

Award No. 13085

Docket No. MW-12923

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

Robert J. Ables, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY**

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

(1) The Carrier violated the effective Agreement when it called and used Work Equipment Operator W. T. Graham instead of Work Equipment Operator W. C. Holman to operate a clamshell during overtime hours on July 17, 18, 19 and 20, 1959.

(2) Work Equipment Operator W. C. Holman now be allowed twenty-three (23) hours' pay at time and one-half rate because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: Claimant Holman has established and holds greater seniority as a Work Equipment Operator than does Mr. W. T. Graham. Both were regularly assigned as such on the same seniority district, with Saturdays and Sundays as designated rest days.

The claimant was assigned to the operation of a dragline, with headquarters in outfit cars, which were located within approximately one hundred (100) feet of the Carrier's Yard Office at Havelock, Nebraska, whereas Mr. Graham was assigned to the operation of a revolving crane, with headquarters at Lincoln, Nebraska.

Early in the evening of Friday, July 17, 1959, Work Equipment Supervisor M. L. Haverland drove to Mr. Graham's home shortly after Graham's arrival for a week-end visit to his home and then drove Graham to Ashland, Nebraska to operate unassigned clamshell No. 205265.

The hours and dates on which Mr. Graham performed service for which he was paid at the time and one-half rate are as follows:

Friday, July 17, 1959 — 8:00 P. M. to 12:30 A. M.

Saturday, July 18, 1959 — 8:00 A. M. to 5:00 P. M.,
with thirty minutes out for lunch.

Sunday, July 19, 1959 — 8:00 A. M. to 5:00 P. M.,
with thirty minutes out for lunch.

Monday, July 20, 1959 — 4:30 P. M. to 6:00 P. M.

but in the same grade in which the temporary vacancy occurred on all of the dates specified in the claim. He is therefore not entitled to the preference provided by Rule 25.

2. Carrier's position in this respect is supported by Award 1774, and by the disposition of the only other claim of this nature referred to above.
3. Claimant was not available for use in the emergency that existed, and that Carrier's action in securing the services of an available employe in the manner in which it did is in conformity with the agreement, and in conformity with decisions of all Divisions of the Adjustment Board.

With these clear and undisputed facts in the record, the Board has no alternative but deny the claim in its entirety.

OPINION OF BOARD: The main track of the railroad was blocked by an earthslide. A work train was dispatched to meet the emergency. While enroute, it was discovered that no operator was on board to operate the clamshell bucket. The work train was stopped to wait for an operator.

The first senior operator was called but declined to take the emergency weekend assignment. The second senior operator (Claimant) was not called because he lived in a bunk car and did not have a telephone for personal use. The supervisor then called the next senior operator (Graham) who had a telephone and he accepted the temporary assignment. In order to save time and to avoid further delay to the train, the supervisor requested Graham to be ready to leave home immediately so that he could drive Graham to the work train. All three operators were in the same grade and were regularly assigned.

The employes contend that the Claimant, Holman, should have been called because he was senior to Graham and could have been reached by the supervisor if he had called because Holman had not "checked-out", and was near a telephone in the yard where his bunk car was located where he had been contacted by the company in the past. The employes rely principally on Rule 25, which is a special rule on this property, to support their claim that Holman, who was the senior available operator, should have been called to do the overtime work.

Rule 25 provides:

"A new position or vacancy of thirty (30) days or less duration shall be considered temporary and may be filled without bulletining, except that available employes holding seniority in the grade in which the vacancy occurs who are not assigned in such grade in the seniority district will be given preference in seniority order."

The Carrier contends that the seniority preference in temporary assignments applies only with respect to employes who are not assigned (all operators involved here were regularly assigned) and that the emergency condition allowed the Carrier greater latitude to make on-the-spot judgments regarding the use of employes.

We think the Carrier is correct on both counts.

Rule 25 governs filling temporary vacancies and the rule gives the Carrier the right to fill such positions without bulletining, which indicates that it will not be bound by seniority, except as to available employes "who

are not assigned in such grade." Since the Claimant was assigned in grade the exception does not apply to him and he cannot therefore claim preference in assignment to temporary work.

The change in Rule 25 following Award 1774 does not strengthen the claim here. In that award, the claim was denied based on the language then existing ("except that senior unassigned available employees in the seniority district will be given preference") since the Claimant was regularly assigned, even though not in the grade in which the vacancy occurred. It is possible that if the amended language were applicable in that case the claim would have been sustained because Claimant would have been unassigned insofar as the vacancy was concerned. But the amended rule is of no help to the employees here because the Claimant was assigned, in grade; therefore he did not have the preference of seniority. Award 1774, therefore, is valid precedent in this case because the Claimant in each instance was regularly assigned and, under the circumstances of each case, was not advantaged by his seniority.

Notwithstanding our view on the applicability of Rule 25, we do not believe the claim can be sustained because the Carrier was entitled to a wider degree of latitude in calling employees to meet the emergency which existed. Since the Carrier first called the senior available equipment operator, who declined to take the assignment, it lends support to the conclusion that the Carrier was acting in good faith to meet the emergency when it decided not to call Claimant who did not have a personal telephone and call the third senior operator instead, who did have a telephone. In this respect, we agree with the opinion in Award 12299, Wolf:

"In an emergency, a Carrier must be allowed great latitude in making on-the-spot judgments which should not be upset even if later, more leisurely reflection should prove them to have been erroneous unless bad faith was involved."

Therefore, the claim should be denied.

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 Employees involved in this dispute are respectively Carrier and Employees 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 23rd day of November, 1964.