

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 31380
Docket No. MW-31783
96-3-94-3-52

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Soo Line Railroad Company

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

- (1) The carrier violated the Agreement when it assigned Mr. T.A. Ternes to fill the temporary vacancy of the Underwood section foreman's position on December 7 through 11, 1992, instead of assigning Mr. N.E. Nelson in recognition of his superior seniority and in compliance with the provisions of Rule 14(b) (System Files R7009/8-00112 and R701/8-00113).
- (2) As a consequence of the violation referred to in Part(1) above, Mr. N.E. Nelson shall be '... reimbursed for the equivalent of any and all lost wages including difference in pay between December 7, and December 11, 1992, as well as have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.' and Section Laborer M.J. Holiday shall be '... reimbursed for the equivalent of forty (40) hours pay at the pro rata rate and have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.'"

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee 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.

There is no dispute about the fact that a junior employee was used to fill a temporary Foreman's position for the period December 7 thru 11, 1992, on the crew where Claimant was working as a laborer. It is Carrier's position that Claimant Nelson did not want the Foreman's assignment as he was scheduled for a vacation commencing December 11, 1992, through the end of the year and if he worked as a Foreman immediately proceeding his vacation, he was apprehensive about losing holiday pay during the Christmas week.

When the Carrier advised the Organization as to why it called a junior employee, the Organization rejected that argument stating the Claimant was never contacted.

At this juncture, Carrier has mounted an affirmative defense, admits calling a junior employee, but says "... we did so because - -" When the reason for nonutilization of Claimant was challenged, it became necessary for the Carrier to prove that Claimant was called but declined because of the holiday pay issue. This was not done. The Carrier has not established the bona fides of its affirmative defense.

Regarding the compensation issue, it is noted that the Organization, during the on-property handling, limited the monetary loss to four days, i.e. December 7 through 10, 1992. Under these circumstances Claimant is to be paid the difference between what he actually earned on December 7, 8, 9 & 10, 1992, and what he would have earned, had he worked the Foreman's job.

Regarding the second part of the claim for Claimant Holiday, the Board cannot adjudicate hypothetical claims. It is pure speculation whether Holiday would have been able to fill Nelson's vacancy or even if Carrier would have filled same. That portion of the Claim regarding Holiday is dismissed.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of February 1996.