

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42512  
Docket No. MW-42219  
17-3-NRAB-00003-130182**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
( CP Rail System (former Delaware and Hudson  
( Railway Company)

**STATEMENT OF CLAIM:**

“Claim on behalf of the System Committee of the Brotherhood:

- (1) The Agreement was violated when the Carrier failed to bulletin a trackman/truck driver position on March 28, 2011 and continuing (Carrier’s File 8-00826 DHR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Anderson shall now be compensated for all hours worked by the unbulletined trackman/truck driver position beginning March 28, 2011 and continuing.”

**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.

From 2002 to February 2007 the Carrier maintained a Trackman/Truck Driver position to operate the boom truck (Truck No. 712) stationed at Binghamton, New

York. During this period of time the Binghamton Maintenance Crew (BMC) operated one ton pickup trucks which did not have the capacity for transporting track material. The Trackman/Truck Driver operated Truck No. 712 and assisted BMC when it needed track material transported.

On February 7, 2007, the Carrier replaced BMC's pickup trucks with larger vehicles - BTMF trucks - which had the capacity for transporting track materials previously transported in Truck No. 712. The BTMF trucks rendered Truck No. 712 obsolete. On March 6, 2007, the Carrier abolished BMC's Trackman/Truck Driver position for Truck No. 712 and in May 2007 the Carrier replaced Truck No. 712 with a grapple truck.

In May 2008, the Carrier established an extra utility crew, in addition to the maintenance crew, at Binghamton. The Carrier determined that a Trackman/Truck Driver position for the grapple truck was required. The Carrier advertised and awarded the position. Upon completing the work on July 18, 2008, the Carrier abolished the grapple truck position.

During the periods of March 2007 - May 2008 and July 2008 - March 2009 the grapple truck stationed at Binghamton was used as needed and operated by qualified employees. The Carrier did not maintain a Trackman/Truck Driver position dedicated to operating the grapple truck.

On March 23, 2011, the Carrier transferred the grapple truck from BMC to Taylor (PA) Maintenance Crew (TMC). TMC has two Foremen / Truck Drivers and two Trackmen/Drivers; they operate TMC's two BTMF trucks. The Carrier did not post a Trackman/Driver position when it stationed the grapple truck at TMC.

On May 24, 2011, the Organization filed a claim on behalf of Employee Anderson for time worked by Employee Smith (Trackman/Truck Driver - Taylor Section Crew) operating the grapple truck beginning March 28, 2011 and continuing. The Organization alleges violations of Rule 3 (Vacancies and New Positions) and Rule 17 (Temporary Assignments) among others.

Historically, the Organization asserts, transporting track material for all subdivisions was performed by a Trackman/Driver assigned to the boom truck (Truck No. 712 - Binghamton and similar trucks out of Kenwood, Central Bridge and Willsboro). The Carrier abolished the Trackman/Driver position in 2007 when it replaced Truck No. 712 with the grapple truck which is operated by a "committee" of employees.

Since March 28, 2011 and continuing, Employee Smith operated the grapple truck on 13 days for more than four hours a day; this was not incidental work but preponderant work for Smith's workday. Although the Carrier labels this a temporary assignment, Employee Smith's assignment involved performing the work of a position which the Carrier was required to post under Rule 3.6 ("[a]ll positions and vacancies will be advertised within 30 days previous to or within 20 days following the dates they occur"). This situation represents a loss of work opportunity for the Claimant as the Carrier did not post the position.

On June 13, 2011, the Carrier denied the claim. No position was posted as TMC positions were filled by Foremen/Drivers and Trackmen/Drivers. In accordance with Rule 17.1 ("[a]n employee may be temporarily assigned to different classes of work within the range of his ability") the Carrier assigned Employee Smith to operate the truck, as needed, for a few hours on claim dates. This is consistent with the historical use of the boom truck/grapple truck. Since there was no need for a new position, Rule 3.6 does not apply. The Carrier asserts that Rule 3.6, nor any other provision in the Agreement, require posting a position for every piece or type of equipment.

On August 5, 2011, the Organization filed an appeal. The claim covers the 13 dates when Employee Smith operated the grapple truck as well as dates after April 18, 2011 when the Carrier made an assignment to the truck without advertising a Trackman/Driver position. The Organization acknowledges the Carrier did not post a Trackman/Driver position but there is a need for the position as shown by Bulletins 143.11, 144.11 and 160.11 where the Carrier advertised for a Foreman and Trackman/Driver (CDL, Class B licenses) to assist the joint elimination crew (headquartered in Central Bridge) in laying out rail plugs. The Organization asserts this shows that the position is routinely and historically advertised otherwise the Carrier would not have advertised and awarded the positions in Central Bridge (Plug Crew) and Willsboro (Material Support Truck).

The Organization notes that the dispute in this claim is the same dispute that occurred in Binghamton which generated numerous claims. The Carrier transferred the grapple truck, and the dispute about the driver position to operate the truck, from Binghamton to Taylor. This claim spans 22 days (March 28, 2011 - April 18, 2011) when the grapple truck was used on 13 days. This usage rate of approximately 60 percent proves the need for a driver position as existed at Central Bridge, Binghamton and Willsboro. Any date after April 18, 2011 must be considered as part of the claim since the grapple truck remains stationed at TMC.

The Organization asserts the Carrier pulled Employee Smith from his crew and awarded him the grapple truck driver position without posting it. The Organization states:

**“Rule 17 provides that employees may be temporarily assigned to positions. Rule 17 further states: ‘It is not the intention of this Rule to eliminate positions.’ When the Carrier did not advertise the grapple truck position and instead used an employee assigned to a separate and distinct advertised position, the position left open by the employee filling the grapple truck was effectively eliminated because of the Carrier’s failure to advertise this position in accordance with the Agreement.” (Emphasis added)**

The Organization asserts the Carrier violated the intent of Rule 17.1 and the Carrier’s interpretation of the Rule means it could avoid posting for any position - notwithstanding the requirement to post in Rule 3.6 (“[a]ll positions and vacancies will be advertised within 30 days previous to or within twenty (20) days following the dates they occur”) - by labeling the position a temporary assignment. The Carrier’s failure to bulletin deprived the Claimant of the opportunity to submit a bid for the grapple-truck position and also denied the Claimant the opportunity to work at home instead of working on the road. Had the position been posted, the Claimant would have been aware of it and applied. Numerous Awards show that the Carrier’s failure to properly post a position which an employee is entitled to bid on is a violation of the Agreement. The Claimant is entitled to a full remedy.

On November 1, 2011, the Carrier denied the appeal. Rule 17.1 does not require the Carrier to advertise or bulletin a temporary assignment; Rule 17.1 allows the Carrier to assign a qualified employee to a temporary assignment which, in this claim, was not a new position and not subject to posting (Rule 3.6). Employee Smith, assigned to operate the grapple truck for a few hours on nonconsecutive days, was senior qualified and senior to the Claimant. Positions in Bulletins 143.11, 144.11 and 160.11 were not dedicated to operating one type of equipment but several types - boom trucks, hi-rail boom trucks, fuel trucks and welding trucks. Also, the Track Maintenance Supervisor confirmed in an e-mail that the Senior Equipment Operator (SEO) at Central Bridge operated the grapple truck as well as a loader for the past seven years without the Organization presenting any exceptions.

The Carrier’s practice, under Rule 17.1, always has been for an equipment operator to operate multiple pieces or types of equipment. The Carrier does not bulletin a position for every piece of equipment owned or rented. The situation in this claim was no different than an SEO operating a loader for a half day at Binghamton

and, for the rest of the day, operating a backhoe. For example, TMC's SEO operated a loader, backhoe and excavator during the week of October 31, 2011. The Carrier did not post a position for each equipment type that the SEO operated as needed. The grapple truck is no different than other equipment in TMC's inventory, i.e., BTMF truck, loader, backhoe or excavator. For the period of March 28, 2011 through April 30, 2011 the grapple truck usage rate was 38 percent which shows sporadic use. As there was no need for a full-time position, the Claimant did not endure a loss of work opportunity. Finally, the Carrier cites Third Division Award 37437 "The right of the Carrier to determine when, where and by whom work is to be performed is well established by decisions of the Board[.]"

On February 10 and March 1, 2012, a claims conference convened. No resolution or understanding were attained. This matter is now before the Board. Having reviewed the record, the Board renders the following findings and conclusions.

The claim before the Board in this proceeding is described by the Organization as the Carrier "attempt[ing] to eliminate a position [Trackman/Driver] from the Taylor Basic Forces by not advertising a Trackman/Truck Driver position when there is a grapple truck at HQ." The Organization asserts that "[h]istorically, Headquartered Points throughout the property had established Trackman/Truck Drivers to transport and haul material as needed on the territory."

In the circumstances presented by this claim, the Carrier asserts that the disputed assignment of Employee Smith was a temporary assignment under Rule 17. The record shows that Employee Smith was placed in a temporary assignment that consumed more than 20 days. For the duration of his temporary assignment, Smith was the only operator of the grapple truck. There is no evidence that he operated any other piece or type of equipment during this time or that he performed any other duties. This assignment was dedicated solely to operating the grapple truck; it was not sporadic or intermittent but continuous and ongoing. Rule 17 is flexible to cover assignments that arise from time-to-time but, in this situation, the Carrier effected a position assignment under the rubric of a temporary assignment. The Board finds this claim as distinct from those filed in 2009 or 2010 as the number of days and hours involved far exceeds the number of days and hours for any one claim filed in 2009 or 2010. Given this evidentiary record and findings, the Carrier was required to post and failed to do so in violation of the Agreement.

In finding a violation, the Board notes that the absence of evidence indicating Employee Smith operated any other equipment distinguishes this situation from those in Advertisements and Awards 143.11, 144.11 and 160.11 and the practice at Central Bridge. The Board is not concluding, however, that use of the grapple truck in every

situation requires posting nor is the Carrier required to establish a Trackman/Truck Driver position at locations where the truck is stationed. The findings in this claim are specific to the facts in the record.

Third Division Awards 23436 and 25687 show that a carrier's failure to post in accordance with the Agreement for employees entitled to bid on a position is a violation of the Agreement. Since the Carrier did not post, there was a violation of the Agreement. For this violation, the Claimant's relief is to be made whole for the difference between his wages during the period of March 28, 2011 and April 18, 2011 and what he would have earned but for the violation of the Agreement. Although the Organization seeks to extend the claims dates beyond April 18, 2011 since the grapple truck remained stationed at TMC, the Board declines to do so as the truck's location is not determinative of a rule violation.

**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 11th day of January 2017.