

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28141
Docket No. MW-27856
89-3-87-3-369

The Third Division consisted of the regular members and in addition Referee John E. Cloney when award was rendered.

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

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

(1) The Agreement was violated when the Carrier assigned Division Machine Operator C. B. McClain to operate System Ballast Regulator #108RM instead of recalling furloughed System Machine Operator/Helper M. R. Thomas and assigning him thereto (System File MW-86-89/456-25-A).

(2) Because of the aforesaid violation, Claimant M. R. Thomas shall be allowed one hundred twelve (112) hours of pay at the machine operator's straight time rate."

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.

Claimant, who holds seniority as a System machine operator helper, was on furlough due to a force reduction when a System machine operator was injured off duty. Carrier unsuccessfully attempted to recall six furloughed System machine operators and, when none was available, a Division machine operator was assigned.

Article 17 of the Agreement provides in pertinent part:

"SECTION 6. When System positions are abolished and rebulletined as Division positions under this agreement, the bulletin will indicate that System employees will have prior rights to the position, and the senior qualified system

employee making application will be assigned in preference, and his System seniority date will be dovetailed into the Division seniority dates of the same class, and thereafter this employee will no longer have System seniority. After the dovetailing of seniority, employees are then subject to general displacement rules.

In the event that a Division position is placed on the System, the position will be advertised on the Division and the Division employes will have the same right as allowed System employes.

SECTION 7. Employees in the Sub Track Department holding seniority as laborers will be permitted to place their bids on vacancies of roadway machine operator and helper positions on their respective seniority districts.

Employees assigned to positions under this rule shall have up to thirty (30) days to qualify on these positions, the regional maintenance-of-way manager to be the judge. If the employe fails to qualify, he may return to the position from which taken unless a senior occupies that position; in that case, he may then displace in accordance with his seniority.

SECTION 8. Employees assigned to position of roadway machine operator who have not previously qualified on the machine to which assigned will be compensated at rate of machine operator helper until such time as qualified.

SECTION 9. Employees promoted under this rule shall be promoted based on seniority, fitness and ability. Ability and fitness being equal, seniority shall prevail, the management to be the judge.

SECTION 10. An employe promoted to a position covered by this agreement shall retain and accrue seniority in the Sub Department from which promoted and seniority in the Sub Department to which promoted shall be established in the manner provided in Article 2, Section 1(a). An employe promoted to a machine operator would thus establish seniority as a machine operator helper effective date of promotion."

In an August 25, 1986, letter to Carrier the Organization stated:

"It is our position that the work was performed on a machine that is assigned to Mr. Thomas's seniority class and seniority roster, therefore he has the seniority rights to this work. Although he had not established machine operator's seniority he had performed service as an operator while working temporary positions and since this was in his seniority class he should have been recalled to perform this temporary operator's position."

Regarding the assertion about working temporary positions Carrier noted in subsequent correspondence to the Organization:

"There is no record to support the Organization's contentions. Certainly the burden is on the Claimant and no proof of his qualification has been forthcoming."

The Organization contends Article 17, Section 9 requires Carrier to promote an employee from the System roster rather than using an employee from the Division roster in the circumstances here. It also contends Carrier cannot argue Claimant lacked qualification since it produced no records in support of its denial that Claimant had worked temporary positions as Operator.

This Board cannot agree with either position. The evidence shows Carrier first attempted to recall all furloughed Operators on the System roster. It then assigned an Operator from the Division. No one was promoted. Although Rule 17, Section 9 describes factors to be considered in making promotions, it does not mandate that a promotion be made.


We must further disagree with the Organization regarding the use of Carrier's records. While asserting Claimant had served as an Operator working temporary positions the Organization furnished no details whatsoever. It did not state when, where, or for how long these assignments took place, etc. If it had, Carrier may have been required to rebut that factual evidence. However, we consistently hold mere assertions do not constitute proof.

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 16th day of October 1989.