

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award amber **22305**
Docket Number m-22269

Don Hamilton, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Inc.

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned **Sectionman** V. Noyola instead of Truck Driver **J. A. White** to fill a vacation vacancy of section foreman from **June 4, 1976** through **June 18, 1976** [System File P-P-301C/MW-6(d)-1 10/5/76].

(2) Truck Driver **J. A. White** shall be allowed the difference between the section foreman's rate and the truck driver's rate for all time worked by Sectionman **V. Noyola** as a section foreman during the period referred to in Part (1) hereof."

OPINION OF BOARD: **Rule 19B** provides:

"Vacation relief may be provided by assigning qualified **employees** in seniority order in the following order of preference before other employees till be assigned to perform vacation relief on an involuntary basis:

(1) **Employees** holding seniority but unassigned in the classification or seniority rank of the vacationing **employee** who are Working at the location or on the gang Where relief is to be provided.

(2) Employees holding seniority in lower classification and seniority ranks in the seniority sub-department of the vacationing **employee** who are working at the location or on the gang where relief is to be provided.

(3) Employees who have filed Written requests under Section A of this rule who are not working at the location or on the gang where relief is to be provided, and who will be subject to Rules 35 and **36.**"

The **Claimant** holds seniority as a truck driver within the Track Sub-Department. His assigned headquarters is **Connell**, Washington. Section Foreman **L. F. Hansman**, also headquartered at **Connell**, Washington, was on vacation **June 5** through June 18, 1976.

The Claimant asserts that he should have been utilized to relieve the Foreman during the vacation and that the Carrier erred **when** it used **Sectionman Noyola**, who was headquartered at Wheeler, Washington.

The Organization asserts that the claim is proper under **Rule 19B(2)**.

The Carrier first argued that the Claimant did not file a written request pursuant to **Rule 19B(3)**. If the Claimant was a qualified employe and the provisions of **Rule 19B(2)** apply, then the **written** request called for in **Rule 19B(3)** would, in fact, be **inapplicable** to this case. Apparently, the Carrier recognized this contention and then asserted that the Claimant was not qualified and, therefore, none of the three numbered paragraphs of **Rule 19B** apply.

The **argument** advanced by the Carrier to support the lack of qualification of the Claimant is based strictly upon his attitude. The Carrier maintains that the Claimant has a bad attitude in regard to following directions and, therefore, he is not qualified to perform the job of Section Foreman. The record is inadequate to support this contention.

What is **proven** is the fact that the Claimant and the Carrier had a disagreement in regard to alleged injuries two years prior to the time of this claim. It appears that the Carrier advanced the argument that the Claimant was not qualified predicated primarily on the prior incident **involving** safety and injury and not on his current ability, or lack thereof, to perform the duties of Foreman.

Rule 19B first provides that **employes** holding seniority in the class of the vacancy to be filled will be given first opportunity. In this case, no employe was available. The second preference is granted to **employes** holding seniority in a lower class who are working at the location where the vacation vacancy arises. The Claimant qualifies under this section. **Rule 19B(2)** does not require a written request by the employe in order for him to be available for vacation relief on or at the point employed.

The Organization further asserts that weight should be given to the offer of the Carrier to compensate the Claimant in the amount of one-half of the amount sought to be **recovered** herein. We do not view an offer of settlement as an admission against interest. To do so would stifle and inhibit legitimate negotiations to settle pending cases.

The record supports the contentions of the Claimant and the claim is sustained.

FINDINGS: The Third **Division** of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and **Employes** within the meaning of the Railway labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction **over** the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD **ADJUSTMENT** BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this **22nd** day of February **1979**.