

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26492  
Docket Number MW-26266

Herbert L. Marx, Jr., Referee

(Brotherhood of Maintenance of Way Employees

PARTIES TO DISPUTE: (

(The Chesapeake and Ohio Railway Company (Southern Region)

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

1. The Carrier violated the agreement when it failed and refused to return Mr. K. W. Ragland to his assigned position as foreman-inspector when he returned from his vacation on July 2, 1983 (System File C-TC-1889/MG-4273).

2. Because of the aforesaid violation, Mr. K. W. Ragland shall be allowed the difference between what he should have been paid at the inspector-foreman's rate and what he was paid at the bridge and building mechanic's rate July 2 through July 31, 1983 and forty-five (45) hours of pay at the foreman-inspector's time and one-half rate for July 2, 16, 17, 23 and 31, 1983."

OPINION OF BOARD: Rule 83(b), in reference to work which is let to contract, states "if painting work is contracted, a foreman will be used." The Carrier required a Foreman-Inspector under such conditions beginning June 23, 1983. Such position was not posted under Rule 18, which exempts from bulletining temporary vacancies "until the expiration of thirty days from the date such vacancies occur."

The Carrier states that it has been its "practice" in assigning employees to work with contractors to select the "senior qualified, available foreman and, if there are no qualified foremen available, to use the senior qualified available B&B Mechanic."

In the instance here under review, a current Foreman was to be assigned but bid off on another position. The Carrier then selected the senior B 6 B Mechanic, the Claimant herein, to serve as Foreman-Inspector. The Claimant served in the position commencing June 23, 1983. He then took his **pre-scheduled vacation** from Monday, June 27 through Friday, July 1. Upon the Claimant's departure for vacation, the Carrier selected a junior B 6 B Mechanic to replace him. Upon the Claimant's return from vacation, the Carrier continued to use the junior B & B Mechanic as Foreman-Inspector through the month of July.

The Organization argues that the Claimant, having been assigned by seniority in the first place, should have been permitted to **resume** the Foreman-Inspector position upon his return from vacation.

The Organization refers for support to Rule 2(b), which reads as follows:

"(b) Service Rights. -- Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Railway Company as hereinafter provided."

The Organization argues that Rule 2(b) is applicable to temporary positions, a view supported in general by many previous Awards.

The Carrier argues **that** Rule 83(b) simply states that a foreman shall be "assigned. " It draws from this that it is therefore free of restriction in selecting such Foreman. The Board need not review here the degree of latitude which the Carrier may have in making a selection of an employee to serve as Foreman-Inspector. In this particular instance, however, the Carrier in fact selected the Claimant for the assignment, representing for him an increased level of pay and responsibility. It did so in recognition of the Claimant's seniority standing, as its stated practice (and assuming, of course, that the Claimant had the necessary qualification and availability for the assignment). This was not only in accordance with the Carrier's stated practice but also within the purview of Rule 2(b).

It is obvious from the record that the only factor in the Claimant's removal from the position, being superceded by a junior employee, was that he was absent on vacation. The Board does not find that this justifies the Carrier's failure to retain the Claimant in the assignment. The Carrier argues that the junior employee would provide greater continuity in the Foreman-Inspector position, since he had been serving therein from June 27, 1983. This argument was apparently not considered, however, when the Carrier made the initial assignment of an employee in the face of his pre-scheduled vacation. Further, since the Claimant had been selected initially, there can be no question to his availability or qualification.

The Board will find, both by practice and applicable seniority Rules, that the Carrier improperly removed the Claimant from his assignment following his return from vacation.

In addition to its argument as to the Claim's merits, the Carrier also takes issue with the remedy sought, which includes difference in pay as well as premium pay for overtime **worked** by the junior employee. In viewing these contentions, as well as those of the Organization, the Board will sustain the Claim but with the following modifications:

1. Claimant shall receive the difference between what he earned in straight-time pay from July 4 through July 31, 1983 and what he would have earned in straight-time pay a Foreman-Inspector for the same period.

2. Claimant shall receive pay at the rate of time and one-half for overtime hours worked by the junior employee on July 16, 17, 23, 1983, less the pay he received for any overtime work which he performed as Mechanic between July 4 and July 31, 1983. It is well settled by the predominance of Awards in this Division that the premium rate is applicable in such circumstances.

3. Claimant shall not receive pay for July 2, 1983, when the junior employee worked overtime. Awards to the contrary effect submitted by the Organization refer co overtime work on the rest days of the week previous to vacation. Claimant's availability on July 2 (the week of his vacation) was not ascertained.

4. Claimant shall receive pay at the rate of the time and one-half for 7 1/2 hours on July 31, 1983, unless the Carrier can promptly demonstrate by payroll records that the junior employee did not work overtime as Foreman-Inspector that day.

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 Employees involved in this dispute are respectively Carrier and Employees 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

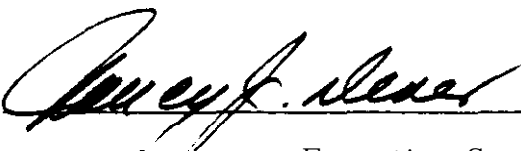
That the Agreement was violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of September 1987.