

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31515
Docket No. MW-30744
96-3-92-3-540

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

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

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

- (1) The Agreement was violated when the Carrier failed and/or refused to provide senior Machine Operator R. Davis with accurate information concerning junior Machine Operator J. R. Cottrell who was allowed to continue working his assignment while Mr. Davis was furloughed on November 26, 1990 and continuing (System Docket MW-1984).
- (2) As a consequence of the aforesaid violation, Mr. R. Davis shall be "... paid ten (10) hours pay for days listed, all overtime, credit for the days and months and to be made whole."

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.

Claimant's position as a TKO operator and junior employee J. Cottrell's position on a 500 ballast regulator were abolished effective November 21, 1990. However, although Cottrell's position was abolished, the Carrier continued to work Cottrell on the regulator. Cottrell reported to the machine and not to sub-division headquarters.

In order to exercise his seniority rights, Claimant checked with the Assignment Clerk to determine if employees junior to him were working. Not knowing that Cottrell continued to work, the Assignment Clerk advised Claimant that no junior employees were working. Claimant then went on furlough effective November 26, 1990 while junior employee Cottrell continued to work. According to the Carrier, Cottrell continued to work for approximately one month.

This claim was instituted when it was discovered that Cottrell had been working while Claimant was on furlough.

The claim will be sustained. Whether intentional or not, by permitting the junior employee Cottrell to continue working after the abolishment of his position and by having Cottrell report to the machine rather than headquarters for what the record discloses was a substantial period of time at a remote location, the abolishment of Cottrell's position was not actually accomplished and the Carrier effectively hid Cottrell from being bumped by a senior employee seeking to exercise contractual seniority rights. As a result of the Carrier's actions, the Assignment Clerk had no idea that Cottrell was working and therefore could not advise Claimant that a junior employee was working so as to allow Claimant to exercise his seniority rights. Because Rule 4, Section 2(a) allows an employee to "exercise seniority to a position for which he is qualified," the Carrier's actions precluded Claimant from exercising those rights.

The Carrier cannot successfully maintain that Claimant did not make a timely written request to demonstrate his qualifications on the regulator. Because the Carrier's actions effectively hid the fact from Claimant that it continued to work Cottrell, the Carrier is therefore precluded from arguing that Claimant was required to take affirmative steps about a position he knew nothing about.

Nor can the Carrier successfully argue in this case that Claimant was not qualified to perform the work on the regulator. Were it not for the fact that the Carrier's actions precluded Claimant from knowing that Cottrell continued to work on the regulator, Claimant would have had the opportunity to demonstrate his qualifications on that equipment. In this case, the Carrier cannot benefit from the fact that it hid from Claimant that Cottrell continued to work.

As a remedy, Claimant shall be made whole at the appropriate contract rate and shall receive all other entitlements for hours worked by Cottrell from the point Claimant ceased working as a result of the abolishment of his job until Cottrell was furloughed.

AWARD

Claim sustained in accordance with the Findings.

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 20th day of June 1996.