

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31328  
Docket No. MW-30463  
96-3-92-3-306

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. 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 Agreement was violated when the Carrier assigned junior employe J. McCabe to work a Class 2 Operator position (ballast regulator) at Duncannon, Pennsylvania from September 10 through 13, 1990 instead of Mr. R. J. Ickes (System Docket MW-1729).
- (2) As a consequence of the aforesaid violation, Claimant R. J. Ickes shall be allowed the difference in pay between the trackman's rate and the applicable Class 2 Operator's rate of pay for forty-two (42) straight time hours and three and one-half (3-1/2) overtime hours expended by the junior employe performing Class 2 Operator's work."

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 employee 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 holds seniority within the Track Department as a Class 2 Machine Operator on the Allegheny "A" seniority district. During the period here under review, he was unable to hold a position in that district and moved to a Trackman position on the Allegheny "B" seniority district.

According to the Organization, the Carrier required a Machine Operator for a Class 2 Ballast Regulator between Banks and Duncannon, on the Allegheny "A" seniority district for September 10 to 13, 1990. Again according to the Organization, the Carrier selected an employee holding no Allegheny "A" seniority, rather than the Claimant, who holds such seniority rights.

The first problem is that the Carrier states that the employee mentioned by the Organization did not perform it and was assigned elsewhere. In support of this, the Carrier presented an "Employee History" of this employee, but this simply shows his permanent assignment from July 30 to November 9, 1990, and does not indicate whether he was given any temporary assignments. However, the Division Engineer, in his response to the claim, stated that the "position was awarded in accordance with Schedule Agreement," indicating the Carrier's acknowledgement of no doubt as to someone filling the position. Further, the Organization provided a note from the other employee, stating in pertinent part:

"... I, J. J. McCabe worked in Reading on a ballast regulator during that time period. On those days, September 10, 11, 12, and 13, 1990, I worked on the Allegheny A side between Banks and Duncannon, Pa."

From the record, the Board determines that the Organization presented a credible account of the September 10 to 13 assignment. Even under these circumstances, the Carrier argued that the Claimant was not entitled to the position, stating that none was bulletined, and "no vacancy existed." However, the Board finds, as argued by the Organization, that Rule 3, Selection of Positions, Section 4, Filling temporary vacancies, is directly applicable. It reads in pertinent part as follows:

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

Even if this is not sufficient as to a vacancy, the fact is that the Claimant held seniority in the affected seniority district, while the employee utilized did not.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of January 1996.