

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23877

Docket Number MW-23328

George E. Larney, Referee

PARTIES TO DISPUTE:

(Brotherhood of Maintenance of Way Employees  
(  
(Chesapeake and Ohio Railway Company

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

(1) The Carrier violated the Agreement when, between December 11 and 22, 1978, it assigned and used a laborer to fill a temporary machine operator's position (bulldozer) instead of using cut-back Machine Operator K. E. Roe (System File C-TC-697/MG-2465).

(2) The Carrier shall now allow to Claimant Roe pay at his applicable rate for a number of hours equal to the hours worked by the laborer between December 11 and December 22, 1978."

OPINION OF BOARD: Between December 11 and 15, 1978, and again between December 18 and 22, 1978, Carrier placed in service an extra bulldozer on its Lexington Subdivision. The bulldozer was operated eight (8) hours per day and was utilized to clear brush under pole lines between Winchester and Mt. Sterling, Kentucky. The Carrier did not advertise a machine operator's position to run the bulldozer as it was a temporary assignment of less than thirty (30) days. As the bulldozer was located at Winchester, Kentucky, Carrier upgraded a qualified operator, a Barry Hinton, assigned to Force 1402 to operate the bulldozer and Hinton was compensated at the equipment operator's rate when running the bulldozer.

Claimant, Kenneth E. Roe, a machine operator working as a laborer on Force 1103 of the Lexington Subdivision located at Olive Hill, Kentucky, became aware somehow Hinton was operating the bulldozer at Winchester and complained to Track Supervisor L. D. Reed that he should have been assigned this work based on the fact he held seniority over Hinton. Reed allegedly counseled Claimant that in order to exercise his seniority so as to run the bulldozer on these temporary assignments at Winchester, he would have to transfer to Force 1402 as a Laborer. Claimant allegedly declined to transfer to Force 1402 if it meant he had to do so as a Laborer.

The instant claim arises as a result of the Organization's position Carrier erred in not assigning the Claimant who had greater seniority over Hinton to run the bulldozer, irrespective of what Force Claimant was assigned to in the Lexington Subdivision. The Organization contends that in not assigning Claimant to operate the bulldozer, Carrier violated Rules 2(a)1, 2(a)8, 2(b), 13(d), 18, 19 and 66 of the Controlling Agreement bearing effective date of July 1, 1955 as revised to August 1, 1978.

Based on our review of all the salient facts before us, we find Carrier did afford Claimant an opportunity to exercise his seniority by

counseling him to transfer from Force 1103 to 1402 as a way to obtain a machine operator's position when the extra bulldozer was put into service. It is our determination that because Claimant, apparently of his own free will, declined to transfer to Force 1402, is now estopped from pressing this instant claim. Additionally, we note Carrier was within its contractual right in not bulletining the subject temporary machine operator's position.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Acting Executive Secretary  
National Railroad Adjustment Board

By Rosemarie Brasch  
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 13th day of May, 1982.

