

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36031
Docket No. MW-35780
02-3-99-3-761

The Third Division consisted of the regular members and in addition Referee Nancy F. 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 Agreement was violated when the Carrier removed Mr. R.L. DeSmith from his assigned (speed swing operator) position and instructed him to fill a lower rated position producing a lower hourly rate of pay beginning August 1 and continuing into November 1997 (System File R1.219/8-00336).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. L. DeSmith ‘ . . . shall now be reimbursed for the difference in pay for time worked between the Speedswing operator’s rate of pay and 5A Machine Operator’s rate of pay from August 1, 1997 until the Tie Gang work ended in November (\$15.62-\$15.29=.33x514 hours=\$173.03) at the pro rata rate and 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.

The Claimant holds seniority in various groups and ranks within the Track Subdepartment. Prior to August 1, 1997, the Claimant was regularly assigned, by

Bulletin No. 101A to a Group 1, Rank C Machine Operator (speed swing) position with the production Rail Gang. Under circumstances which are in material conflict in the present record, on or about August 7, 1997 the Claimant left that Rail Gang position and moved to a Group 5, Rank C position on the Tie Gang on the Paynesville Subdivision. The record indicates that he worked that latter job until the end of November, when he and other employees received Rule 12 Force Reduction seasonal layoff notices during Thanksgiving Week 1997.

On December 10, 1997, the Organization filed the following claim on behalf of the Claimant, alleging a failure by the Carrier to comply with the notice requirements of Rule 12 Force Reduction in connection with his departure from the Rail Gang some four months earlier in August 1997. That claim read in pertinent part as follows:

“Claim is hereby presented on behalf of Robert L. DeSmith for the Carrier’s continued violation of Rules 12, 47 (Appendix H), not exclusively, of the Schedule Agreement dated October 1, 1987, and as subsequently amended.

According to our information, the Claimant was assigned as Speedswing Operator on May 23, 1997. On August 1, 1997, the Carrier reduced the crew on the Rail Gang, removed the speedswing from the consist, and directed the Claimant to fill a 5(a) Machine Operator position on a Tie Gang working at Paynesville. This was done without releasing him from his previous position. As a result, the Claimant was paid at a lower rate of pay for the duration of Tie Gang work, not released to bid or displace to a position of his choosing, and therefore placed at a disadvantage both monetarily and geographically. Because the Claimant was not released from the Speedswing Operator position, he was not allowed to bid to an Extra Gang Foreman position on the former Milwaukee side, one his seniority would have allowed him to receive.

As a remedy for the above violation, Claimant De Smith shall now be reimbursed for the difference in pay for time worked between the Speedswing operator’s rate of pay and 5(a) Machine Operator’s rate of pay from August 1, 1997 until the Tie Gang work ended in November ($\$15.62 - \$15.29 = .33 \times 514 \text{ hours} = \173.03) at the pro rata rate and have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.”

The Carrier denied the claim, stating that when the Claimant’s Speed Swing position was abolished on August 1, 1997, he was instructed to bid a position if he wanted to continue to work. However, a 5(a) vacancy opened when the Production Crew moved from the Carrington Division to the Paynesville Subdivision, and the Claimant

opted to fill the 5(a) position as offered, according to the Carrier. Specifically, the Carrier stated that:

“This position was offered to Mr. DeSmith if he elected to fill the 5(a) position. Contrary to the Organization’s claim, Mr. DeSmith was not held to the 5(a) position and could have bid on any open positions and he would have been released. Mr. DeSmith chose to stay on the Soo side on his own behalf.”

The material conflict in the record of this case concerning the facts and circumstances of the Claimant’s movement from the Rail Gang to the Tie Gang in early August 1997 remained unresolved throughout handling on the property and persisted throughout handling before the Board. The inadequacy of the record prevents an informed judgement by the Board on the merits of the claim and requires that we dismiss the claim for failure of proof.

AWARD

Claim dismissed.

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 21st day of May, 2002.