

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34982
Docket No. MW-33259
00-3-96-3-732**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it improperly withheld Mr. S. R. Hanenberg from the assistant foreman position on Surfacing Crew 49668-071 at Kenmare, North Dakota, which was advertised within Bulletin No. 231 dated August 14, 1995 and to which he was assigned on August 29, 1995 (System File R1.045/8-00233).**
- (2) As a consequence of the aforesaid violation, Mr. S. R. Hanenberg shall be ‘ . . . reimbursed for the equivalent in the difference of any and all lost wages while held on the Helper position rate of \$12.94 per hour and the Assistant Foreman rate of \$2,388.78 per month beginning September 12, 1995 through October 11, 1995, and continuing forward in the event the Claimant is further held from his assigned position. Furthermore, the Claimant shall 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 were given due notice of hearing thereon.

Agreement Rules 2, 10, 14 and 33, deemed pertinent to this dispute, state, in pertinent part:

“Rule 2 CLASSIFICATION OF WORK

- (C) An employee who in addition to his other duties assists the foreman in directing the work of men under the immediate supervision of the foreman is classified as an assistant foreman.

Rule 10 BULLETINS

- (h) An employee making application for and who is assigned to a bulletined position must take the position within twenty (20) calendar days from the date of assignment, unless he is prevented from doing so because of illness or other reasonable cause.

During the twenty (20) calendar day period referenced above, an employee assigned to a position who requests to be released from his former assignment to take such position may be held to perform temporary relief on his former assignment in the event no qualified relief is available to protect the former assignment, the employee must be permitted to take the new assignment.

Rule 14 INCREASING FORCES

- (a) Pending assignment by bulletin or, pending assignment of the senior, furloughed employee in the event there are no applicants for a position, permanent assigned positions and temporary assigned positions will be filled as short vacancies in accordance with the process in (b) below.

Rule 33 COMPOSITE SERVICE

- (a) An employee working one hour or more on higher rated work, coming within the scope of this Agreement, will receive the higher rate for the actual time worked. If used four hours or more for such higher rate work on any day, will be allowed the higher rate of pay for the entire day. When temporarily assigned to a lower rated position his rate of pay will not be reduced.
- (b) Where employees are regularly assigned less than 4 hours per day for a period of 30 days or more to work carrying a higher rate, necessary adjustment in daily or monthly allowance may be negotiated.

- (c) An employee coming within the scope of this Agreement required to and performing work during the whole or a part of his daily assignment not covered by the scope of this agreement carrying a higher rate of pay, will be allowed actual time worked at the higher rate of compensation with a minimum allowance of one (1) hour."

The undisputed facts which led to this dispute are as follows: S. R. Hanenberg (Claimant) established and holds seniority in the Track Subdepartment and Roadway Equipment Subdepartment. Commencing May 28, 1995, the Claimant was assigned as a Roadway Equipment Helper on Surfacing Crew 49668-067. At that time, the Claimant was under the direct supervision of Roadmaster C. Medenwald.

On August 14, 1995, by Bulletin No. 231, the Carrier advertised a temporary position for one Assistant Foreman on Crew 49668-071 headquarters Kenmare, North Dakota. The Claimant applied for the Assistant Foreman position, and on August 29, 1995, by Bulletin No. 231A, the Claimant was awarded said position. In accordance with Rule 10(h) of the Agreement noted supra, the Claimant had to take the Assistant Foreman's position within 20 calendar days from the date of assignment (August 29, 1995).

On September 12, 1995, the date upon which the Claimant was due to assume his new position, Mr. Hanenberg sent the Carrier the following notification:

"I will assume my bid position as Assistant Foreman at Kenmare, but am being held at present position by Roadmaster Mendenwald."

On October 10, 1995, the Organization submitted a claim on behalf of Mr. Hanenberg asserting the Carrier had violated Rule 10(h) of the Agreement, account Roadmaster Mendenwald "refused to allow the Claimant to report to his new assignment." With regard to the requested remedy, the General Chairman stated that:

"As remedy for the above violation, Claimant Hanenberg shall now be reimbursed for the equivalent in the difference of any and all lost wages while held on the Helper position rate of \$12.94 per hour and the Assistant Foreman rate of \$2,388.78 per month beginning September 12, 1995 through October 11, 1995, and continuing forward in the event the Claimant is further held from his assigned position. Furthermore, the Claimant shall have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation."

In its October 18, 1995 denial, the Carrier maintained that the Claimant was held on the Surfacing Crew because "there was no replacement employee available." With regard to the requested remedy, the Carrier contended the following:

“During these twenty-one working days Employee Hanenberg was held on the Surfacing Crew, he worked forty-six hours of overtime and earned \$3,066.78 in wages. During the same twenty-one working days, if Employee Hanenberg had worked as Assistant Foreman on the Kenmare section, he would have worked seventeen hours of overtime, (based on what overtime was worked by the Kenmare Section Foreman) and would have earned, (based on the Assistant Foreman’s rate of pay) \$2,625.88.

As can be seen, Employee Hanenberg earned \$440.90 more working on the Surfacing Crew than he would have working as Assistant Foreman on the Kenmare Section. Employee Hanenberg suffered no loss of wages, therefore, your claim is denied.”

The General Chairman replied to the Carrier’s denial, contending that any overtime service the Claimant performed while being held on the Helper’s position “should have been paid at the Assistant Foreman’s overtime rate.” Therefore, according to the General Chairman, the Claimant should have been paid \$3,368.78 rather than \$3,066.78 which the Claimant was actually paid for the period of time September 12 through October 11, 1995.

At the outset, the Carrier asserted that the Claimant was held on the Helper’s position “account no replacement employee was available.” A review of the record evidence reveals the following: the Claimant was assigned to the Assistant Foreman position by System Bulletin No. 231A dated August 29, 1995. However, the Carrier did not advertise the vacancy created by the Claimant’s assignment until 14 days later as evidenced in System Bulletin No. 264 dated September 12, 1995. Bulletin 264A, dated October 2, 1995 lists employee Bruce as assigned to the Helper position. The Bulletin demonstrates that 12 additional employees also applied for that same position, which the Carrier now claims could not be filled.

In that connection, Rule 14 provides a mechanism for the filling of a position pending bulletin assignment, or “short vacancies,” and allows that if the “call list” is exhausted, the Carrier can fill the vacancy without regard to seniority. While in this instance that applicable “call list” may have been exhausted, there is no evidence on this record which demonstrates the Carrier attempted to fill the vacancy created by the Claimant’s new assignment in a timely fashion.

Although the Organization technically has shown an Agreement violation in the Carrier’s untimely release of the Claimant from his Helper position, the unrefuted evidence of record shows that in fact the Claimant earned more compensation on the position to which he was held than he would have earned in the position to which he should have been released. Neither fact, contract or logic support the assertion that the overtime generated by the Claimant’s continued incumbency on the Helper position should have been paid at the Assistant Foreman rate of pay. To the contrary,

logic suggests that if he had been on the Assistant Foreman position, he would not have worked that Helper position overtime at all. The Board has long held that it does not award punitive damages, but rather awards remedial or "make whole" monetary damages, so as to put an employee in the position she or he would have been in but for the Carrier's Agreement violation. The proven Agreement violation in this case notwithstanding, in the peculiar circumstance of this factual record the Claimant suffered no loss of income and accordingly no award of monetary damages is in order.

AWARD

Claim sustained in accordance with the Findings.

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 20th day of September, 2000.