

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25701
Docket Number MW-25673

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Chesapeake and Ohio Railway Company
(Southern Region)

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

(1) The Carrier violated the Agreement when it assigned junior Machine Operator T. Shortt to fill a temporary vacancy as machine operator at Newport News on November 17, 18 and 19, 1982 instead of calling and using Machine Operator M. L. Spikes who was senior, available, willing and qualified to fill that vacancy (System File C-TC-1512/MG-3835).

(2) Because of the aforesaid violation, Machine Operator M. L. Spikes shall be allowed twenty-four (24) hours of pay at the machine operator's straight-time rate.

OPINION OF BOARD: The basic facts in this case are as follows: Claimant was regularly assigned as a Machine Operator, operating a MT-53 Plasser Tamper with a Program Force at Newport News, Virginia. The Force was terminated on November 15, 1982 and the MT-53 was assigned to maintenance work at the Newport News Terminal. Claimant exercised his seniority on the Richmond Division and was working as a laborer assigned to Force 1105 headquartered at Lee Hall, Virginia. On November 17, 18 and 19, 1983, Trackman L. W. Shortt who possesses Machine Operator seniority, and who was working as a Trackman at Newport News was temporarily upgraded to operate the MT-53 Plasser Tamper. This assignment was challenged by the Organization and a claim was filed on behalf of Claimant on December 3, 1982. It was the Organization's position that Carrier's action violated Rule 2(b) of the Controlling Agreement since Claimant was the senior machine operator as between himself and Mr. Shortt. In essence, it argues that Claimant was entitled to operate the machine on the claimed dates. For purposes of analysis and clarification, Rule 2(b) is referenced as follows:

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

Carrier asserts it complied with the Agreement since it had been the practice to upgrade the senior most readily available trackman at a work location to operate equipment for temporary and intermittent Machine Operator work. It observes the Organization remained silent on this assertion of past practice as the claim progressed on the property and thus, by definition reflected an acquiescence to the practice. It avers that under Rule 5 a cut-off employee must make himself available for extra work by apprising a

Carrier Officer in writing of his availability for temporary or extra work and such notification was not given in this instance. Carrier contends that absent this notice and Claimant's assignment to the laborer's position on the Richmond Division, he was plainly not available for the work claimed.

In our review of this dispute, we agree with the Organization's position. Essentially, what is at issue herein is whether Carrier had the authority under the Agreement to bypass Claimant and upgrade the trackman to operate the MT-53 Plasser Tamper on November 17, 18 and 19, 1982. In considering this question within the context of the rules cited, Carrier's contention of past practice and past decisions of this Board, we have to conclude that the work in question was that of a machine operator and, as such, Claimant's seniority entitled him to the work. Rule 2(b) is clear and it protects and gives preference to jobs and other opportunities to employees with greater seniority. (See Third Division Award No. 20120.) Claimant was the senior Machine Operator employee and he should have been called for this work. In Third Division Award No. 24521 involving the same parties and conceptually the same issue, we held that an employee's seniority standing was the dispositive criterion. Under the facts herein, we find no distinguishable factors that would warrant a variant interpretation. We will sustain the claim, but only for the difference in compensation between Claimant's laborer position and the machine operator's rate of pay. This will make Claimant whole for the actual compensatory loss suffered.

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.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD

By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of November 1985.

