

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31654
Docket No. MW-31032
96-3-92-3-920**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Southern Pacific Transportation Company (Eastern Lines)**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier used Track Foreman D. Swoboda, instead of assigning furloughed Machine Operator S. P. Resendez to perform Maintenance of Way work operating a backhoe tractor on November 5, 6 and 7, 1991 (System File MW-92-7/MofW 152-1185 SPE).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. P. Resendez shall receive payment for twenty-four (24) hours at his machine operator's straight-time rate, four and one-half (4 ½) hours at his time and one-half rate and he shall be credited with three (3) 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.

This claim, filed on November 15, 1991, on behalf of a furloughed Roadway Subdepartment Machine Operator, contends that the Carrier used a Track Subdepartment Foreman to perform specified work operating a backhoe on the claim dates rather than recalling the Claimant who had seniority within the classification and subdepartment intended to perform this work.

On the property, the parties did not dispute the fact that the operation of the backhoe in issue is Roadway Machine Operator work. Rather, the Carrier's initial response to the claim indicated that "a machine operator was on the job site and being paid for the performance of these duties." Despite being asked to identify the operator and the machine on which he was being paid on January 13, 1992, the Carrier did not furnish the name and social security number of the individual who "worked with Foreman Swoboda on the dates of the claim" until November 3, 1992. The exchange of correspondence between that time raised other issues including the impossibility of recalling a furloughed employee for 3 days work and the applicability of Articles 3 and 8 in this case, whether a vacancy existed, and the appropriateness of the remedy request for vacation entitlement credit. On January 17, 1992, and again on September 2, 1992, the Organization asserted that the foreman did the work, noting that such fact had not been denied by the Carrier.

On November 18, 1992, the Organization informed the Carrier that there was no person on its rosters with the name or social security number provided to it. By letter dated December 14, 1992, the Carrier attached a copy of the November 2, 1992 memo of the District Engineer setting forth the information provided to the Organization in its November 3 correspondence. The Organization did not receive this letter until two days prior to the filing of the Notice of Intent. Its January 12, 1993 response again indicated that there was no one on any of the Carrier's seniority rosters with the name or social security number provided. The Carrier objected to consideration of this letter as untimely filed. The Organization argues that the

Carrier's December 14 letter must be considered suspect due to the timing of its filing, which precluded it from having an opportunity to respond, relying upon Third Division Awards 19832, 20025 and 20773.

A review of the record and arguments properly submitted on the property reveals that the Carrier never denied the Organization's assertion that the foreman did the disputed work. Thus, the Board cannot accept the Carrier's assertion that the Organization failed to sustain its burden of proving that the foreman actually did the work. Any dispute of fact as to the identity of the named machine operator is insufficient to rebut the claim that the foreman worked as alleged, since the Carrier never asserted that said machine operator actually performed the disputed work.

However, the Organization also bears the burden of establishing that the Carrier violated the Agreement by failing to recall the Claimant to perform the three days of work in issue. On this record, the Organization has failed to show how Articles 3 and 8 obligate the Carrier to either post the short-term work as a vacancy or initiate the recall provisions for the disputed work. In the absence of such a showing, the Board concludes that the Organization has failed to sustain its burden of proof and the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

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