

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles 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 junior Trackman D. Gaston to fill a temporary vacancy as assistant foreman on the tie gang on July 4, 5, 9, 10, 11, 12, 13, 16, 17, 18, 19, 23, 24 and 25, 1984 instead of assigning Trackman W. Mason who was senior, available and qualified to fill that vacancy (System Case 7-85).

(2) Because of the aforesaid violation, Trackman W. Mason shall be allowed the difference between what he should have received at the assistant foreman's rate and what he was paid at the trackman's rate for one hundred twenty-eight (128) hours of straight time and twenty-four and one-half (24 1/2) hours of time and one-half."

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.

In early July, 1984, the Carrier issued a bulletin advertising an assistant foreman position on the Tie Gang T-98, but it was necessary to fill the position pending the assignment. Rather than affording the Claimant the opportunity to fill the position, a junior trackman was assigned, and he worked a total of 128 hours at the straight-time rate and 24-1/2 hours of overtime at time and one-half.

Rule 27(B) provides for the temporary filling of vacancies pending a permanent assignment and indicates that the senior available employee will be given preference. The Organization asserts that the Carrier's failure to allow the Claimant to fill the position violated the cited portion of the Agreement.

The Carrier argues that there was an on-property custom dictating that an individual interested in the position make a request to supervision to cover the interim assignment, and if that individual can be spared from his position, the request is accommodated. The Carrier states that the Claimant made no request to cover the vacancy even though he did inquire. Also, since the Claimant did not bid for the job on a permanent assignment, the Carrier felt that the Claimant "never had any interest in the position claimed but chose to capitalize on a situation that has no factual basis of support."

The Organization points out that the assertion of an alleged on-property custom was not raised and considered while the matter was under review on the property but, in fact, was raised for the first time in Carrier's submission.

The Organization states that Claimant did raise the issue of a junior employee having been given the opportunity to cover the work while the matter was considered on the property, and denies that the failure to bid the permanent assignment is material to this dispute.

As we review Rule 27, it states that vacancies may be filled temporarily and it appears obvious from the language that the senior available employee is to be given preference.

Accordingly, we are inclined to sustain the claim.

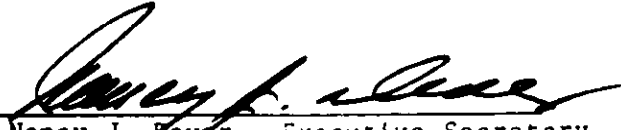
The Carrier questions the propriety of awarding 24-1/2 hours of overtime since the Claimant did not actually perform work and argued that if the claim is to be sustained, the Claimant be compensated for 24-1/2 hours at the pro-rata rate. We disagree and note that Third Division Award 25601 has recently spoken to this question. Accordingly, we will sustain the claim as presented. See also Third Division Award 27707.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Beyer - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of February 1989.

CARRIER MEMBERS' DISSENT
TO
AWARD 27708, DOCKET MW-27227
(Referee Joseph A. Sickles)

The Majority held, in part:

"The Carrier questions the propriety of awarding 24½ hours of overtime since the Claimant did not actually perform work and argued that if the claim is to be sustained, the Claimant be compensated for 24½ hours at the pro-rata rate. We disagree and note that Third Division Award 25601 has recently spoken to this question. Accordingly, we will sustain the claim as presented. See also Third Division Award 27707."

For the same reasons expressed in our Dissent to
Third Division Award 25601, we dissent.

Michael C. Lesnik
M. C. Lesnik

M. W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

P. V. Varga
P. V. Varga

James E. Yost
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