

PUBLIC LAW BOARD NO. 2960

AWARD NO. 88
CASE NO. 122

PARTIES TO DISPUTE:

Brotherhood of Maintenance of Way Employes

and

Chicago & North Western Transportation Company

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when, on July 18, 1983 through October 31, 1983, it assigned and used Track Foreman Steve Kath to operate a ballast regulator instead of recalling and using furloughed Machine Operator Dave Benson. (Organization File 7T-4073; Carrier File 8-83-198).
- (2) As a consequence of the aforesaid violation, furloughed Machine Operator Dave Benson shall be allowed the Class B Machine Operators rate for three hundred ninety two (392) hours at the straight time rate and forty four and one half (44 1/2) hours at the time and one half rate.

OPINION OF THE BOARD

This Board, upon the whole record and all of the evidence, finds and holds that the Employee and Carrier involved in this dispute are respectively Employee and Carrier within the meaning of the Railway Labor Act, as amended, and that the Board has jurisdiction over the dispute involved herein.

The basic facts are not in dispute. The Claimant, Dave Benson, established and holds seniority as a Class B Machine Operator dating from

April 8, 1981. He was regularly assigned as such until his position was abolished and he was furloughed on November 19, 1982. From July 18, 1983 through October 31, 1983, the Carrier intermittently had in service a ballast regulator (Class B machine) and instead of assigning and using the Claimant as the operator thereof, it assigned and used Foreman Kath.

There is much argument in the record about whether the Carrier was obligated under Rule 16(a) to bulletin the assignment inasmuch as it did not work every day during a 30-day period

This issue is somewhat besides the point because even if the vacancy is less than 30 days in duration, Rule 16(b), based on this record, is clearly controlling in the case of such vacancies for machine operators. It states:

"Vacancies of less than thirty (30) calendar days duration may be filled without bulletining, except that senior qualified employees in the district and group will be given preferred consideration.

"Vacancies of less than thirty (30) calendar days in machine operator positions will first be filled by employees holding seniority as Machine Operators but not working as such.

"If there are no such employees holding seniority as Machine Operators, consideration will then be given to Track Department employees who have on file written request with Assistant Division Manager-Engineering for such consideration, prior to assignment of others. No seniority will be established for employees filling these positions on this basis."

Thus, it is clear that foremen are not allowed to fill machine operator vacancies. They "will" be filled by employees holding seniority as machine operators and after that those employees without machine operator seniority who have asked for consideration to fill such vacancies. In view of this unambiguous language, the Board cannot accept the Carrier's contention that it was permissible for a foreman under these circumstances

to operate the machine.

There may be a question whether Mr. Benson was the proper Claimant. However, such an issue was not raised during the handling of the claim before appeal to the Board. An employee with machine operator seniority rights was entitled to operate the machine not the foreman. This, based on this record, is the overriding issue. Thus, the claim must be sustained.

AWARD

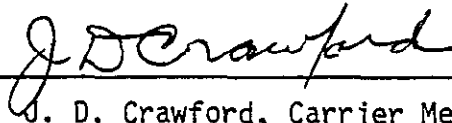
In view of the foregoing, the claim is sustained.



Gil Vernon, Chairman



H. G. Harper, Employee Member



J. D. Crawford, Carrier Member

Dated:

May 8, 1985