

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36396
Docket No. MW-36111
03-3-00-3-263

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign furloughed Track Machine Operator R. L. Sinclair to perform track machine operator work on Extra Gang 8581 beginning on January 25, 1998 and instead called junior employee D. A. Scott (System File J-9923-53/1183637).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. L. Sinclair shall now be compensated for all time worked by junior employee D. A. Scott beginning January 25, 1999 and ending on February 1, 1999 at the applicable machine operator's rate of pay.”**

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 and D. A. Scott hold seniority in Group 26(c) of the Track Subdepartment as system track Machine Operators. The Claimant is senior to Scott and was on furlough awaiting the results of his bid for a position beginning February 1, 1999 on System Extra Gang 8591 when this dispute arose. The instant claim alleges that the Carrier violated the Agreement when it allowed Scott, the junior employee, to work from January 25 through February 1, 1999 as a track Machine Operator on System Gang 8581 pending bulletin assignment instead of assigning the Claimant.

The Carrier defends against the claim on two grounds. First, it contends that the Claimant had been called for the temporary vacancy, but he did not respond. In response to that assertion, the Organization submitted during the on-property handling of this dispute the Claimant's statement that he was not contacted by the Carrier.

In resolving these disparate positions, we find upon close review of the record that the Carrier has not sufficiently rebutted the Organization's showing that the Claimant was not called. The Carrier's assertion is supported solely by an unsigned, undated typewritten memo purporting to be from Supervisor D. Peterson, submitted more than one year after the filing of this claim. No telephone records were produced. When weighed against the signed statement of the Claimant, we find that the Carrier comes up short in establishing its affirmative defense.

Equally important, the Carrier's second defense is logically inconsistent with the first. The Carrier argues that, in accordance with Appendix Q of Rule 20, the Claimant was required to provide notice of his availability for the temporary position. That Rule provides:

"It is recognized furloughed employees holding seniority in the group and class in which the vacancy occurs should, after making their availability known, be afforded the opportunity to work interim vacancies, with preference afforded the nearest furloughed employee(s) of the class within forty (40) rail miles of the work site. Such employees, may, however, be displaced by a senior furloughed employee in the group and class."

In our view, the Carrier tacitly acknowledged the Claimant's seniority entitlement to preference for the temporary vacancy when it argued it had attempted to call him. The Carrier's own asserted actions in response to his bid suggests that it recognized the Claimant's desire to work and acted upon it. The Carrier failed to

prove that the Claimant was required to take any action other than his bid submission in order to make his availability known.

We must conclude that the Claimant made his availability known and that the Claimant's seniority entitled him to the work at issue. The claim, therefore, is sustained.

AWARD

Claim sustained.

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 18th day of February 2003.