

CORRECTED

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31763
Docket No. MW-30735
96-3-92-3-528**

The Third Division consisted of the regular members and in addition Referee John J. Mikrut, Jr. when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of System Committee of the Brotherhood that:

- (1) The Agreement was violated when, on September 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, October 1, 2, 3, 4, 8, 9, 10, 11, 15, 16, 17, 18, 22, 23, 24, 25, 29, 30, 31, November 1 and 5, 1990, the Carrier used B&B Foreman R. F. DePue, instead of assigning a Class 1 Machine Operator, to operate a crane at Albany, Ohio (System Docket MW-1959).**
- (2) The Agreement was violated when, on November 6, 7, 8, 12, 13, 14, 15, 19, 20, 21, 22, 26, 27, 28, 29, December 3, 4, 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, 1990, January 1, 2, and 3, 1991, the Carrier used B&B Foreman R. F. DePue, instead of assigning a Class 1 Machine Operator, to operate a crane at Albany, Ohio (System Docket MW-1957).**
- (3) The Agreement was violated when, on January 7, 8, 10, 14, 15, 16, 17, 21, 22, 23, 24, 28, 29, 30, 31, February 4, 5, 6, 7, 11, 12, 13, 14, 18, 19, 20, 21, 25, 26 and 27, 1991, the Carrier used B&B Foreman R. F. DePue, instead of assigning a Class 1 Machine Operator, to operate a crane at Albany, Ohio (System Docket MW-1963).**

- (4) As a consequence of the violation referred to in Part (1) above, the Class 1 Machine Operator's position on the Columbus Seniority District shall be advertised and assigned in accordance with the Agreement and the senior furloughed Class 1 Machine Operator on the Columbus Seniority District shall be allowed pay for ten (0) hours each workday, September 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, October 1, 2, 3, 4, 8, 9, 10, 11, 15, 16, 17, 18, 22, 23, 24, 25, 29, 30, 31, November 1 and 5, 1990, at his applicable straight time rate and he shall be allowed pay for all overtime worked by Mr. DePue during said period at his applicable overtime rate of pay.
- (5) As a consequence of the violation referred to in Part (2) above, the Class 1 Machine Operator's position on the Columbus Seniority District shall be advertised and assigned in accordance with the Agreement and the senior furloughed Class 1 Machine Operator on the Columbus Seniority District shall be allowed pay for ten (10) hours each workday, November 6, 7, 8, 12, 13, 14, 15, 19, 20, 21, 22, 26, 27, 28, 29, December 3, 4, 5, 6, 10, 11, 12, 13, 17, 18, 19, 20, 24, 25, 26, 27, 1990, January 1, 2, and 3, 1991, at his applicable straight time rate and he shall be allowed pay for all overtime worked by Mr. DePue during said period at his applicable overtime rate of pay.
- (6) As a consequence of the violation referred to in Part (3) above, the Class 1 Machine Operator's position on the Columbus Seniority District shall be advertised and assigned in accordance with the Agreement and the senior furloughed Class 1 Machine Operator on the Columbus Seniority District shall be allowed pay for ten (10) hours each workday, January 7, 8, 9, 10, 14, 15, 16, 17, 21, 22, 23, 24, 28, 29, 30, 31, February 4, 5, 6, 7, 11, 12, 13, 14, 18, 19, 20, 21, 25, 26 and 27, 1991, at his applicable straight time rate and he shall be allowed pay for all overtime worked by Mr. DePue during said period at his applicable overtime rate of pay."

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 were given due notice of hearing thereon.

On all claim dates, the Organization alleges, and the Carrier does not dispute, with the exception of operating the crane on December 24 and 25, 1990, that Foreman DePue operated a B&B locomotive crane equipped with semi-fixed pile driving leads during his regular tour of duty.

The Carrier argues that Foreman DuPue operated the crane no more than 30 percent of the time.

The Organization disputes this assertion. As a result of Foreman DuPue's operation of the B&B locomotive crane equipped with semi-fixed pile driving leads, the Organization filed claims on November 6, 1990, January 4, and February 27, 1991, each requesting ten hours pay for 32 work days alleging the Carrier violated Rules 1 and 3 by utilizing Foreman DuPue instead of an unnamed senior furloughed Class 1 Machine Operator.

The Organization believes the unnamed Claimant is entitled to perform the disputed work by virtue of the Scope Rule and by virtue of the seniority and classification Rules establishing B&B Foreman and Machine Operator as separate seniority classifications.

The Organization argues that crane operation clearly falls within the Scope Rule and therefore, the Carrier was obliged to assign the operation of the crane to a Machine Operator rather than the Foreman. The Organization also argues that the Carrier is obliged by the Agreement to advertise positions and vacancies per Rule 3, which requires the Carrier to advertise and award all positions and vacancies within 30 days previous to or within 20 days following the date they occur.

The Carrier defends the claim by first taking issue with a procedural aspect. According to the Carrier, the Organization is estopped from progressing these claims because it initiated essentially the same claims during 1990 and 1991 and failed to progress the claims to a Board in accordance with Rule 26(d) of the Agreement. Moreover, the Carrier argues that the claims were not timely submitted in accordance with Rule 26(a) because DePue began operating the B&B locomotive crane in 1985. Therefore, the Organization failed to timely protest his operation of the crane by submitting claims in November 1990, January and February 1991.

The Carrier also argues that sporadic use of employees working across classification lines is permitted under Paragraph (4) of the Rule which reads:

"A listing of a given classification is not intended to assign work exclusively to that classification. It is understood that employees of one classification may perform work of another classification subject to the terms of this Agreement."

Next, the Carrier argues that the operation of the equipment in question requires special qualifications and that an offer to advertise the position apparently discussed during the negotiation of the claim on the property, does not bind the Carrier to bulletin the position and therefore, it should be ignored by this Board as terms of a settlement discussion.

Finally, the Carrier questions whether an appropriate damage remedy exists because there is an unnamed claimant. The unnamed senior furloughed employee arguably may or may not have been available for work and furthermore, the Organization failed to establish that the unnamed claimant would have been qualified to operate the crane in question.

Therefore, the Carrier urges us to deny the claim.

After considering the arguments of the parties, we find that we must deny this claim. As an appellate body, we are obliged to decide claims and grievances based on the arguments made by the parties on the property. Here, the Carrier raises an issue of whether the unnamed claimant would be qualified to perform the work in question.

The Organization, as the moving party, bears the burden of proving that a specific claimant is qualified to perform the work in question. Here, according to the Carrier, the particular crane arrived on the property in 1985. The only person ever qualified to operate this particular crane was B&B Foreman DePue. The Organization argues that, a crane is a crane, and in any event, the Carrier is obliged to train Machine Operators on new equipment. This may, in fact, be true. However, the issue before the Board is whether the claimant, in this case an unidentified claimant, was qualified to perform the work in question.

The Organization, by failing to name a specific claimant and by failing to prove that, in fact, that particular claimant was qualified to perform the disputed work, failed its burden of proving the elements of its claim.

Therefore, since the record is devoid of any information indicating that a particular Machine Operator was qualified to perform the work in question, we must deny the claim.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order Of Third Division

Dated at Chicago, Illinois, this 24th day of October 1996.