

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39314
Docket No. SG-39210
08-3-NRAB-00003-050623
(05-3-623)

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(Union Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of J. A. Rocha, for 20 hours at his straight time rate of pay, account Carrier violated the current Signalmen’s Agreement, particularly Rules 5 and 58, when Carrier failed to provide the Claimant the necessary information so that he could exercise his seniority, causing the Claimant to lose two days of pay. Carrier’s File No. 1410899. General Chairman’s File No. S-42, 55-564. BRS File Case No. 13373-UP.”

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.

In late August 2004, Claimant J. A Roche was working temporarily on Gang 2671, which had an eight days on, six days off work schedule. The Claimant worked during the period of August 24 to August 31, and then took his six rest days. He was scheduled to return for the next work period, which began on September 7. On September 6, however, he told Foreman K. M. Bailey that he would be out September 7 and 8 due to illness. The Claimant subsequently called Bailey on September 8, and Bailey informed him that he had been outbid and displaced from his temporary position on Gang 2671, and would need to exercise his seniority rights to another position because the employee displacing the Claimant was reporting for work the next day, September 9. On September 10, the Claimant again contacted Bailey, who told him of a vacancy with Gang 2156. According to Carrier records, the Claimant reported to that position (which had been posted since September 3) on September 12, 2004. In the meantime, the Claimant's time records reflected no entry for September 9, a layoff for a medical appointment on September 10, and a vacation day on September 11, 2004.

The Organization filed a claim on the Claimant's behalf on October 12, which the Carrier denied on November 22, 2004. The parties exchanged additional correspondence and discussed the matter in conference. Having failed to resolve the matter, the parties submitted it to the Board for final and binding resolution.

The Organization contends that the Carrier violated Rules 5 and 58 of the parties' Agreement, and caused the Claimant to miss two days of available work by failing to provide the Claimant with information relative to vacancies onto which he could exercise his seniority. The Organization cites the following part of Rule 5 (40-Hour Work Week):

“NOTE: The expressions ‘positions’ and ‘work’ used in Rule 5 refer to service, duties, or operations necessary to be performed the specified number of days per week and not to the work week of individual employees.

GENERAL

There is established for all employees, subject to the exceptions contained in this agreement, a work week of 40 hours, consisting of five days of eight hours each, with two consecutive days off in each seven; the work weeks may be staggered in accordance with the Carrier's operational requirements, so far as practicable the days off will be Saturday and Sunday. The foregoing work week rule is subject to the provisions which follow. . . ."

The Organization cites the following portion of Rule 58 (Displacements):

"D. In the event a new position is created, or a vacancy exists, an employee entitled to make a displacement may take such new position, or vacancy, until such time as the successful applicant is assigned. The employee's exercise of seniority will be considered as his/her bid on the position."

The Organization argues that when the Claimant was displaced from Gang 2671, he was unable to reach TCS Specialist J. Bricker, whom the Organization alleges is the designated person to contact for information regarding available vacancies. According to the Organization, the Claimant left messages on Bricker's voicemail on September 8, 9 and 10, 2004, but Bricker failed to call the Claimant back. The Claimant also tried to reach his manager, but discovered that he was on vacation. It is the Organization's position that the Carrier violated Rules 5 and 58 by not providing in a timely manner information on where the Claimant could exercise his seniority, thus causing a delay of two days and a loss of two days' pay. The Organization argues that when the Claimant finally found out about the vacancy on Gang 2156 from Bailey on September 10, the Claimant confirmed the vacancy and placed himself on that position on September 11. The Carrier therefore must compensate the Claimant for two days' pay.

The Organization further avers that the Claimant's payroll history showing an absence on September 10, 2004 due to a doctor or dentist appointment is false. The Organization provided a statement from the Claimant's dentist that he did not

see the Claimant on September 10. The Organization contends that “this bald assertion that the Claimant was not available to perform work on September 10, 2004 was not supported by any evidence from the Carrier as to who submitted this statement into the Claimant’s payroll history and when” noting that the Claimant was not assigned to a gang during the time period in question. The Organization argues in addition that while the Claimant could have received bulletin information from other sources, “this information would not have contained the positions, locations and work cycles of junior employees” where the Claimant could exercise his seniority. The Organization asserts that the Claimant was restricted in deciding where to place himself because Bailey knew of only one open position. The Organization further argues that it is clear from the record in the instant case that Bricker did not return the Claimant’s calls.

After careful consideration of the record, the Board must find that the Organization failed to meet its burden of proof. The Rules the Organization relies on, Rules 8 and 58, contain no language that supports the Organization’s position and, in fact, seem to have little relevance to this matter. The Organization may seek to imply that Rule 5 guarantees employees 40 hours’ pay per week, even when they are in between positions and not working 40 hours per week, but that is not what Rule 5 states. Rule 5 merely sets out the “standard” work schedule, and then goes on to provide for various other work schedules (such as Gang 2671’s eight days on, six days off schedule).

The Organization’s remaining assertions are unsubstantiated by any evidence whatsoever. While the Organization contends that over the three-day period of September 8 – 10 the Claimant left numerous messages for Bricker, no evidence that the Claimant ever called Bricker was provided. Such calls would have been from Arkansas, to Nebraska, and long distance call records should have been easily obtained to support the Organization’s assertion. No such records were submitted, however. Moreover, as the Carrier argues, the fact that the Claimant learned about the vacancy on Gang 2156 from Bailey on September 10 is evidence in itself that the Claimant had various resources to call on in order to find a place for himself, with just a little diligence. It is unrefuted that the TCS bulletin system is accessible to all Carrier employees, and that the Claimant could have taken a 22 mile drive to Pine Bluff, Arkansas, to access the TCS system there. The Board finds that the

Organization failed to prove that the Carrier caused the Claimant to miss two available work days by failing to provide him with information. Rather, the Claimant's lack of any real or proven effort to find a place for himself from September 8 to September 10 caused him to miss two days' pay he might otherwise have received. It should be noted that the vacancy on Gang 2156 had been posted on September 3, 2004.

In light of the above findings, the Organization's argument that the Claimant's payroll records for September 10, showing that he had laid off for a doctor or dentist appointment is not a key issue. Nevertheless, the Board finds it noteworthy that the Claimant had been out sick September 6 – 8. The Organization, while asserting that the Claimant called Bailey on September 8 to tell him he would return to work on September 9, offered no proof to substantiate its assertion. It is equally possible that the Claimant called Bailey on September 8 to tell him that he would continue to be out due to illness, and had a doctor's appointment on September 10. The Organization's submission of a dentist's statement that the Claimant was not seen in that office on September 10, 2004 is meaningless in this context. It certainly cannot prove that the Claimant had no doctor's appointment, and indeed, there is no proof extant that the dentist who submitted the statement was even the Claimant's regular dentist. On September 11, the Claimant was listed as off on vacation. Perhaps he had marked off sick as long as he could and then had to use a vacation day to continue to be out. In any event, the Organization's assertion that the records are false is unsupported, and the Board is not persuaded that there was any Carrier conspiracy that caused the Claimant to miss two days' pay which he otherwise would have had.

Based upon the facts as established by the record, the Board must deny the claim.

AWARD

Claim denied.

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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 29th day of September 2008.