

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

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

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

(1) The Carrier violated the Agreement when it used Machine Operators J. Cervantes and H. L. Rasco to fill temporary and vacation vacancies instead of furloughed Machine Operator J. D. Swearengen on various dates from October 22, 1984 through January 18, 1985 (System Files MW-85-31/422-91-A and MW-85-37/423-87-A).

(2) Claimant J. D. Swearengen shall be allowed four hundred (400) hours of pay at the relief machine operator's straight time rate because of the violation referred to in Part (1) hereof."

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.

The Claimant who holds seniority as a Roadway Machine Operator, was furloughed during the period of time covered by this claim. The Carrier used active employees to fill vacation and other vacancies for which the Organization contends Claimant should have been recalled to service.

Although the parties had handled this dispute as two separate claims on the property, the Organization consolidated them for presentation to this Board over the objection of the Carrier. As the claims involve the same Claimant and the same principle, this Board will permit the consolidation of the claims in the interest of expeditious handling (Third Division Award 19750).

From October 29, through November 16, 1984, the Carrier used Roadway Machine Operator Cervantes to fill a vacation vacancy on a Trackliner. Cervantes was regularly assigned to the Weedmower which was idle due to a lack of

work. From November 19, through November 23, 1984, Cervantes was used on a vacation vacancy on the Link Belt Crane while his Weedmower was still idle. From November 26 through December 7, 1984, Cervantes was assigned to a front end loader, but it, too, was idle, and he filled a vacation vacancy on a Trackliner. The front end loader was again idle from January 7 through January 18, 1985, and Cervantes was assigned to the Link Belt Crane.

From November 19, through December 27, 1984, Roadway Machine Operator Minatrea was regularly assigned to a Bob Cat Loader, which was idle for repairs. The Carrier used Minatrea to fill several vacation vacancies, as well as a temporary vacancy on a boom truck.

From December 10, through December 14, 1984, Roadway Machine Operator Smith filled a vacation vacancy on a Heavy Duty Truck. The record does not disclose the status of Smith's regular assignment during this week.

From December 13, through December 21, 1984, Track Foreman Duckett ran Roadway Machine Operator Rasco's Tamper while the latter was off for vacation and personal days.

The Organization contends that if the Carrier chooses to have the work of vacationing employees performed, it is limited to either distributing such work among two or more employees (subject to the limitation that no single employee may perform more than twenty-five per cent of the work) or the use of a vacation relief employee in accordance with the February 1, 1984 Memorandum of Agreement. This Agreement provides, inter alia, for the advertising of such positions and that applicants be "qualified to operate machines on which relief work is contemplated." The Organization also relies upon Section 1(g) of Article 3, Force Reductions, which reads:

"When forces are increased, or in filling temporary vacancies, senior laid off employees in their respective rank, seniority group and seniority district will be given preference in employment..."

The Carrier's chief defense is that the Agreement gives it authority to have regularly assigned employees perform other duties. It relies upon Section 14 (a) of Article 16, which governs the compensation of an employee assigned to work on a higher rated position, as well as Section 4 of Article 17, which reads:

"Employees of roadway machines will be required to work with gangs under the foreman in charge and perform any work they are able to handle under the direction of the foreman when their machine is not actually being used. Machines will not be idled for the sole purpose of supplementing the force on a gang."

This Board concludes the Organization is in error in arguing the Carrier is so limited in filling vacation vacancies. Paragraph 10(a) of the National Vacation Agreement, in fact, governs the rate of pay of a single employee designated to fill a vacation vacancy, and provides a special Rule in the case the vacancy is filled by an assigned vacation relief employee. The Carrier must, however, have some basis in the Agreement for the movement of an employee from his regularly assigned position. While Article 16, Section 14(a) provides a basis of compensation, it does not authorize the movement of an employee from his regular assignment.

A special case, however, is provided by Article 17, Section 4, quoted above. The record shows the roadway machines regularly operated by Cervantes and Minatrea were idle during the time they were covering vacation vacancies. While the Organization asserted the machines were idled for the sole purpose of making the operators available for the vacancies, there is no evidence in the record to support this assertion. Accordingly, that portion of the claim is denied.

With respect to that portion of the claim wherein Track Foreman Duckett worked Machine Operator Rasco's Tamper, the Carrier denied the claim solely on the basis that Duckett was never authorized to perform this work. There was, however, no denial that he did so. The Board must conclude, therefore, that the vacancy was improperly filled and that Claimant, as the senior furloughed employee, should have been called. This finding is consistent with Third Division Award 25209 involving the parties herein. Third Division Award 26171 must be distinguished as it dealt with a bulletined vacancy temporarily filled by an employee who volunteered to do so. Accordingly, this portion of the claim is sustained.

Finally, the Board does not have a sufficient record before it to reach any conclusion with respect to the portion of the claim wherein Smith operated the Heavy Duty Truck. Accordingly, that portion of the claim is dismissed.

The Carrier argues that portions of the Organization's claim had been abandoned because the Statement of Claim before the Board referred only to the use of Machine Operators Cervantes and Rasco. We believe the substitution of Duckett's name for Rasco was a harmless error and that the Carrier was sufficiently put on notice that the claim for this period of time was being appealed. As the balance of the claim is either denied or dismissed, the balance of the Carrier's objection is moot.

Claim sustained for the period from December 13, 1984, through December 21, 1984.

Form 1
Page 4


Award No. 27913
Docket No. MW-26923
89-3-85-3-701

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 18th day of May 1989.