

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Consolidated Rail Corporation

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

(1) The Carrier violated the Agreement when it failed to assign Mr. C. Davis to fill a temporary vacancy as Class 2 machine operator (switch tamper) in the I&C Gang on May 25 and June 1, 1984 (System Dockets CR-1250 and CR-1251).

(2) Because of the aforesaid violation, Mr. C. Davis shall be allowed the difference between what he was paid at the trackman's rate and what he should have received at the Class 2 machine operator's rate for the time he worked on May 25 and June 1, 1984."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Claimant was regularly assigned as a Trackman in an I&C Gang on the two Claim dates, May 25 and June 1, 1984. The I&C Gang was working at Dueber Avenue, Canton, Ohio, on the dates in question.

Messrs. J. O'Brien and J. Daniel both held advertised positions as Trackman and Repairman, respectively, on the Project Construction Gang and were assigned to work at Maryland Avenue, Canton, Ohio, on the dates in question. On those two dates, the Class 2 Machine Operator regularly assigned to operate the switch tamper on the I&C Gang was absent from service. Since the switch tamper machine was assigned to work with the Project Construction Gang at Maryland Avenue, Carrier upgraded Messrs. O'Brien and Daniel to operate the tamper.

The Organization contends that Claimant, who holds seniority as a Trackman and Class 2 Machine Operator, should have been assigned to operate the switch tamper on May 25 and June 1, 1984. By assigning employees who hold no seniority as Class 2 Machine Operators, Carrier violated the Agreement, the Organization maintains.

In support of their position, the employees rely on several provisions of the Agreement. Rule 1, for example, establishes that tampers are Class 2 machines to be operated by employees holding seniority as Class 2 Machine Operators. According to the Organization, when the regularly assigned switch tamper operator on the I&C Gang was absent on May 25 and June 1, 1984, his absence created a temporary vacancy in the Class 2 Machine Operator's class which should have been filled in accordance with Rule 3, Sections 4(a) and (f), which states:

"Section 4. Filling temporary vacancies.

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

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(f) Vacancies which are not advertised may be filled in like manner."

In this instance, the Organization contends that the absence of the regularly assigned machine operator on the I&C Gang created temporary vacancies in his position which were not required to be advertised, and, therefore, the Claimant, as the senior qualified available employee who was working in a lower rated position, was entitled to fill those temporary vacancies.

Carrier does not dispute Claimant's seniority or qualifications, but argues instead that Claimant was assigned to a different gang at a different location, and it would have been . . . "too disruptive to the crossing gang to remove [Claimant] for such a short duration." According to the Carrier, it has the managerial right to move equipment consistent with operational requirements, and it is under no contractual obligation to move employees or to disrupt the continuity of the workforce for a brief period of time on the two non-consecutive dates at issue here.

Moreover, Carrier asserts that Messrs. O'Brien and Daniel were both qualified and available at Maryland Avenue, and that Carrier's action in upgrading these two employees was proper and entirely in accordance with Rule 19 and Paragraph 4 of the Scope Rule, which specifically provides that " . . .

employees of one classification may perform work of another classification subject to the terms of the Agreement."

Finally, Carrier suggests that the Organization's reliance upon Rule 3 is misplaced. Carrier stresses that a temporary vacancy is a position or vacancy on a position pending assignment. The absence of an employee does not create a temporary vacancy as contemplated by Rule 3, Carrier stresses. Moreover, Carrier points out that Claimant never requested consideration to operate the switch tamper on the Claim dates. Claimant had no demand right to the operator's vacancy, Carrier submits, and, therefore, this Claim should be denied.

In our review of this case, we find the controlling principles set forth in prior Awards of this Board are dispositive of the matter at hand. In a series of prior cases, (Third Division Awards 25700, 25701, 25702, 25703), the Board considered the question of whether Carrier violated the controlling Agreement when it temporarily upgraded employees to perform various machine operator work over the Claimants who held greater seniority. The cases bear great factual similarity to the one at issue herein. In one case, Third Division Award 25701, an individual working as a Trackman was temporarily upgraded to operate a MT-53 Plasser Tamper for three days. Claimant in that case held greater machine operator seniority than the individual who performed the work. In another case, Third Division Award 25702, Carrier temporarily upgraded a Trackman out of machine operator seniority when the regularly assigned operator took his scheduled two-week vacation. In the two remaining cases, the individuals also were upgraded out of seniority for relatively brief periods of time, less than two weeks in both cases.

In all the foregoing Awards, the Claim were sustained. Noting that "an employee's seniority standing was the dispositive criterion," the Board concluded in each case that the Claimant's seniority entitled him to the work.

Although in the instant case the Carrier placed great reliance upon the temporary nature of the upgrading, we do not find that the facts here are sufficiently distinguishable from the prior Awards cited, all of which involved short-term, temporary upgrading, to warrant a different conclusion. By the same token, Carrier's bare assertion that assigning Claimant to the work at issue would have been too "disruptive" is supported neither by credible evidence nor Board precedent.

Moreover, to the extent that Carrier argued Claimant failed to request or make known his availability for the assignment, we note that contention was rejected in Third Division Award 25926. There, the Board concluded, "Seniority rights are not limited to instances where an employee must take an initiative, especially where he may have no advance knowledge of the assignment of other employees."

We must conclude that the work in question was that of a machine operator and, as such, Claimant's seniority entitled him to the work. Rule 1

clearly establishes that tampers are Class 2 machines which are to be operated by employees holding seniority as Class 2 Machine Operators in the Track Department. Rule 3, Sections 4(a) and (f) specifies that when new positions or vacancies occur, the senior qualified available employee will be given preference. To support the contention of the Carrier that those provisions are limited solely to instances pending assignment would, in our view, require a construction of the Agreement which would unduly restrict the broad Interpretation generally accorded seniority provisions. As noted in Third Division Award 105: "Every reasonable interpretation giving recognition to the seniority rule should be given, especially when sufficient fitness and ability are admitted by the Carrier and other circumstances or exceptions as provided in the Agreement do not intervene."

Under Rule 3, we do not consider it unreasonable to hold that the Rule means seniority shall be recognized in vacancies, even though short-term and temporary in nature. Other Rules cited by the Carrier governing scope and assignments to higher or lower rated positions do not permit the Carrier to disregard specific seniority provisions of the Agreement.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Decker - Executive Secretary

Dated at Chicago, Illinois, this 4th day of May 1989.