

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40384
Docket No. MW-39799
10-3-NRAB-00003-060613
(06-3-613)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Carrier violated the Agreement when it failed to notify Mr. J. Marquis of displacement until he reported, as directed by Roadmaster G. Goy, to work at Rochelle, Illinois on November 29, 2004 and when it subsequently recovered per diem allowance payments made for November 25, 26, 27 and 28, 2004 and thereafter recovered holiday pay made for November 25 and 26, 2004 [System File C-05-P018-5/10-05-0112(MW) BNR].**
- 2. As a consequence of the violations referred to in Part (1) above, Claimant J. Marquis shall now ‘*** be paid eight hours straight time for 11/29/04 and repaid sixteen hours for his holidays on 11/25/04 and 11/26/04. I also request that he (sic) paid five days per diem at \$23.00 per a (sic) day.’”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

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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 November 24, 2004, the day before Thanksgiving, the Claimant worked as a Sectionman on Mobile Maintenance Gang 2 headquartered in Rochelle, Illinois. His regular schedule was 7:30 A.M. - 4:00 P.M., Monday - Friday. He received \$23/day per diem seven days/week to offset expenses.

Many displacements were possible or in progress in late November. Sometime prior to 4:19 P.M. on November 24, the Claimant called Roadmaster G. Goy to learn his upcoming work status. Goy told him that he had not been bumped and he was to report to work on November 29 (no work was scheduled on November 25 and 26 due to the Thanksgiving holiday and November 27 and 28 were the Claimant's regular days off).

At about 4:19 P.M. on November 24, Goy received a fax displacing the Claimant from his position effective November 29, due to a bump by a senior employee. Also on November 24, the displacement information was entered in the Employee On-Line Connection ("EOC") and IVR networks available to employees 24 hours/day via telephone or computer.

The Claimant asserts that he looked at a computerized screen with the Carrier's weekend schedule and it did not show that he had been bumped. There is no Rule or obligation requiring the Claimant to view the electronic schedule.

The Claimant traveled to, and obtained lodging in, Rochelle on November 28 and reported for work at 7:30 A.M. on November 29. At that time, Goy first told him of his displacement. He was not allowed to work. The Claimant later bumped to another job. His next paycheck paid for the Thanksgiving holiday, November 29 and November 25 - 28 per diem, however, the Carrier recouped the amounts on the December 13 paycheck.

The Organization's February 1, 2005 claim alleged a violation of Rules 1, 2, 5, 8, 38 and Appendix B. It contends that (1) contrary to Rule 8F, the Carrier did not make a reasonable effort to notify the Claimant as soon as practicable that he had been bumped by waiting more than four days (2) the Claimant's authorized supervisor told him to report for work on November 29 (3) the improper notice prevented the Claimant from working the day after Thanksgiving holiday and receiving per diem and (4) no basis for recoupment exists because the Claimant did nothing wrong and was not paid erroneously. The Claimant seeks eight hours straight time pay for November 29, repayment of 16 holiday hours on November 25 and 26 and five days of per diem at \$23/day.

The Carrier contends that (1) the Organization failed to satisfy its burden of proof (2) existence of disputed facts (whether proper notice was given) requires dismissal (3) as required by Rule 8F, the Claimant received notice as soon as practicable after another employee exercised his seniority rights (4) Rule 8 does not guarantee wage payments (5) the Claimant did not work overtime on November 24 and did not check a computer on the weekend (6) he is not due holiday pay because he did not work the day after the holiday (7) he is not entitled to per diem because he did not work on November 29 and did not use the EOV or IVR to learn pertinent information (8) the claim for damages is excessive and (9) arbitral precedent supports the Carrier.

Contrary to the Carrier's contentions, no material disputed fact exists in this record. The disputed fact alleged by the Carrier is whether the Claimant received proper notice before physically returning to work. However, as explained below, that question is not an operative fact. It is part of the ultimate fact or question raised by the claim itself: whether the Claimant should have received notice before returning to work. Moreover, there is little consistency in the Carrier's logic that the Claimant should be believed when he volunteered that he looked at the electronic information, but disbelieved when he asserts that he did not find anything there.

Rule 8F governs employees, like the Claimant, who have been bumped. It requires notice "as soon as practicable." The absence of specifics means each case must be decided on its own merits. The Rule does not require periodic computer or telephone inquiries by employees. Under some circumstances, those sources might constitute adequate notice. They do not under these particular facts.

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The Claimant initiated a reasonable inquiry about his status with the appropriate person. He was told that he had not been bumped and to report for work as scheduled after his holiday and scheduled days off. He was not told that his status might change or to check electronic information in the meantime. Absent evidence of good reason that contact would have been especially difficult, these unequivocal instructions oblige the Carrier to issue, or at least attempt to issue, a correction when contrary information was received shortly thereafter. As it is, the Claimant was misled, innocently but detrimentally, by the Carrier's failure to update important new information that easily could have been communicated in the four subsequent days before his return.

The Claimant is entitled to be made whole until he was properly notified. He shall be paid 16 hours for the Thanksgiving holiday and eight hours for November 29, 2004. However, \$23.00 per diem is granted for one day only.

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 25th day of March 2010.