

Award No. 5941

Docket No. MW-5946

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY**

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

(1) The Carrier violated the provisions of the effective agreement when they would not allow Mr. Donald M. Auestad to occupy the position of Machine Operator for approximately fourteen (14) days after the date on which he was awarded the position by bulletin.

(2) Mr. Donald M. Auestad be allowed the difference between what he was paid as a section man and section foreman and what he would have received as a Machine Operator because of the violation referred to in part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Mr. D. M. Auestad acquired seniority as a Section Foreman beginning March 6, 1946. He held a regular position as a Section Foreman until August 1, 1949, when due to the abolishment of several positions, he was unable to hold a regular position as Section Foreman. However, he relieved other foremen on every opportunity afforded him and at other times, worked as a Sectionman.

Under date of August 9, 1950, Bulletin No. 28 was issued on the Cedar Rapids Division, advertising for bids on positions including one disc machine operator and one weed mower operator. Mr. Auestad was assigned the position of Weed Mower Operator by Bulletin No. 35 dated August 23, 1950.

On the date Mr. Auestad was assigned to the position of Weed Mower Operator, he was relieving the regular section foreman at Sellsburg, Iowa, and was relieved of that service at the close of the work day, August 28, 1950, and was required to return to service as a Sectionman on August 29, 1950.

Upon receipt of Bulletin No. 35 assigning him to the Weed Mower Operator's position, Mr. Auestad advised the Carrier's Superintendent that he would be unable to protect his new assignment until August 29, 1950, unless he was relieved as Section Foreman at Shellsburg. On August 28, he again inquired of the Superintendent, Mr. Berman, of the location of the Weed Mower in order that he might protect his new assignment. He was advised that District Maintenance Engineer J. W. Shurtliff would advise him with reference to taking over mower if a vacancy still existed.

The Claimant was then advised by the Superintendent on August 30 that he might exercise seniority against R. Y. Dalsiel, Operating Power Mower, Wellsberg to Iowa Falls. Immediately a copy of this notice was received by R. Y. Dalsiel he challenged the right of the Claimant to displace him. This challenge was based upon Group 13 (Roadway Machine Operators) seniority. This resulted in further investigation by the District Engineer of Maintenance of Way located at Des Moines and the Superintendent located at Cedar Rapids. This investigation resulted in the following wire:

"Des Moines, Sept. 5, 1950

"DB Cedar Rpd
DAausted Vinton
LR Poppingo Larchwood
PB FLC Estherville

"If Austed qualified on book rules and physical he assigned weed mower and can report Mower 2163 now working Lester to Granite displacing Poppingo. Austed advs jt with DB and Buser jt this office when will protect so can notify Poppingo M-1801 Jt DB
DMA LRP PB FLC

JWS
10 am."

The Claimant reported on September 6, 1950. Thus it can readily be seen that the placement of the Claimant was not delayed by a capricious act of the carrier, but was the result of a dispute between the employees as to who was entitled to the position on a Group 13 (Roadway Machine Operators) seniority basis.

In deliberation of the foregoing, the carrier respectfully petitions the Board to deny the claim.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Auestad, formerly a Section Foreman, who because of reduction in force had lost that position and on all dates in question had been relieving other foremen or working as a Section Man, bid in, and by bulletin dated August 23, 1950, was assigned, a position as Weed Mower Operator. On August 24 he wired the Superintendent, stating in substance that he was relieving a Section Foreman on vacation and could take the mower position Tuesday, August 29, 1950, if not released at an earlier date. August 28 Claimant inquired of the Superintendent as to the location of the mower for purposes of protecting his new assignment. He was advised the District Maintenance Engineer would advise him with reference to taking over the position if a vacancy still existed. August 30 the official last mentioned advised Claimant he could displace Operator Dalziel. The latter protested displacement and a delay ensued with the result that on or about September 5 Carrier finally notified Claimant he could take over a weed mower position, then occupied by one Poppingo. The parties are in dispute as to when Claimant started work on this position, the Carrier stating it was on September 6 while the Organization asserts it was on September 7. On September 4 Claimant notified Carrier in writing that because of the delay in being placed on a weed mower position he was claiming Operators' compensation from August 29 A. M. until he was placed there. During the interim August 29 to September 6 or 7th, whichever is the correct date, Claimant worked as a Section Man at a lower rate of pay than he would have received had he been working as a Weed Mower Operator.

Claimant bases his right to a sustaining award on Claims (1) to the effect he was entitled to fill the weed mower position on all dates in ques-

tion on the basis of seniority and (2) that he was entitled to actually fill the position as of and from August 23, 1950, the date it was assigned to him by bulletin.

Touching the first of the two contentions advanced by Claimant the facts of record are so indefinite, incomplete and confusing that we are unable to pass thereon except on the basis of guess and speculation. The result is Claimant has failed to establish facts sufficient to sustain this particular contention by the preponderance of proof required to sustain it and it cannot be upheld. Notwithstanding our disposition of the foregoing contention there remains the issue whether Carrier was required to immediately transfer Claimant to the weed mower position on August 23, 1950, the date on which it was assigned to him by bulletin under and by virtue of Rules 4 (a) and (b) of the current Agreement reading:

"(a) All new positions or vacancies, except section men and laborers, will be promptly bulletined on bulletin boards accessible to all employes affected for a period of ten (10) days. Bulletin will show location, descriptive title, and rate of pay.

"(b) Employes desiring bulletined positions shall file their application with the officer whose name appears on the bulletin. Assignments will be made and the name of the successful applicant posted within fifteen (15) days from the date bulletin is posted. New positions or vacancies may be filled temporarily pending permanent assignments. Copy of bulletin and notice of assignment will be furnished employes' representatives."

The problem now confronting us, although factually different, is neither new nor novel from the standpoint of the governing principles involved. Long ago in Award 2174, wherein we were called upon to determine the force and effect to be given a rule of like import, we said and held:

"We think assignment to a position, in contemplation of Rule 10, does not carry with it the right to immediate transfer to it. However, this does not leave the time of transfer to the caprice of the carrier. The transfer must be made within a reasonable time. What is a reasonable time must be determined from the facts and circumstances of the particular case."

Turning to the record we are convinced that under the facts and circumstances of the instant case the Carrier was warranted in failing to transfer Claimant to his new position up to and until August 29, 1950. He was then relieving an employe on vacation; he had advised the Carrier he would not be available to fill the new position until that date unless relieved, and the Carrier, without denial or probative refutation of any kind, asserts that it would not have been practical to remove him from his temporary vacation assignment. On the other hand, applying the same test, we are just as convinced that in view of the existing facts and circumstances the reasonable time for Carrier to have placed Claimant on his new position would have been the day after it relieved him from his temporary vacation assignment, i.e., August 29. Although incomplete in many particulars the record is replete with facts showing that prior to that date it was fully aware, that due to circumstances over which it had control, it was going to have difficulty in placing Claimant on the position to which he had been assigned. Indeed, as we read the record it never did place him on that position but assigned him instead to fill a similar position, then occupied by Poppingo. Obviously if it could take that action on September 6 or 7th it could have done so on August 29. Under such circumstances we do not believe it was reasonable for the Carrier to refrain from making Claimant's assignment effective and thereby make him assume the burdens resulting from a situation for which he was in no manner responsible.

The conclusions just announced mean that Claimant should be paid the difference in what he was paid as a Section Man and what he would have received as a Machine Operator from and including August 29, 1950, up to and until the date he commenced work in the latter capacity. Heretofore we have pointed out that so far as the record is concerned the parties are in disagreement as to whether that was September 6 or 7th, 1950. That is a matter over which there should be no dispute and which can be definitely determined from the records on the property. We direct that be done and that reparation be paid accordingly from August 29, 1950.

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 Agreement was violated.

AWARD

Claim sustained in part, and denied in part as indicated in the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois this 18th day of September, 1952.