

Claim was declined.

In further support of our position, we call the Board's attention to the provisions of Rule 8-(a) of the effective agreement, which provides:

"When it is known fifteen (15) days in advance that a position is to be established or that a vacancy of thirty (30) days or more is open, such position or vacancy will be promptly bulletined.

"Where there would not be fifteen (15) days advance notice of such position or vacancy, temporary assignment as per Section (c) of this rule may be made by the Supervising Officer pending result of bids received on the bulletin."

Knowing that the position would last but a short time, there was no need to bulletin it, consequently, it was considered as an emergency temporary vacancy, bringing it within the provisions of Rule 8 (c).

Rule 13 of the Agreement provides in part:

"An employee assigned to temporary or special service shall retain and accumulate seniority, and when released shall return to his former position within ten (10) days of release, *****."

This rule makes it permissive for the Carrier to assign an employee to temporary or special service.

Both of the emergency temporary vacancies were filled in accordance with the provisions of Rule 8 (c) that is: "***** may be filled without bulletining, *****" and "emergency service may be performed without regard to seniority." And Rule 13 "an employee assigned to temporary or special service shall retain and accumulate seniority, *****."

Rule 19—Basic Day—of the Agreement provides in part:

"****, eight (8) consecutive hours, exclusive of the meal period, shall constitute a day's work."

In the instant case, Mr. Hayes was assigned to and held the First Shift Crane Operator position at Aberdeen and worked each of the days here involved, therefore, lost no time and had no contractual right to the emergency temporary vacancy of less than thirty (30) days at Aberdeen in addition to his regular assignment.

In view of the facts and circumstances and inasmuch as Mr. Hayes already having a regular assignment as First Shift Crane Operator at Aberdeen had no agreement right to the emergency temporary vacancy on the second shift of less than 30 days at Aberdeen **in addition** to his regular assignment anymore than he did to the emergency temporary vacancy of less than 30 days at Bird Island, accordingly, Section Foreman Anton Meier of Letcher, S. D., who was qualified to operate the crane at Aberdeen but who, at that time, was working in a lower classification, was assigned to the emergency temporary vacancy at Aberdeen, which, in the opinion of the Carrier was only the decent thing to do as it gave our employees a chance at the extra earnings rather than to have hired an outsider, which could have been done and to which the employees agree.

The foregoing establishes the fact that the Carrier acted within its rights in using Mr. Meier on the position in question, in view of which it is respectfully requested that the claim of the employees be denied.

All data contained herein has been presented to the Employees.

OPINION OF BOARD: The Carrier found it necessary to make certain repairs on a coaling plant at Bird Island, Minnesota, between August 24 and

September 11, 1950. Gasoline Crane No. 61 was used to coal engines at that point during this period. Since it was necessary to operate this crane for 24 hours per day, a Mr. Johnson was brought from Aberdeen, S. D., to handle the crane on one of the shifts. When he left Aberdeen for Bird Island, he vacated an assignment on a steam crane at Aberdeen for the second shift. To fill this job the Carrier brought a section foreman from Letcher, S. D., a Mr. Anton Meier, who was qualified to operate a steam crane.

Claimant, Cecil J. Hayes, who was working the steam crane on the first shift at Aberdeen, contends that he should have been hold over to do the second shift work at overtime rates, since Meier held no seniority as a crane operator.

The Carrier takes the position that an emergency existed at Bird Island, and that under such circumstances the Agreement permitted the filling of the position without regard to seniority. Further, it is argued, the transfer of Johnson from Aberdeen to Bird Island had the result of creating an emergency temporary vacancy at Aberdeen, which the Carrier was privileged to fill without regard to seniority.

In considering this controversy it is necessary to determine whether or not an emergency existed as contended by the Carrier. There is nothing in the record to support a conclusion that an emergency existed in fact. On the contrary it seems clear that the work at Bird Island was of the sort that the Carrier could plan in advance. The Carrier was not suddenly confronted with an unexpected situation which threatened life or property or the interruption of normal schedules. In view of such facts it must be found that no emergency existed which permitted the Carrier to disregard seniority.

It is agreed that Meier had no seniority in the Roadway Equipment and Machine Sub-department. Rule 4 of the applicable Agreement confines seniority to certain specified sub-departments of which the Roadway Equipment and Machine Sub-department is one.

The record indicates that there was no employe unassigned or in furloughed status who could have been assigned to the temporary position at Aberdeen. Under these circumstances Claimant Hayes was entitled to be held over for an additional shift of work. This Board upheld the proposition that under such facts the employes in the seniority group are entitled to the extra work. Award 5311, 4601, 4603. Here the Carrier chose to assign an employe who held no seniority in the sub-department. In accordance with these considerations we find that the claim has merit and should be sustained.

In keeping with many awards of this Division it is appropriate that payment be made at pro rata rates rather than at time and one-half as requested by Petitioner.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained at pro rata rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Acting Secretary

Dated at Chicago, Illinois this 17th day of April, 1952.