

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26167
Docket Number MW-26109

John E. Cloney, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation - (Amtrak) -
(Northeast Corridor)

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

1. The Carrier violated the Agreement when it assigned junior trackmen to fill a vacancy in the truck driver class on Panel Building Gang A-972 headquartered at Franklintown, Maryland beginning February 15, 1982 instead of using Trackman W. H. Miciche who was senior, available, willing and qualified to fill the vacancy (System File NEC-BMWE-SD-489).

2. Because of the aforesaid violation Trackman W. H. Miciche shall be allowed the difference between what he should have earned for all regular and overtime hours as the truck driver on Panel Building Gang A-972 and what he did earn in the lower rated trackman's position on February 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, March 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 1982 and continuing until such violation has been corrected or discontinued."

OPINION OF BOARD: The Agreement of the parties contains the following:

"Rule 1

Assignment of Position

In the assignment of employees to positions under this Agreement, qualifications being sufficient, seniority shall govern.

The word 'seniority' as used in this Rule 1 means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classes, respectively, in the same group in the order in which they appear on the seniority roster.

* * *

Rule 4

Temporary Positions and Vacancies - Method of Filling

(a) A position or vacancy may be filled temporarily pending assignment. When new positions or vacancies occur the senior available employees will be given preference, whether working in a lower rated position or in the same grade or class, pending advertisement and award.

* * *

Rule 58

Assignment to Higher or Lower Rated Positions

An employee may be temporarily or intermittently assigned to different classes of work within the range of his ability. In filing the position of an employee which pays a higher rate, he shall receive such rate for the time thus employed. If assigned to a lower rate position for reasons other than reduction in force or his request or fault, he will . . . be paid the rate of his regular position."

Claimant who was assigned as Trackman on Gang A-422 at Bay, Maryland, alleges that starting February 15, 1982, the employer assigned Junior Trackman on Gang A-972 at Baltimore, Maryland to perform bus driving for that Gang. It is contended that under Rules 1 and 4 the bus driving work should have been assigned to Claimant.

The Carrier contends Gang A-972 staffing did not include a Truck Driver. On days when a driver was needed a Trackman from the gang was assigned and paid the Truck Driver rate of pay for the time spent driving. Thus, the Carrier argues, since the composition of Gang A-972 did not include a Truck Driver position there was no "position" or "vacancy" to be filled within the meaning of Rules 1 and 4. Rather, according to the Carrier, these were "occasional assignments" made in accordance with Rule 58. That Rule, Carrier claims, does not require that assignments of a temporary or intermittent nature be offered to employees covered by the Agreement. Such requirement, it states, would be "disruptive and counter productive."

The Organization argues Rule 58 applies solely to rates of pay and cannot be read to be in derogation of employees' seniority rights.

This Board agrees that the provisions of Rule 58 do not permit assignment to be made in disregard to Agreement Rules governing seniority and it's application but rather speaks to rates of pay employees are to receive when temporarily or intermittently assigned.

The Claim was filed on March 17, 1982. It alleged, in effect, that the Agreement violation began on February 15 and continued. Gang A-972 was disbanded in September, 1982. In a letter to the General Chairman on March 21, 1983, it was contended the Gang had not worked on five of the dates cited in the Claim and it was further contended that on 10 other days no one had performed driving duties. The letter contained no information regarding use of drivers during the period March 18, 1982 to September, 1982. Thus it appears that for the time frame regarding which there is some evidence (February 15 to March 17, 1982), driving duties were involved on well over a majority of days that Gang A-972 worked. Accordingly the available evidence does not support Carrier's contention that there was no vacancy or position within the meaning of Rules 1 and 4.

Although Carrier argues Grievant was not available for assignment to Crew A-972 because he was working his regular assignment, numerous Awards of this Board have rejected this position. Thus it was held in Award 21678:

" . . . In prior Awards, which we find persuasive herein, we have rejected similar bootstrapping theories and stated that since claimants were working where Carrier had assigned them they not only were 'available' but Carrier was then availing itself of them"

Finally the Carrier contends Claimant never made a request for the assignment and in any event suffered no loss. The answer to these contentions seem to be that Claim was filed within a reasonable time after the conduct began and, for all the record discloses perhaps as soon as Claimant learned of the situation. As the position was not advertised it is uncertain when Claimant learned of the matter but there is no evidence to suggest he laid back or remained silent once he had the facts. Finally the extent of Claimant's losses, if any, can only be determined by reference to the employers records.

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 Employee involved in this dispute are respectively Carrier and Employee 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

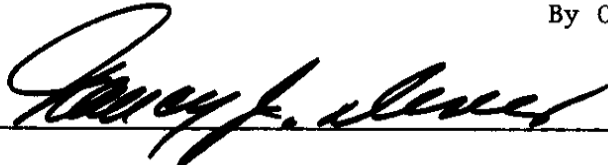
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: _____



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of October 1986.



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CARRIER MEMBERS' DISSENT
TO
AWARD 26167, DOCKET MW-26109
(Referee John E. Cloney)

The "reasoning" set forth in the "Opinion of Board" is totally inconsistent with the facts in this dispute.

Fact: Claimant was regularly assigned to another gang at another location as a Truck Driver; a position obtained solely of his own volition by bidding thereon.

Opinion: Claimant was working where assigned by Carrier.

Fact: The junior employe worked (and was paid) as a Truck Driver on only 16 of the 31 claim dates specified in the claim handled on the property and then only for the time so employed, which was less than eight hours and on some dates as little as two.

Opinion: A temporary vacancy existed to be filled under Rule 4 subtitled "Temporary Positions and Vacancies - Method of Filling".

Fact: Rule 58 permits the Carrier to assign an employee performing lower rated work to do work to which a higher rate is applied, paying the higher rate only "...for the time thus employed...". Seniority, fitness and ability does apply to such assignments tempered however by common sense - i.e., at the point, within the same gang working on the same shift where the need arises.

Opinion: Such assignments under Rule 58 must be made consistent with the Rules governing seniority, (even though the need is for less than eight hours and the senior qualified employe is regularly assigned 1 block, 1 mile or 101 miles from the point of need).

The Majority may have resolved the instant dispute, but it did so contrary to Schedule Rules and in disregard of a common sense application and interpretation of these rules in light of a given set of facts.

We dissent.

Robert L Hicks
R. L. Hicks

M. W. Fingerhut
M. W. Fingerhut

Michael C. Lesnik
M. C. Lesnik

P. V. Varga
P. V. Varga

James E. Yost
J. E. Yost

