



Award Number 17759

Docket Number MW-18240

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Ellis, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
THE BELT RAILWAY COMPANY OF CHICAGO**

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

- (1) The Carrier violated the Agreement beginning August 21, 1967 when it used Section Laborer T. Carmona instead of Section Laborer C. Trinidad to perform service as a crane operator helper.
- (2) The claim in behalf of Claimant Trinidad (presented on October 6, 1967; appealed on January 3, 1968) should be allowed as presented under the defaulting provision of Section 1(a) of Article V of the National Agreement of August 21, 1954 because Messrs. Termunde and Chapel failed to give reasons for their respective disallowances of the claim as contemplated within the provisions of Section 1(a) of the aforesaid Article V.
- (3) Mr. C. Trinidad now be allowed the difference between what he would have received as crane operator helper and what he was paid as a section laborer for each day on which junior Section Laborer T. Carmona was used as a crane operator helper.

EMPLOYES' STATEMENT OF FACTS: Beginning August 21, 1967, Section Laborer T. Carmona, with seniority dating from October 9, 1956, has been assigned to work as a crane operator helper while Section Laborer C. Trinidad, with seniority dating from December 7, 1954, was available, qualified and willing to perform this higher pay-rated service. Neither of the aforesaid employees hold any seniority as a crane operator helper.

The factual situations which resulted in the use of Junior Section Laborer Carmona as a crane operator helper are as follows:

From August 21 to August 25, 1967, two (2) crane operator helpers were used; regular Crane Operator Helper Munoz was one of the two (2) crane operator helpers and Junior Section Laborer T. Carmona was the other.

From August 28 to September 1, 1967, regular Crane Operator Helper Munoz was used as a crane operator in the absence of the regular crane operator. Junior Section Laborer Carmona was used as the crane operator helper. Junior Section Laborer Carmona was allowed eight (8) hours' pay at the crane operator helper's rate as holiday pay for September 4, 1967.

days from the date bulletin is posted. Copy of bulletin will be furnished General Chairman. Employees bidding and the General Chairman will be advised name of employees assigned.

Such new positions or vacancies may be filled temporarily pending the filling of positions as provided in this Rule.

Under these rules there is no preference of assignment of laborers.

(Exhibits Not Reproduced)

OPINION OF BOARD: Beginning in August 1967 and continuing intermittently on various dates until February 12, 1968, the Carrier had need for the services of a Crane Operator Helper for the purpose of helping the regularly assigned Crane Operator Helper as an additional Helper, or for purpose of working in place of the regular Helper when the latter was being used in some other capacity, or was absent from work. On such occasions the Carrier utilized the services of Section Laborer Carmona, who had seniority dating from October 9, 1956, and did not use Section Laborer Trinidad who had seniority dating from December 7, 1954.

The Organization contends that Carrier officers in denying the claim at the local levels of handling on the property failed to state any reason for the disallowance of the claim; and that Carrier violated Rules 14 and 32 of the Agreement in assigning the junior employee to the work in question.

Carrier contends that the original claim was in error in stating that Section Laborer Carmona was assigned as a Crane Operator Helper on August 21, 1967; that the claim presented to Carrier's highest designated officer was not the claim first presented on the property and is therefore prematurely before the Board; that Section Laborer Trinidad was not qualified to perform the duties of a Crane Operator Helper; and that no merit or basis exists either for the claim originally presented or the one presented to Carrier's highest designated officer.

The record reveals that in denying the claim at the local levels on the property the Carrier officers denied that a violation of the Agreement occurred. We therefore reject the contention of the Organization that Article V of the August 21, 1954 National Agreement was violated. Carrier's contention that the original claim should be denied by reason of the date of August 21, 1967 being in error is rejected as is also Carrier's contention that the claim handled with the highest designated officer was not the same claim as that presented at the lower level. The substance of the claim has remained constant throughout the handling and Carrier acknowledges that Carmona was used as a Crane Operator Helper on various dates in the period covered by the claim. We do not believe that Carrier has been misled or that its rights have been prejudiced in any manner.

We therefore proceed to consider the claim on its merits. The rules involved are as follows:

"Rule 14:

Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad as hereinafter provided."

"Rule 29:

Promotion shall be based on ability and seniority, ability being sufficient, seniority shall prevail, Management to be the judge.

In assigning employees to fill vacancies or new positions, the provisions of this rule will apply."

"Rule 32:

Positions or vacancies of thirty (30) days' or less duration shall be considered temporary and may be filled without bulletining, except that senior employees will be given preference, subject to provisions of Rule 29."

Neither party raises any question as to the necessity for bulletining the position or vacancy in question and we may therefore consider it to be a short vacancy that could be filled without the necessity of bulletining. Even so, Rule 32 requires that senior employees be given preference in filling positions or vacancies of less than 30 days' duration, subject only to the provisions of Rule 29. Rule 29 specifically provides that seniority is to apply providing ability is sufficient and that Management is to be the judge as to ability. In responding to the Organization's statement in its Ex Parte Submission that the matter of Trinidad's qualification had not been handled on the property the Carrier alleges that Trinidad was not qualified because of his lack of knowledge of the English language and that the General Chairman was well aware of this situation. Such argument on Carrier's part comes too late. Since the question of Trinidad's qualifications were not a part of the handling on the property it constitutes a new issue that is presented to this Board and it may therefore not be considered.

Absent Carrier's invocation of its right to reject the use of Trinidad on the basis of his ability not being sufficient as provided for in Rules 29 and 32 we can only find that Trinidad, being senior to Carmona in relative length of service as referred to in Rule 14, should have been utilized to perform the work in dispute. Accordingly he should be paid the difference between the Laborer's rate and the Crane Operator Helper's rate for each date that Carmona was so used in the period covered by the claim providing that he was available for such service on each of such dates.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 violated to the extent indicated in the Opinion.

A W A R D

Claim sustained to the extent indicated in the Opinion.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

**ATTEST: S. H. Schulty
Executive Secretary**

Dated at Chicago, Illinois, this 9th day of March 1970.