

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40330
Docket No. MW-40528
10-3-NRAB-00003-080381**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when Mr. W. Harman (who was working the heater car foreman position on System Rail Gang 9113) was recalled by the Carrier under letter dated January 17, 2007 to the foreman position on Texas Tie Gang 9287 for which he reported on January 26, 2007 but was not allowed to work that date and continuing to February 8, 2007 (System File MW-07-52/1471796 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Harman shall now be compensated for seventy-two (72) hours at his respective straight time rate of pay and compensated at his respective time and one-half rate of pay for any overtime hours that were lost to him from January 20, 2007 through February 8, 2007.”**

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.

On January 17, 2007 Claimant W. Harman received a recall notice to report for a Foreman position on Texas Tie Gang 9287 headquartered at Texarkana, Texas. He was obligated to report or lose seniority in the Foreman classification. The Claimant reported on January 26. The recall notice did not list a CDL license as a prerequisite for the position. The Claimant did not have a CDL license. When he reported, the Supervisor took the following action, as recorded in the statement that he submitted in his on-property response to this claim:

“The claimant was not qualified for the job when he showed up to work. All claims on time are denied. He is entitled to reimbursement of costs associated with getting DOT qualified. The claimant should submit his expenses with receipts through the proper personal expense forms.”

On the property, the Organization and the Carrier argued whether the Carrier’s recall of the Claimant to a position for which he was not qualified (because he did not hold a CDL license) violated Rules 1 - Scope, 2 - Seniority, 20 and 29. Both also addressed his claim for reimbursement for the \$299.00 that he spent to rent a truck to take the driving portion of the CDL license exam.

During argument before the Board, the Carrier raised a procedural issue. It asserts that the Organization modified the issue to be addressed on appeal. On the property, the Organization and the Carrier focused their arguments on whether the recall of the Claimant to a position for which he was not qualified violated Rules 2 and 20. In its claim before the Board, the Organization argues that the Carrier erroneously recalled the Claimant from a Heater Car Foreman position that he held on System Rail Gang 9113 at the time that he received the recall notice. The

Carrier, in effect recalled the Claimant from one Foreman to another Foreman position.

In addition, the Organization and the Carrier disagree whether the Claimant was or was not on furlough when he was recalled. The Organization argues that the Claimant was actively working on a Foreman position when he received the recall notice. There is no evidence on this point in the record.

There are two bases to dismiss the portion of the claim concerning the recall. First, the Organization modified the basis of its claim to focus on an issue that the parties did not address in their processing of this claim on the property. On the property, they focused on the Carrier's recall of the Claimant to a position for which he was not qualified. On appeal, the Organization argues that because the Claimant held a Foreman position on System Rail Gang 9113, recall was not appropriate. For support it heavily relied on Third Division Award 29743.

Second, the factual predicate to the Organization's position is itself a basis for dismissal. As noted above, there is no agreement, nor any evidence concerning whether the Claimant was on furlough at the time that he received the recall notice.

In Third Division Award 37998, the Board observed:

"It is well settled that when there is a substantial variance between the issues handled by the parties on the property and those advanced to the Board, the faulty aspect of the claim must be dismissed. See Third Division Award 37480, involving these same parties, and Awards cited therein."

Because that is the case here, the Board dismisses that portion of the claim which pertains to the Carrier's recall of the Claimant to the Foreman position in Texarkana, Texas.

However, there remains that portion of the claim for reimbursement for the truck that he rented to obtain his CDL license so that he could assume the position to which he was recalled. The on-property record evidence is devoid of any receipts supporting this claim. There is no evidence that he asked the Carrier to provide a

truck so that he could take the driving portion of the test. Although his immediate Supervisor stated that the Claimant should file his claim for expenses, there is no evidence that he did so, or if he did, what the Carrier did with the claim. Simply put, the Organization failed to meet its burden of proof in support of its claim for \$299.00.

AWARD

Claim denied.

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 March 2010.