

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35848
Docket No. MW-34663
01-3-98-3-249

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (*Brotherhood of Maintenance of Way Employees*
(*Grand Trunk Western Railroad Company (former Detroit,*
(*Toledo and Ironton Railroad Company)*

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Tie Crane Operator D. McLean to perform foreman's duties while the incumbent foreman was on vacation on August 19, 1996 through September 5, 1996 instead of assigning Mr. E. A. Young to fill the vacation vacancy and perform the work in question (System File DTI 037/8365-1-577 DTI).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. E. A. Young shall be allowed the difference in pay between what he earned and the foreman's rate of pay plus all overtime earned by Mr. D. McLean while working the foreman's position during the period in question.”

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.

The facts of this matter do not appear to be in dispute. Between August 19 and September 5, 1996, Track Foreman K. Seedorf of DTI/DTSL Tie Gang No. 2 observed vacation. In his absence, the Carrier assigned Tie Crane Operator D. McLean to the Foreman's position. McLean has no Foreman seniority. At the time, Claimant, E. A. Young held seniority as a Track Foreman, dating from May 31, 1989. During the term of Foreman Seedorf's vacation, the Claimant was not furloughed and was working at another location.

The Carrier takes the position that under Rule 4(a) it had the right to not use seniority when filling Foreman Seedorf's position:

"A new position or vacancy may be filled temporarily, at the discretion of Management, pending permanent assignment."

Under Rule 4(a) the Carrier asserts that it had the right to look beyond seniority in filling the position. The Carrier states that while Rule 4(d) mandates the Carrier to select furloughed employees in seniority order, the Claimant was not on furlough and thus this provision is not applicable. Further, the Carrier contends that the claim is excessive because the Claimant was working during Foreman Seedorf's vacation.

The Organization takes the position that Rule 12(b) controls the instant situation. Rule 12(b) provides:

"As employes exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employe is to be filled and regular relief is not utilized, effort will be made to observe the principle of seniority."
(Emphasis added)

However, the Organization did not raise Rule 12 on the property. It was raised in its Submission and before the Board. The Carrier objected and indicated that because such argument was not raised on the property, the Board may not consider it.

After a review of the evidence, the Board finds that the Organization was unable to sustain its burden of proof in this matter. While the Organization may be correct that Rule 12(b) would control the situation had it been properly raised on the property, it was not. Thus, the Organization has been unable to prove that the Claimant should have been placed in the position of Foreman in place of Foreman Seedorf.

Thus, the claim is 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 18th day of December, 2001.