

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39620
Docket No. MW-39281
09-3-NRAB-00003-060022
(06-3-22)

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 Agreement was violated when the Carrier failed to call and assign Mr. S. Gary to fill the assistant foreman position on Maintenance Crew 798 headquartered at Hankinson, North Dakota beginning February 4 and continuing through March 15, 2004 (System File C-04-160-020/8-00460-002).
- (2) The Agreement was violated when the Carrier failed to call and assign Mr. L. Bjerke to fill the laborer position on Maintenance Crew 798 headquartered at Hankinson, North Dakota beginning February 9 and continuing through March 15, 2004 (System File C-04-160-021/8-00460-001).
- (3) The Agreement was violated when the Carrier failed to call and assign Mr. F. Jones to fill the foreman position on Maintenance Crew 798 headquartered at Hankinson, North Dakota beginning February 9 and continuing through March 15, 2004 (System File C-04-160-019/8-00460-003).
- (4) As a consequence of the violations referred to in Part (1) above, Claimant S. Gary shall now be compensated ‘. . . for the

equivalent of 200 hours at the Extra Gang Assistant Foreman rate of pay \$17.73 per hour and have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.'

- (5) As a consequence of the violations referred to in Part (2) above, Claimant L. Bjerke shall now be compensated '. . . for the equivalent of 200 hours at the extra gang labor (sic) rate of pay \$16.85 and have all overtime, vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.'
- (6) As a consequence of the violations referred to in Part (3) above, Claimant F. Jones shall now be compensated '. . . for the equivalent of 144 hours at the extra gang foreman rate of pay \$19.67 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 three claims involved in this matter were consolidated because they all raise the same issue about the proper application of Rule 14 to the facts at hand. For purposes of explanation, it may be assumed that all three Claimants were

furloughed at the time the claims arose. All three had placed their names on the applicable call list to fill temporary vacancies of the kind involved in each claim. Three other employees who held bulletined positions on Maintenance Crew 798 bid out of their incumbent positions on the crew to perform other work elsewhere. The resulting vacancies they left behind were properly bulletined to be refilled. However, the Carrier elected to leave them vacant until the new position holders could report.

Rule 14 reads, in pertinent part, as follows:

"RULE 14 - INCREASING FORCES

- (a) Pending assignment by bulletin or, pending assignment of the junior, furloughed employee in the event there are no applicants for a position, permanent assigned positions and temporary assigned positions will be filled as short vacancies in accordance with the process in (b) below.
- (b) Call lists to protect short vacancies will be established within each sub-department of the Maintenance of Way Department.* * *

Rule 14 (b) contains 12 paragraphs that further describe the process to be followed for filling such vacancies.

Each of the Claimants contends that Rule 14 required the Carrier to immediately fill the vacancies from the applicable call lists. The Carrier contends that Rule 14 is not applicable because it did not increase its forces. The Carrier asserts that it is free to determine staffing levels and may elect to leave a temporary vacancy unfilled. It concedes, however, that if it had chosen to fill any of the three vacancies in dispute, it would have been required to follow the process described in Rule 14 (b).

The Organization cited ten prior Third Division Awards between these same parties, all of which deal with Rule 14. We carefully reviewed the cited Awards and do not find them to apply to the instant controversy. All of the cited Awards deal

with situations where the Carrier did fill each of the vacancies in the respective cases. None of the cited Awards raise the question of whether the Carrier violated the Agreement by choosing not to fill the vacancy. Thus, the instant claims appear to be cases of first impression.

As we analyze Rule 14, its text can be read to plausibly support either of the competing interpretations. Its boldface title, however, supports the Carrier's position that the Rule only applies when the Carrier has determined to increase its forces. No other provision of the Agreement has been cited that explicitly required the Carrier to fill such vacancies. In addition, one of the 12 paragraphs that make up subdivision (b) contains words that suggest that filling such vacancies is at the option of the Carrier. The seventh paragraph reads as follows:

* * *

"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 foremen's 'call list' in accordance with Schedule Rule 14(b)." (Emphasis added.)

As written, the foregoing seventh paragraph recognizes that a vacancy may not be filled. The decision to fill or not fill, of course, is within the Carrier's discretion in the absence of any other Agreement provisions that restrict its discretion. No such other provisions have been cited.

We note also that the Organization failed to provide any evidence of bargaining history to establish support for its interpretation of Rule 14.

Given the foregoing discussion factors, we must conclude that the Organization has not sustained its burden of proof to establish a violation of the Agreement as alleged in the claims. Accordingly, they must be denied.

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 1st day of April 2009.