

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 Employes
(The Chesapeake and Ohio Railway Company

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

(1) The Carrier violated the Agreement when it failed and refused to permit Mr. J. Dewey to displace Mr. P. Cousino from a track patrolman's position beginning December 7, 1984 (System File C-TC-2179).

(2) Because of the aforesaid violation, Claimant J. Dewey shall be placed on the appropriate Track Patrolman Roster, he shall be allowed the difference between what he was paid at the welder helper's rate and what he should have been paid at the track patrolman's rate beginning December 7, 1984 continuing until Mr. Dewey is placed on the track patrolman's position and all other employees adversely affected by Mr. Dewey's displacement on a welder helper's position, under protest, shall each be made whole for any wage loss suffered through displacing in a lower rated position or in the event they were furloughed."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

Effective May 22, 1984, the Toledo Terminal Railroad Company (TTRR), the Chesapeake & Ohio Railroad Company (C&O), and the Brotherhood of Maintenance of Way Employes entered into a Memorandum of Understanding to permit the consolidation and coordination of maintenance of way work in the greater Toledo, Ohio terminal area. The Memorandum of Understanding set forth the terms under which positions would be allocated to TTRR and C&O employees, who would then work together to maintain the terminal area.

Under the terms of the May 22, 1984 Memorandum of Understanding, several Track Patrolmen's positions were established in the greater terminal area. Some of these positions were allocated to C&O employees and some were

allocated to TTRR employees. At the time the TTRR Track Patrolmen's positions were initially advertised to TTRR employees, the Claimant was on leave of absence in connection with an on-the-job injury. Claimant therefore did not bid for the Track Patrolmen's positions when they were initially advertised. Employee P. Cousino, who is junior to the Claimant, did submit an application for a TTRR Track Patrolmen's position and was subsequently awarded a position.

Claimant returned to service in August or September of 1984 (the parties differ as to the precise date) as a trackman. Claimant continued to work in the position of trackman until approximately four months later, when his position was abolished. He thereupon attempted to exercise his seniority to the position of Track Inspector by displacing employee Cousino from the TTRR Track Patrolman's position. This request was denied by Carrier, since in Carrier's view, the Track Inspector position is an excepted position and not subject to displacement.

We concur with Carrier's view. While the May 22, 1984 Coordination Agreement in general provided that the work force would be subject to the rules and regulations of the Toledo Terminal Railroad Agreement, certain exceptions and amendments were outlined. One of those exceptions was set forth in 5(b)(8)(b) of the Agreement, and states as follows:

"(8) The Memorandum of Agreement of January 1, 1972 covering the establishment of Trackman Truck Driver and Track Patrol classifications on the TTRR shall not apply but:

* * *

(b) Track Inspector and/or Assistant Track Inspector positions allocated to the C&O shall be filled in accordance with the provisions of Article II-Track Inspector and Article III-Assistant Track Inspector of Appendix G of the C&O Southern Region Agreement. Track Inspector and/or Assistant Track Inspector positions allocated to the TTRR may, at the option of the TTRR employee whose seniority on the Track Patrolman roster would entitle him to the position, be filled under the C&O Agreement provisions referenced above in which case such employee would have his name removed from the TTRR Track Patrolman Roster or be filled under the provisions of Article II Track Patrol of the former January 1, 1972 Memorandum Agreement and be paid the lower TTRR rate for the position. The TTRR Track Patrolman roster shall be closed as of the effective date of this Agreement."

The foregoing language essentially provides that if the Track Inspector position is C&O allocated, it will be filled in accordance with the C&O Agreement. However, if it is Toledo Terminal allocated, the employee then

has the option of going under the C&O Agreement, or remaining under the 1972 Memorandum Agreement at a lower rate of pay.

As the record indicates, the Toledo Terminal position was taken by employee Cousino. However, when he exercised his seniority to the Toledo Terminal position, he elected to go under the C&O Agreement as provided in Section 5(b)(8)(b) cited above. As a result of Mr. Cousino's election, the position was subject to Article II of Appendix G of the C&O Southern Region Agreement Book. Section 5(a) of Article II provides:

"ARTICLE II - TRACK INSPECTOR

Section 5. (a) Vacancies and new positions of Track Inspector will be bulletined in accordance with Rule 18(a) of Agreement No. 6 covering 'Southern Region and Hocking Division' employees and in accordance with Rule 17(e) of Agreement No. 3 covering 'Northern Region Excluding Hocking Division' employees. However, such positions of Track Inspector shall be excepted from the seniority rules of the said schedule agreements."
(Emphasis added.)

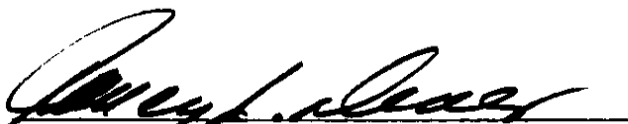
In accordance with the foregoing provision, Track Inspector positions are "excepted" positions, and, as such, are not subject to seniority displacements. We must conclude, therefore, that while the position in question is a TTRR allocated position, Claimant did not have the right to displace Track Inspector Cousino when his trackman position was abolished. Because of Mr. Cousino's election to go under the C&O Agreement, he could not be displaced. In the event Mr. Cousino bid off or left the position, then Claimant would have an opportunity for the job. Under the facts and circumstances as they have been presented in this case, however, we find that Claimant was not entitled to the Track Inspector position.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

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