

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39558
Docket No. MW-38074
09-3-NRAB-00003-030484
(03-3-484)

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call Mr. J. Lemer from the Foreman Call List to fill a short vacancy for the section foreman on Section Crew 794 at Minot, North Dakota beginning May 14, 2002 and continuing through May 30, 2002 and instead filled said vacancy with Assistant Foreman M. Weber (System File R1.676/8-00219-079).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Lemer ‘. . . shall now reimbursed for the equivalent of one hundred four hours at the Minot Section Foreman rate of pay ($\$18.15 \times 104 = \$1,887.60$) 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 Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement by failing to call the Claimant, who was furloughed at the time, from the Foreman Call List to protect a Foreman position while the incumbent took scheduled vacation.

The Organization initially contends that this claim involves undisputed facts and a blatant violation of the "call list" provisions of the Agreement, followed by the Carrier's mendacious attempt to excuse the violation that deprived the Claimant of a valuable work opportunity and the compensation to which he was contractually entitled. The Organization asserts that the Claimant was qualified and obviously willing to fill a temporary Foreman vacancy. Moreover, there is no dispute that the Claimant had placed his name on the appropriate call list, but that the employee who actually filled the vacancy had not done so. The Organization maintains that there also is no dispute that the incumbent Section Foreman had gone on vacation during the claim period and that the Assistant Foreman was assigned and paid to temporarily fill the Section Foreman position.

The Organization emphasizes that the Carrier's then-Director of Labor Relations apparently forgot that the parties had agreed how the call list would be applied in the circumstances contemplated therein, which are precisely the same as the circumstances involved in this matter. The Organization points out that a review of prior Third Division Awards reveals that this is but another in a series of similar violations. The Organization insists that the Carrier has no valid excuse for denying the Claimant the work assignment at issue, and the Carrier compounded its contractual error with a bad-faith attempt to justify its assignment in this instance.

The Organization argues that the facts are undisputed, the Rules are crystal clear, and the on-property arbitral authority provides ample guidance. The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization failed to meet its burden of proving a Rule violation on the part of the Carrier. It asserts that this dispute has been resolved by numerous Awards throughout the years. It argues that almost all of these prior decisions confirm that an absence from duty because of vacation does not constitute a vacancy under the Agreement. The Carrier emphasizes that because it did not increase force to fill the crew to the authorized allotment, Rule 14 has no application.

The Carrier points out that Rule 14 would come into effect only if the Carrier decided to cover a vacationing employee's absence with another employee, an increase in force. To accomplish this, the Carrier would utilize the applicable provisions of Rule 14. The Carrier contends that Article 12 of the Vacation Agreement establishes that an employee absence from duty due to vacation does not constitute a vacancy under the Agreement, and the Carrier therefore is not obligated to apply the seniority provisions of Rule 14. The Carrier argues that the "call list" is set up to provide relief for a vacancy. The Carrier insists that because a vacation absence does not constitute a vacancy, and because the Vacation Agreement merely provides an option to utilize relief employees, the Carrier could not have violated either the Vacation Agreement or Rule 14(b). Pointing to a number of Awards, the Carrier asserts that it has the right to decide whether to provide vacation relief.

The Carrier argues that because it designated an Assistant Foreman to fill the Foreman's position and paid that Assistant Foreman at the Foreman's rate of pay in accordance with Section (a) of the Vacation Agreement, the Carrier did not increase forces, because no additional employee was called in to fill the crew to its authorized allotment. Under these circumstances, there was no violation of Rule 14, and the Organization failed to refute this, thereby failing to meet its burden of proof. Moreover, Rule 14 has no application in this dispute, demonstrating that the Organization also failed to meet its burden of proof on this issue.

The Carrier emphasizes that under the Vacation Agreement, the Carrier is not required to provide a vacation relief worker when vacation relief work is not needed. The Carrier points out that no short vacancy relief was needed in the instant case, so Rule 14 was not utilized. The Carrier insists that it was not necessary to increase the force, and it did not increase the work. The Carrier further argues that there is an established practice on this property of utilizing

Assistant Foremen to perform the duties of a Foreman when the Foreman is on vacation.

The Carrier then asserts that Rule 56 demonstrates how vacations are to be handled. The Carrier asserts that, contrary to the Organization's position, Rule 14 would apply only if and when the Carrier decided to "increase force." There was no increase in force in this matter, and the Vacation Agreement allows the Carrier to decide whether to keep the crew at full strength or to have the work performed by the remaining crew members.

Because the Organization failed to meet its burden of proof in this matter, the Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization met its burden of proof that the Carrier violated the Agreement when it failed to call the Claimant from the Foreman Call List to fill a short vacancy for the Section Foreman on Section Crew 794 at Minot, North Dakota, for the period of May 14 through May 30, 2001.

The record reveals that the parties entered into a Letter of Understanding on December 1, 1988, wherein they agreed to the following language:

- "1. It is understood that vacation and other Short Vacancy relief for Foreman's positions in all Sub-departments will be provided from the applicable Foreman's 'call list' except as provided in 2 below.
2. In crews with one or more regularly assigned Assistant Foremen, the Senior Regular Assistant Foreman in the crew where the vacancy occurs who is willing to relieve the Foreman will be given preference for the position in the event there are no employees with a seniority date on the Foreman's Seniority Roster available on the applicable 'call list.'
3. If the Short Vacancy left in the Assistant Foreman's position by this relief procedure is to be filled, it will be filled from the

applicable Assistant Foreman's 'call list' in accordance with
Schedule Rule 14(b)."

It is clear from the record that the Section Foreman was on vacation during the claim period and that an Assistant Foreman was assigned and paid to temporarily fill the Section Foreman position. The Carrier did not follow the required call list which would have involved calling in the Claimant to perform the work.

The Board has held on numerous occasions in the past that the Carrier must follow the call list as it has agreed to do in these types of situations. (See Third Division Awards 29113, 31380, and 31456. In addition, see Third Division Awards 35020, 36268, 36270, 36978, and 38991.)

For all of the above reasons, this claim must be 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 27th day of February 2009.