

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39612
Docket No. MW-38145
09-3-NRAB-00003-030553
(03-3-553)

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman 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 and refused to bulletin a Group 15(d) Division Truck Operator position in connection with the operation of Truck 1915-65807 on Gang 6172 and instead assigned junior employees, including Mr. P. Parker, to fill said position and thereby deprived Idaho Division Truck Driver R. Skinner of the work and compensation related to said position (System File W-0220-153/1347721).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Skinner shall now ‘. . . be allowed per-diem and overtime that has been worked by anyone driving the identified truck on gang 6172 from September 16, 2002 until such time as the position referred to has been put up for bid and assigned by bulletin.’”**

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.

This claim centers on the Organization's contentions regarding the Claimant, who holds 15(d) seniority (Truck Driver - Idaho) and is covered by the Memorandum of Agreement dated April 15, 2002, herein that established an In-Track Welding Gang to perform maintenance in and across the Utah and Idaho Seniority Divisions. There was no dispute as to the Claimant's qualification to hold such position.

In sum and substance, the Organization contends that the Carrier failed to bulletin what it considers to be a vacant Truck Driver position covered by the MOA. There are two principal claims for relief – one for overtime and one for per diem payments associated with the job.

The MOA, Section 3 [Seniority] provides in relevant part that:

- “(a) All new positions and vacancies will be bulletined and assigned pursuant to Rule 20 to employees who retain seniority or who are desirous of establishing seniority on the Idaho or Utah Seniority Divisions. . . .**
- (b) Where only one position in a classification is to be established, assignment will first be made to the senior applicant of the class involved regardless of whether seniority is held on either the Idaho or Utah seniority division. . . .**
- (c) Except as provided in Section 3(b), where more than one position in a classification is to be established on this gang to work on both the Idaho and Utah Seniority Divisions, these positions will be bulletined simultaneously to employees holding seniority on the Idaho and Utah Seniority Divisions. Preference on the first assignment on the gang will be given to employees holding seniority on the applicable Utah Seniority**

Division Roster. Preference on the second assignment will be given to the employees holding seniority on the applicable Idaho Seniority Division Roster. . . .”

The essential question presented is whether a vacancy existed. The record evidence before the Board establishes that P. Parker drove a truck, by his own statement, for at least one and one-half months. In its initial claim dated November 11, 2002, the Organization specifically cited September 16 as the date of commencement of the alleged violation. Parker’s statement, dated February 10, 2003, is consistent with the original date of the alleged violation and the formal claim of November 2002.

While it is clear based on longstanding precedent that the Organization bears the burden of proof and where there is a factual dispute that is relevant to the establishment of the claim the Carrier prevails, based on the record before us we find that the Carrier failed to sufficiently establish the existence of a factual dispute. However, based on the record, we make no finding that the position at issue existed beyond a six-week period commencing September 16, 2002.

Because it is established that a vacancy existed, at least for one and one-half months, the MOA applies and the Carrier was required to bulletin the position. The Carrier asserted that even if a violation were established as to bulletining the position, the Claimant’s Idaho-based seniority would not have resulted in the Claimant having been awarded the position, because under the MOA, the first bidding would have gone to a Utah Seniority Roster applicant. While that argument may make some sense, the Carrier’s failure to bulletin the position leaves the Board with no ability to determine whether a Utah Seniority Roster applicant would have bid for the position. We cannot assume that a Utah Seniority Roster bidder was forthcoming.

Turning to the remedy, the Claimant never worked the disputed job. Accordingly, he is not entitled to per diem payments based on accepted precedent. The record establishes that not only was the Claimant working during the relevant period, he was earning the same rate of pay or higher than Parker. The only question, therefore, is the deprivation of overtime payments that would have been earned had the Claimant stood in the shoes of the employee who worked the job. The Board finds that the Claimant is entitled to be compensated for any overtime

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hours worked by Parker during the period September 16, 2002 – November 1, 2002, less any overtime hours the Claimant worked on his own position during the same period.

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 1st day of April 2009.