

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26257
Docket Number MW-26097

Edward L. Suntrup, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Southern Pacific Transportation Company
(Western Lines)

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

(1) The Carrier violated the Agreement when it assigned End Loader-Backhoe Operator T. J. Miller instead of Water Service Mechanic T. L. Walsh to perform Water Service Mechanic's work from August 11, 1982 through September 17, 1982, for a total of seventy-six (76) man-hours (Carrier's File MofW 152-960).

(2) Claimant T. J. Walsh shall be paid at the Water Service Mechanic's rate for seventy-two (72) hours at the pro-rata rate and four (4) hours at the time and one-half (1 1/2) rate."

OPINION OF BOARD: The Organization submitted a Claim to the Carrier on October 2, 1982, on behalf of the Claimant for seventy (72) hours at straight-time pay and four (4) hours at overtime rate. The contention of the Claim is that the Claimant, a Water Service Department employee in the Carrier's Oregon Division, should have worked the hours in question from August 11, 1982 through September 17, 1982, in lieu of a fellow employee, Mr. T. J. Miller, who had less seniority. Although the Claimant cites various Rules from the operant Agreement which the Carrier allegedly violated on the dates in question the Rule provision which the Claimant specifically references is the following, in pertinent part:

"Rule 13(a) - When force is reduced, the senior employee in the class or classes affected in the gang, or in case of employees not assigned to gangs, having headquarters at the location where reduction is to be made, shall be retained."

In its denial of the Claim the Carrier states that the Claimant was a Water Service Mechanic whereas Mr. Miller was an End Loader-Backhoe Operator and as such was needed on the days in question in that capacity. The Carrier Officer states, in its correspondence to the District Chairman of the Organization on November 30, 1982, that since "...there were no senior qualified end loader-backhoe operators among the water service mechanics furloughed (on the dates

in question), (Mr. Miller) remained on his assigned position." The Board can find no evidence in the record to the effect that the Claimant was a qualified End Loader-Backhoe Operator. Further, in his original correspondence to the Organization which is dated September 10, 1982, and which was the information supplied by the Claimant to the Organization which became basis for the Claim filed on October 2, 1982, the Claimant included a plain sheet of paper on which he listed each workday from August 11, 1982 through September 17, 1982, and the specific work allegedly performed by Mr. Miller on each of these days. Although it is unclear from the record exactly how the Claimant obtained this information since he was on furlough on the days in question, the information states that Mr. Miller did work the Backhoe on some of the days for which pay is claimed but that on other days he performed yard work or did something other than operate a Backhoe. The General Chairman of the Organization was advised by the Carrier, however, in correspondence dated June 30, 1983 that:

"J. T. Miller, incumbent of end loader-backhoe operator (position), B&B Gang No. 35, Eugene, performed service on that position on the dates of claim as indicated by a joint check of our records.

In regard to the copy of the work schedule provided by the Claimant (which is the one referenced by this Board above) alleging that this schedule represented end loader-backhoe operator T. J. Miller's work schedule on the dates involved, you were advised that the company rejects his alleged work schedule as self-serving evidence which is not substantiated by a review of our records during our conference which records indicate that T. J. Miller as performing service on his regular assigned position each day." (Emphasis added.)

As moving party in the instant dispute the burden of proof lies with the Organization to provide substantial evidence that the Claim be sustained (Second Division Awards 5526, 6954; Fourth Division Awards 3379, 3482). Assertions by the Organization are no substitute for proof according to substantial evidence criteria (Third Division Award 25575). Substantial evidence has been defined as such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" (Consol. Ed. Co. vs Labor Board 305 U.S. 197, 229). A search of the record fails to produce evidence by the Organization that Mr. Miller did, in fact, do other than cover the assignment for which he and not the Claimant was qualified. On merits, the instant Claim cannot be sustained.

The Board observes that there is considerable information contained in the Submissions which was not part of the exchange on the property. The Board has ruled that materials and arguments used in Submissions to the Board which have not been exchanged by the parties on the property are untimely and inadmissible (Third Division Awards 21463, 22054, 25575; Fourth Division Awards 4112, 4136, 4137).

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:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 20th day of March 1987.