

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35020
Docket No. MW-33260
00-3-96-3-733**

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 failed to assign Mr. R.E. Dusterhoft to the assistant foreman position on the floating maintenance crew as advertised in Bulletin No. 192 beginning July 25, 1995 and thereafter improperly failed and refused to allow him to assume that position (System File R1.042/8-00235).
- (2) As a consequence of the aforesaid violation, Mr. R.E. Dusterhoft shall be ‘ . . . reimbursed to the equivalent of any and all lost wages at the pro rata rate, beginning July 25, 1995 and continuing until such time as this violation is corrected and further 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.

R. E. Dusterhoft (Claimant) has established and holds seniority in the Track Subdepartment. At the time this issue arose, the Claimant held a regular assignment as a Section Laborer on the Glenwood section crew. Pertinent to this dispute, Mr. K.

Behrens also established seniority in the Track Subdepartment, however, Mr. Behrens' seniority is junior to that held by the Claimant. Prior to July 25, 1995, Mr. Behrens was assigned as Acting Assistant Foreman on the floating maintenance crew working on the Heartland Division.

On July 5, 1995, the Carrier posted for bid the position of Assistant Foreman to be assigned to the Heartland floating maintenance crew. Both Mr. Behrens and the Claimant applied for said position. On July 25, 1995, the Carrier issued System Bulletin No. 192A wherein the junior employee, Mr. Behrens, was assigned to the Assistant Foreman's position on the floating maintenance crew. The Carrier concedes that this was counter to the requirement of the Agreement and, in Bulletin No. 192B, it properly assigned the Claimant to the subject position. However, the Carrier then held the Claimant in the position of Section Laborer on the Glenwood Section crew until August 14, 1995, at which time he reported to the floating maintenance crew to protect his newly assigned Assistant Foreman's position. When he reported, however, he was told that the Carrier had abolished the Assistant Foreman's position effective August 3, 1995.

On September 25, 1995, the General Chairman presented a claim on behalf of Mr. Dusterhoft alleging that the Carrier had violated Rules 2(c), 3, 4, 6, 8, 10 and 12 of the Agreement when it "continued to pay Mr. Behrens at the Assistant Foreman's rate of pay until August 14, 1995 and improperly held the Claimant to his previous assignment of Section Laborer on the Glenwood Section Crew." According to the General Chairman: "When Claimant was finally allowed to report to the assignment, he was told the position had been abolished." The General Chairman claimed "any and all lost wages at the pro rata rate beginning July 25, 1995 and continuing." The Carrier denied the claim, maintaining that Mr. Behrens had returned to his previously assigned Machine Operator's position on August 7, 1995, and was not compensated at the Assistant Foreman's rate of pay after August 3, 1995.

In subsequent handling, the General Chairman provided a written statement signed by the Claimant and verified by seven other employees on the gang, to buttress the following rebuttal of the Carrier's contentions regarding the facts:

"... It has now been brought to our attention that subsequent to the alleged abolishment of the Claimant's Assistant Foreman position, junior employee K. Behrens accepted a promise for, and received, additional overtime compensation as a machine operator in lieu of having his time reported as Assistant Foreman. Our sources advise that this violative decision was made by the Supervisors when they learned the Claimant was filing a claim and their intent to do this was to be able to report that there is no timeroll record of any Assistant Foreman pay to K. Behrens during the time of this dispute. ..."

The final denial by the Carrier on the property did not effectively counter the Organization's prima facie showing that, even though the Carrier made a de jure abolishment of the contested Assistant Foreman's position on August 3, 1995, the Foreman continued to utilize the mis-assigned junior employee to serve as de facto Assistant Foreman. Accordingly, the claim is sustained for the period August 14 through September 28, 1995.

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 25th day of October, 2000.