Award No. 11180
Docket No. MW-9829

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Roy R. Ray, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY

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

(1) The Carrier violated the Agreement when, on March 19, 1956, it used Section Foreman Patrick Cobb as a dozer operator instead of using Section Laborer Peter Cobb, who holds seniority in seniority group (b) 2 in the Track Sub-department.

(2) Peter Cobb now be allowed the exact amount of monetary loss suffered account of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On March 19, 1956, Mr. Patrick Cobb, who was employed as Acting Section Foreman at Mountain Iron, was assigned to and did perform the duties of a Dozer Operator in connection with the operation of a dozer snow plow on that date.

The work performed by Section Foreman Cobb consisted of the operation of the nose of the snow plow and assisting in the operation of the small spreader wing. The remaining duties, including the operation of the larger wing, was performed by Dozer Operator Chester Johnson. They worked from 8:00 A. M. to 5:00 P. M. excluding twenty minutes for lunch, in the performance of the above referred to work.

The Claimant, Section Laborer Peter Cobb, who has established and holds seniority in Group (B) 2 of the Track Sub-department, was available, fully qualified and could have performed the Dozer Operator's work that was assigned to Section Foreman Patrick Cobb, had the Carrier so desired.

The Agreement violation was protested and a claim filed in behalf of Peter Cobb, requesting that he be allowed the difference between what he received at the section laborer's rate (1.78 per hour) and what he should have received at the dozer operator's rate (2.03 per hour) because of this improper work assignment.

that employes must apply for such vacancies before the Carrier is under any obligation to so assign them.

The Carrier submits, therefore, that even if it were granted that Peter Cobb was the senior unassigned employe in the group and the situation here was one which concerned the filling of a new position or vacancy under Rule 4 (b), the claim in this docket would still be without merit for the reason that Peter Cobb made no request to be so assigned.

IV. **Conclusion.**

In summary the Carrier submits that it has been clearly shown in the foregoing that there is no substance to the claim of the employes in this docket, and that the proposition contended for by the employes not only does violence to the basic meanings and purposes of the agreement rules involved, but is actually a practical impossibility. It is not possible to treat work which exists for only one hour, or any other such brief period of time, as a new position or vacancy to be filled as such under the agreement rules, and ordinary common sense rules out any such proposition.

There is a provision in the agreement rules for handling such a situation. Rule 23, the composite service rule, is designed for exactly that purpose.

The Carrier respectfully requests that the Board sustain the position of the Carrier in this docket, and that the claim of the employes be denied in its entirety.

All that is contained herein is known or available or has been the subject of discussion or correspondence with the employes or their representatives.

(Exhibits not reproduced.)

OPINION OF BOARD: On March 19, 1956, a dozer was used to clean snow from two tracks in Section 13, Mountain Iron. The dozer was operated by Dozer Operator Chester Johnson assisted by Section Foreman Patrick Cobb. Claim was filed on behalf of Section Laborer Peter Cobb, alleging that under Rule 4(b) Carrier was obligated to use Claimant for the work performed by Patrick Cobb.

Rule 4(b) provides: "Positions or vacancies of thirty (30) calendar days or less may be filled without bulletining, except that senior unassigned employes in the group will be given preference." Petitioner asserts that Claimant was the senior unassigned employe holding seniority in that group and thus entitled to the work.

On the property both parties took positions which they later abandoned. The Employes at first asserted that Patrick Cobb had no seniority in Group B(2). Carrier originally denied that Patrick Cobb assisted in the operation of the dozer. The facts as shown by the record are that Patrick Cobb did have seniority in Group B(2) and that Patrick Cobb did assist Johnson in the operation of the dozer, operating the spreader wing.

There is a dispute as to the length of time Patrick Cobb worked at this particular job. Petitioner claims it was eight hours. Carrier asserts that it was not more than one hour. The record is devoid of evidence supporting either position. However, we do not reach this question unless we find that the assignment of the work to Patrick Cobb was improper.

The first and primary issue to be resolved is whether Claimant was the senior unassigned employe in Group B(2) (Track Machine operator, etc.) on the date in question. The record shows that both Patrick Cobb and Claimant held seniority in Group B(2) but that Patrick Cobb's seniority was greater (his seniority date was 1943, while Claimant's was 1948).

Petitioner contends that on the date in question Patrick Cobb was assigned as Foreman at Mountain Iron. That assignment, however, was in Group A(1). He held no assignment in Group B(2). Assuming that the words "senior unassigned employes in the group" refer to employes holding no assignment in that group (as we think it does) then Carrier complied with the Rule. However, even if the words could be considered to refer to employes holding no assignment whatever, Claimant would not be entitled by the Rule to any preference since he held an assignment as laborer on the date in question. This is shown by the fact that the claim was for the difference between what Claimant received at the laborer's rate and what he would have received had he been given the assignment.

Petitioner has failed to prove that Claimant was entitled to preference under Rule 4(b). Therefore, no violation of the Agreement has been established.

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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1963.