

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36961
Docket No. MW-36078
04-3-00-3-187

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 Carrier violated the Agreement when it failed to compensate Claimants V. E. O'Toole, J. D. Burton, B. O. Armstrong, K. M. Higel and G. F. Padilla for January 4, 1999 and failed to allow them their daily per diem allowances for December 31, 1998, January 1, 2, 3 and 4, 1999 (System File D-9927-1/1177197).
- (2) As a consequence of the violation referred to in Part (1) above, the Claimants shall be allowed “*** nine hours and twenty minutes (9' 20”) at their respective straight time and overtime rates of pay as well as payment for the Holidays of December 31, 1998 and January 1, 1999. Also, the referred to Claimants must be allowed the applicable per diem allowance for the dates of December 31, 1998, January 1, 2, 3 and 4, 1999.”

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 Claimants hold seniority in classes of the Maintenance of Way and Structures Department. Immediately prior to this dispute, they were assigned to System Gang 9031 at Fairbury, Nebraska. This dispute centers upon what happened on January 4, 1999 when the Claimants reported after the Carrier had previously abolished four of the five Claimants' positions.

Prior to discussion of the facts in this dispute, we find the claim with respect to Claimant O'Toole is moot. In Third Division Award 36962 we sustained a claim filed on O'Toole's behalf which protested the Carrier's failure to allow O'Toole to displace a junior employee on January 4, 1999 and remain with System Gang 9031. As part of the remedy in that case, we required that O'Toole be made whole. That remedy encompasses any entitlements O'Toole may have in this case which also focuses on the events of January 4, 1999. The claim with respect to O'Toole therefore is dismissed.

With respect to Claimants Burton, Armstrong and Higel, the record shows that their positions were abolished pursuant to bulletin as part of the abolishment of 23 positions on System Gang 9031 effective December 31, 1998. On January 4, 1999, these three Claimants came to the starting location for System Gang 9031 at approximately 6:20 A.M. According to these Claimants, they were instructed by Supervisor D. Rising to remain at the work location until 3:50 P.M. as the Carrier attempted to determine which employees would be allowed to remain with the gang. According to the Carrier, Supervisor Rising told these Claimants that they could stay if they wanted or they could leave and go home. These Claimants elected to stay on their own awaiting information as to where they could go to exercise their bumping rights.

We need not resolve the dispute concerning what Claimants Burton, Armstrong and Higel were told by Supervisor Rising. The facts show that these

three Claimants' positions were abolished effective December 31, 1998. There is insufficient evidence in this record - indeed, the record is quite confusing on this point - for the Board to conclude that these Claimants properly exercised their displacement rights in accord with Rule 21(e) or that their displacement rights were not honored. Nor does this record sufficiently show that the Carrier gave these specific Claimants erroneous information concerning their entitlements and that these Claimants were, in the exercise of those rights, entitled to be working with System Gang 9031 on January 4, 1999, but were prevented from doing so. Compare Third Division Award 36962, *supra*, where the Organization successfully demonstrated that Claimant O'Toole was improperly denied the ability to remain with the gang starting on that date. We see no similar demonstration in this case with respect to these three Claimants concerning the exercise of their displacement rights. The Organization did not show that these three Claimants were entitled to compensation beyond what the record shows they received. Therefore, the claim with respect to Claimants Burton, Armstrong and Higel is denied.

The claim with respect to Claimant Padilla requires a different result. Padilla, like the other Claimants, reported on January 4, 1999 and states that he was instructed by Supervisor Rising to stay on the property until he was notified whether he should remain (which, as earlier noted, the Carrier disputes). However, unlike Claimants Burton, Armstrong and Higel, there is no evidence in this record that Claimant Padilla's position was abolished effective December 31, 1998. Indeed, the Carrier acknowledges in its letter of December 29, 1999 that with respect to the notices of abolishment of positions on System Gang 9031, "... four (4) of your Claimants were affected . . . Claimant Padilla was the only one of your Claimants not mentioned in the above Abolishment Notices." Further, according to Padilla's statement, he was not told at the start of the shift on January 4, 1999 that he was bumped. Contrary to the Carrier's general assertion in its letter of December 29, 1999 that Padilla "... was displaced prior to the start of the shift," there is no evidence in the form of a statement or sufficient documentary proof contradicting Padilla's assertions. Therefore, unlike Claimants Burton, Armstrong and Higel, the record shows that Padilla was entitled to work on January 4, 1999. Padilla reported for work on that date and therefore must be compensated for that day and further made whole (less any payments previously received) in accord with the Agreement as if he worked that day.

In sum, the claim is dismissed with respect to O'Toole; is denied with respect to Burton, Armstrong and Higel; and is sustained with respect to Padilla.

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 21st day of April 2004.