

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25925
Docket Number MW-25792

Herbert L. Marx, Jr., Referee

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

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

(1) The Agreement was violated when, on February 14 and 15, 1983 other than Roadway Machine Operator Group employees were used to operate a backhoe at Newport News, Virginia (System File C-TC-1593/MG-3959).

(2) Because of the aforesaid violation, cut-back Machine Operator R. L. Smith shall be allowed the difference between what he should have been paid at the Class 'A' machine operator's straight-time rate and what he was paid at the trackman's straight-time rate."

OPINION OF BOARD: This dispute concerns the Organization's Claim that the Carrier utilized an employee other than a Machine Operator in the Roadway Machine Operator Group to operate a Backhoe on February 14 and 15, 1983 in connection with Maintenance of Way work at Newport News, Virginia. The Rules provisions are identical to those reviewed in Award No. 25924 which in turn relied in part on the conclusions in Award No. 25703. As to the Organization's reading of Rule 66(f), the Board reaches the same conclusion here.

The parties agree that a Water Supply employee, under the same Agreement as the Claimant, operated the Backhoe on February 15. As to similar work on February 14, the Claim alleges that such work was performed by a B&B Foreman. Such was not denied in the Carrier's initial reply to the Claim. In its final declination letter, however, the Carrier stated that the B&B Foreman had not operated the Backhoe, but "worked and was paid as a B&B Foreman, not machine operator". The Board has no basis to resolve this question of disputed facts. Nevertheless, the Organization set forth a specific assertion as to time and type of work, identifying the employee who allegedly performed the work. Such was not contradicted in the Carrier's initial reply. To counter at a later point the Organization's specific Claim effectively, the Carrier has the affirmative duty to provide convincing evidence. Simply to say that an employee "worked and was paid" as a Foreman fails to show that he did not operate the Backhoe. Given the state of the record, the Board will sustain the Claim as presented.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 26th day of February 1986.

