

The Second Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
(Burlington Northern Railroad Company

PARTIES TO DISPUTE:

1. That in violation of the current agreement the Burlington Northern Railroad failed to timely recall Electrician Johnny C. Hilliard of Tulsa, Oklahoma to a vacant Electrical Craft position at its Tulsa, Oklahoma Diesel Shop and arbitrarily assigned an employee not of the Electrical Craft and/or holding seniority as such to fill the subject vacant position.

2. That accordingly, the Burlington Northern Railroad be instructed to make Electrician Johnny C. Hilliard whole by compensating him for all lost wages and benefits beginning May 2, 1987 and continuing until his recall and return to duty at Tulsa. The Agreement of April 1, 1983 is controlling.

FINDINGS:

The Second Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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.

When Claimant became furloughed in August 1985, he properly advised Carrier of his desire to work on any open jobs anytime an Electrician was needed. Claimant's notice set out the address where he could be reached and specifically indicated that a copy was being furnished Carrier's Tulsa, Oklahoma Shop Superintendent. During the first week in May 1987, a vacancy occurred on an Electrician position at the Tulsa Diesel Shop. Carrier filled the vacancy with a furloughed Machinist while "call back" letters were being sent to furloughed Electricians.

The call back procedure took several months with interludes of inactivity because an additional Electrician may not have been needed during some of the time. Claimant was returned to employment with Carrier on December 3, 1987.

Carrier has defended its temporary use of a Machinist on the vacant Electrician position on a variety of grounds, including an allegation that a local understanding was reached with IBEW representatives on the matter. We are not persuaded that any of these defenses are valid. Carrier contended at the time that it did not have an Electrician available to fill the vacancy, thus it wanted concurrence to use a furloughed Machinist on the job. This contention was based on a material mistake in fact. Claimant had complied with the Agreement, in all respects, and was available for the assignment. Carrier, knew or should have known, when it sought permission to fill the job with a Machinist that a furloughed Electrician was available and willing to assume the vacancy. An understanding, achieved through misrepresentations or material mistake in fact cannot override clear and positive agreement provisions.

Carrier has also defended on the basis that the Claim was tardy and that Claimant is an improper claimant because of his seniority ranking at the time. The improper claimant contention was not raised while the matter was under consideration on the property, accordingly, under well defined authority, it cannot be considered for the first time at the Board.

On the timeliness matter, the Organization's Claim was filed on January 13, 1988. It sought compensation retroactive to May 2, 1987, the date the Machinist first worked as an Electrician. This obviously goes beyond the sixty days of retroactivity provided in the parties Time Limit Rule. Accordingly, the earliest date covered by the Claim would be November 15, 1987. Claimant would therefore be entitled to a days pay for each date the Machinist worked as an Electrician commencing November 15, 1987 and ending December 3, 1987, the date he was returned to service.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 20th day of February 1991.