NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 22644
THIRD DIVISION Docket Number MW-22590

Kay McMurray, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Baltimore and Ohio Railroad Company

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

(1) The Agreement was violated when Class 'A' Equipment Operator J. R. Ball was used to perform trackman's work on November 16, 17, 18, 19, 22, 23, 24, 25, 26, 29, 30, December 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 20, 21, 22, 23, 24 (holiday), 25 (holiday), 28, January 1 (holiday), 3, 4, 5, 6, 7, 10, 11, 12, 13 and 14, 1977 instead of recalling and using furloughed trackman Wm. S. Mallette for such service (System File MON-824/2-MG-1784).

(2) Trackman Wm. S. Mallette shall be allowed eight (8) hours' pay at his straight-time rate for each of the dates set forth in Part (1) above."

OPINION OF BOARD: From the record in this case we cannot determine with certainty the circumstances under which employe, J. R. Ball, acquired the right to exercise his seniority either to displace on to Track Gang 1329-1118 or to be placed in a vacancy on that Track Gang.

What we can determine from the record is that on or about November 15, 1976, Claimant Mallette was cut off from Track Gang 1329-1118 and furloughed, and that, on that same date, employe, J. R. Ball - who is senior as Trackman to Claimant - came on as a member of Track Gang 1329-1118. From November 15, 1976 to January 1, 1977, Employe Ball was paid at the Class A Machine Operator rate for the service he performed with Track Gang 1329-1118. Thereafter, Employe Ball was paid at the Trackman's rate of pay.

Carrier insists that the Machine Operator rate was paid to Employe Ball in error and that when the timekeeper's error was found, it was rectified.

Petitioner argues that such a contention is difficult to believe and that, in fact, Employe Ball was assigned as a Class A Machine Operator but was used to perform Trackman's duties on a daily basis in violation of Rules 1(d) and 1(f) of the Agreement.

Our review of the record before us fails to reveal any substantive proof of the contentions advanced by Petitioner. The fact situation shows that Mr. Ball had greater seniority as a Trackman than did the Claimant. The fact situation shows that the Track Gang in question consisted of a Foreman and five (5) Trackmen. The fact that Mr. Ball was improperly allowed the Machine Operator rate for a period of time does not, per se, imply that he was assigned as a Machine Operator. The respective seniority of the two people involved is the controlling factor. The employe with greater seniority was utilized. Such utilization does not cause the junior employe to be aggrieved. We will dismiss the claim for lack of conclusive evidence.

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 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.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A.W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 30th day of November 1979.