

The Third Division consisted of the regular members and in addition Referee Eckehard **Muessig** when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**  
(Delaware and Hudson Railway Company)

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

(1) The Carrier violated the Agreement when it assigned an employe (**Trackman** D. Reed) holding no seniority in the assistant foreman's class or the foreman's class to fill a vacation vacancy of foreman on December 12, 13, 14, 15 and 16, 1983 (System Case 821.84).

(2) Mr. B. J. Raudibaugh shall be allowed forty (40) hours of pay at the foreman's straight time rate because of the violation referred to in Part (1) hereof."

FINDINGS:

The Third 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.

From December 12 through December 16, 1983, the regularly assigned Foreman for Gang T-49 was on vacation. The Organization contends that the Claimant should have been assigned to the position for that period of time. In so asserting, it mainly relies upon Article 12(b) of the Vacation Agreement which reads:

"(b) As employees exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty **will** not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort **will** be made to observe the principle of **seniority**."

We agree with the Organization. The Board again observes that only the facts and arguments presented by either party on the property may be considered at this stage of the appeal process.

The Organization clearly specified the events that occurred on the property and presented its reasons for relying upon Rule 27(b). The on-the-property record shows that the claim was denied by the Carrier for the stated reason that this question was "not negotiable" and because the Claimant "was not a member of T-49 nor did he have foreman's rights at time claimed."

Once a claim is filed, the Carrier has the obligation for making a timely and meaningful reply. In this case, the Carrier has failed to provide any type of meaningful reply. Numerous Awards have held that when material statements are made by one party and when these are not substantively addressed by the other party, the contentions stand "rebutted and the material statements are accepted as established fact, particularly when there was both time and opportunity to do so, as herein.

Insofar as the remedy is concerned, however, we are of the opinion that the claim is excessive and rule that Claimant is entitled to the difference between the Trackman and Foreman straight time rates of pay for the week of December 12 thru 16, 1983.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Defer - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March 1988.