

SPECIAL BOARD OF ADJUSTMENT NO. 1110

Award No. 46
Case No. 46

PARTIES TO THE DISPUTE:

BROTHERHOOD OF MAINTENANCE WAY EMPLOYEES

and

CSX TRANSPORTATION, INC. (Former Louisville
and Nashville Railroad Company).

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned machine Operator T.W. Anderson to operate a backhoe at Radnor Yard, Nashville, Tennessee on June 8 and 9, 1995, instead of assigning cut-back Machine Operator D.B. Pewitt [System File 13(4)(95)/12(95-1215) LNR].
- (2) As a consequence of the violation referred to in part (1) above, Claimant D.B. Pewitt shall be allowed seventeen (17) hours' pay at the backhoe operator's time and one-half rate.

FINDINGS:

This Board, upon the whole record and all of the evidence, finds and holds as follows:

1. That the Carrier and Employees involved are, respectively, Carrier and Employees within the meaning of the Railway Labor Act, as amended, and;

2. That the Board has jurisdiction over this dispute.

3. The Organization asserts that the Carrier violated Claimant's seniority rights by its assignment of a regularly assigned machine operator (T. W. Anderson) to fill the temporary machine operator vacancy (backhoe operator) on June 8 and June 9, 1995 instead of upgrading Claimant, who was qualified and available to fill the position.

4. The Organization contends that the Carrier violated Rule 22(d)(1) which specifically requires that "in calling men above the rank of repairman for temporary or extra work, the senior cut-off employee in the rank concerned will be given an opportunity to take the extra work when it is expected to be for less than five (5) working days". The Organization argues that the 2 day vacancy created by the absence of Machine Operator Ferrell due to vacation was precisely the type of vacancy to which Rule 22(d)(1) applied.

5. The Organization asserts that the Carrier's defense - that Claimant D. B. Pewitt was not the senior cut-off employee in the rank concerned on the date in question - is invalid. The Organization claims that it is of no consequence whether Claimant was the senior cut-back employee, as long as he held seniority in the classification of the position filled and he was cut-back, he is a proper claimant.

6. Citing authority, the Organization argues that the Board has held that where the Organization claims a rule violation, "the fact that another employee may have a better right to make the claim is of no concern . . . and does not relieve Carrier of the violation". (NRAB Third Division Award 25860). Finally, the Organization claims that the proper rate of pay for overtime violations is the applicable overtime rate.

7. The Carrier argues that the Organization has failed to demonstrate that the regularly assigned vacation vacancy was considered by the Agreement as being "temporary or extra work". The Carrier contends that Rule 22(d)(1) was not applicable to this regularly assigned vacation vacancy. The Carrier argues that its contention was neither discredited nor disproved by the Organization below. Citing authority, the Carrier argues that its statement must be accepted as fact at this level.

8. The Carrier further contends that the Organization has a burden to prove by a preponderance of the evidence that a violation of the Agreement occurred. The Carrier further points out that even if there was a violation of Rule 22(d)(1), the organization is improperly requesting compensation at the overtime rate for time not worked. Citing authority, the Carrier argues that the measure of compensation for time not worked is the *pro rata* rate.

OPINION:

The Board is persuaded that the evidence demonstrates that the Carrier elected to fill the vacancy created by the vacationing employee by laterally moving Machine Operator T.W. Anderson from his assigned machine to Radnor yard to operate the backhoe. The Board is further persuaded that Claimant Pewitt was working in a lower rated classification (trackman) and was entitled, under Rule 22(d)(1), to perform the work created by the temporary vacancy. Rule 22(d)(1) states, in pertinent part:

[I]n calling men above the rank of repairman for temporary or extra work, the senior cut-off employee in the rank concerned will be given an opportunity to take the extra work when it is expected to be for less than five working days.

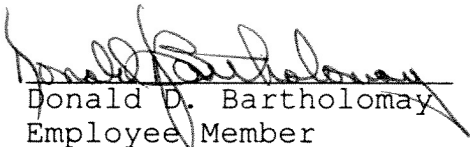
The Carrier was under no obligation to fill the temporary vacancy; however, once it elected to do so, it had to fill the vacancy in accordance with the Agreement. Its failure to do so constituted a violation of Rule 22(d)(1).

AWARD:

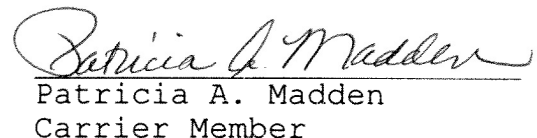
The Claim is sustained in accordance with the Opinion of the Board. Claimant D.B. Pewitt shall be allowed seventeen (17) hours' pay at the backhoe operator's straight time rate.



E. William Hockenberry
Chairman and Neutral Member



Donald D. Bartholomay
Employee Member



Patricia A. Madden
Carrier Member

Dated: OCT 25 1999