

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Form 1

Award No. 31478
Docket No. MW-31338
96-3-93-3-367

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 Employees
(
(Southern Pacific Transportation Company
(((Eastern Lines)

STATEMENT OF CLAIM:

- "(1) The Agreement was violated when the Carrier used Relief Foreman J. A. Gutierrez, instead of assigning furloughed Machine Operator F. G. Davis, to perform Maintenance of Way work operating a tie crane picking up scrap crossties between Alpine and Piasano, Texas on March 9, 11, 12, 13, 16, 17, 18 and 19, 1992 (System File MW-92-106/MofW 92-118 SPE).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant F. G. Davis shall be allowed sixty-four (64) hours' pay at his machine operator's straight time rate, two (2) hours' pay at his time and one-half rate and he shall be credited with eight (8) days toward his qualifying days for vacation purposes."

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.

The Organization argues that Carrier was obligated to call Claimant, a recently furloughed Machine Operator, to work the tie machine in lieu of using the Foreman.

Carrier's defense has been that it paid the Machine Operator's rate to the Machine Operator during the period of the claim and even paid the Foreman the Foreman's rate while operating the tie machine, thus no Rule has been violated.

The Organization referred to various Rules that provide for different seniority in different categories and contends the Rules cited support its position.

The Board, in this instance, based solely upon the facts established in the on-property handling, finds for the Organization. It is fact that the Machine Operator who was with the Foreman who operated the tie machine is senior to Claimant, but Claimant is senior to the Foreman as a Machine Operator and Claimant could run the tie machine whereas the Machine Operator on duty and under pay could not. Furthermore, Carrier has agreed to the work classification and seniority Rules that clearly establish such divisions. Nothing has been cited that permits the Carrier to blur the seniority divisions and/or work classifications.

The Board agrees with Third Division Award 27974 which, although it involves overtime, is on point with the Organization's case. The pertinent portion of Award 27974 is quoted, as follows:

"... The fact that the machine operator, previously held trackman rights does not entitle him to the overtime rights in the seniority class of a prior position. (Third Division Award 25128). Because of Carrier's violation, Claimant lost the opportunity to perform work and is entitled to a monetary claim. The claim is therefore sustained as requested."

This Board also adopts the last line of the aforequoted Award. Claimant lost the opportunity to work, he was ready to work but he was not given the opportunity. Claimant is to be paid the wages lost when he was not recalled for the Machine Operator's vacancy and there certainly was a vacancy (not requiring bulletining) when the working Machine Operator could not operate the tie machine.

There is also a request that Claimant be credited for vacation purposes, the eight days lost when not utilized in this instance.

This was a matter raised and discussed on the property with the Organization citing question and answer 2(h) of the July 20, 1942 Interpretation and Application of the Vacation Agreement of December 17, 1941. Those interpretations have withstood the test of time. Besides, Carrier was unable to refute the charge that the interpretation cited supported the Organization's position.

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Claimant is therefore to be credited with the eight days for whatever good it may do him.

AWARD

Claim sustained.

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 23rd day of May 1996.