

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41637
Docket No. MW-41350
13-3-NRAB-00003-100175**

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

**(Brotherhood of Maintenance of Way Employes 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 Carrier violated the Agreement when it failed to allow B&B Foreman H. Kirkman to exercise his foreman seniority on Gang 9330 after his foreman position was abolished on January 27, 2009 (System File UP-500-JF-09/1515499 MPR).**
- (2) The claim referenced in Part (1) above as appealed by Vice Chairman J. Finch on April 20, 2009 to Mr. B. Hanquist shall be allowed as presented because the appeal was not disallowed in accordance with Rule 22(c).**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant H. Kirkman shall now be compensated ‘. . . for ten (10) hours each day, at his respective straight time rate of pay, to begin on Wednesday, January 28, 2009, through and including Thursday, January 29, 2009 and again on Monday, February 2, 2009, through and including Thursday, February 5, 2009 for a total of sixty (60) hours and to be paid mileage at the rate of \$.55 a mile from the Claimant’s place of residence at 800 Schwarner, Beaumont, Texas 77701, to Addis, Louisiana and back to his place of residence on (sic) for a total of four hundred (400) miles, for a total of \$220 and to be reimbursed for one**

nights lodging at the Audubon Inn, 722 Lobdell Highway, Port Allen, Louisiana 70767 at the amount of \$45.20”

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 dispute arises from the Carrier's denial of the Claimant's attempt to displace the Foreman on Gang 9330 on January 28, 2009, and involves the issue of whether the Claimant was qualified to displace onto the Foreman's position on that date and whether the Carrier was timely advised of any such qualification.

The record reveals that the Claimant submitted to a DOT physical on July 31, 2008, the date his DOT physical card expired, but had to wait to receive his eye waiver. He was removed from a Bridge Foreman's job in August 2008 pending receipt of his DOT paperwork revealing his current CDL with endorsements, which was forwarded to the Carrier's DOT Department by the Claimant in September 2008. Thereafter, the Claimant bid on, and was awarded, a Foreman's position on Gang 9309, which he held until the position was abolished on January 12, 2009. On January 15, 2009, the Claimant displaced onto a Foreman's position on Gang 9334, which he held until the position was abolished on January 27, 2009. The Claimant's statement indicates that he called the GMS Bids and Bulletin Clerk who informed him that he could bump onto a Foreman's position on Gang 9330, and he went to Addis, Louisiana, on January 28, 2009 to do so. At that time the Claimant was informed that he would not be permitted to exercise his seniority because his DOT certification was not current. The Claimant states that he called the DOT Department and was informed that the Carrier was having trouble with its computer system and lots of people were coming up as decertified. He was

instructed to talk to the Medical Department, which he did, and was told that there was no record of his DOT exam or waiver on file and to send it. The Claimant faxed the paperwork to the Carrier's Medical Department on January 28, 2009 and it was acknowledged as received on February 1, 2009. The Carrier asserts that the Claimant's records were updated effective February 4, 2009. This claim seeks lost wages between January 28 and February 5, 2009 at the Foreman's rate of pay, as well as the Claimant's expenses in driving to and from Addis, Louisiana, and an overnight hotel stay.

The Organization argues that the Claimant was qualified to displace onto the Foreman position on Gang 9330 on January 28, 2009, as directed by the GMS Bid Clerk, and as shown by the fact that he had held a Foreman position between receipt of his updated DOT credentials by the Carrier in September 2008 and January 27, 2009, and that any problem with the maintenance of the Carrier's database showing such qualification was not the fault of the Claimant and should not bear on his entitlement to the Foreman's position. The Carrier contends that the Claimant did not have the necessary CDL with endorsements at the time that he attempted to displace on January 28, 2009, that such qualifications are required by law for such position, and that it was the Claimant's responsibility to assure that his records were properly updated at its DOT Department prior to the time of his attempted displacement. It relies upon its PeopleSoft computer record showing that the Claimant was certified on February 5, 2009, as the basis for its position that he was not qualified at the time that he attempted to displace onto the disputed position.

There is no dispute that the Carrier has the right to establish reasonable qualifications for a position, that possession of a CDL with appropriate endorsements was a reasonable qualification for this Foreman position, and that the Claimant had the seniority right to displace onto the Foreman position on Gang 9330 on January 28, 2009 if he possessed the qualifications to do so. A careful review of the record convinces the Board that the Organization met its burden of proving that the Claimant did, in fact, have his CDL with the necessary endorsements at the time that he attempted to make the displacement on January 28, 2009 and that he had provided documentation of such to the Carrier's DOL Department in September 2008. If there was a problem with the Carrier's computer software or record-keeping system affecting the entry of the Claimant's DOT certification, there is no evidence in the record indicating that the Claimant should have known of such issue prior to January 28, 2009. To the contrary,

because the Claimant was held to be properly certified to hold a Foreman's position on Gangs 9309 and 9334 between September 2008 and January 27, 2009; it was reasonable for him to assume that his DOT record was updated to reflect his CDL with endorsements. The Carrier's assertion that the Claimant did not properly notify its DOT Department of his qualification until February 1, 2009 does not explain his apparent clearance to work on the Foreman's position for the prior five month period.

With respect to the appropriate remedy, the Board agrees that the Claimant is due compensation for his lost work opportunity of 60 hours at the Foreman's straight time rate of pay. However, the Organization failed to establish that there is Agreement language that supports the Claimant's entitlement to expenses incurred as a result of a displacement. Thus, the request for reimbursement for mileage and lodging is denied.

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 24th day of April 2013.

LABOR MEMBER'S
CONCURRENCE AND DISSENT
TO
AWARD 41637, DOCKET MW-41350
Referee Newman

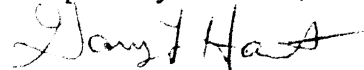
The Majority correctly found on the merits that the Claimant was improperly denied the opportunity to exercise his foreman seniority on Gang 9330 after his foreman position was abolished on January 27, 2009 and correctly awarded damages for his lost work opportunity. Hence, a partial concurrence is appropriate. However, the Majority erred in two (2) important respects and dissent is required. First, the Majority erred when it failed to sustain the claim based on the Carrier's default without getting to the merits of the underlying claim. Second, even if the merits were reached, the Majority erred when it failed to award the Claimant a full remedy for the damages he suffered as a result of the Carrier's violation.

A thorough review of the record in the case presented to this Division reveals that the claim as appealed by the Organization was not disallowed as required by Rule 22 of the Agreement. That is, the Organization appealed the Carrier's denial of the instant claim under letter dated April 20, 2009 and pursuant to Rule 22, the Carrier had sixty (60) days to disallow said appeal. However, the Carrier failed to respond or disallow the appeal as required by Rule 22. In fact, the Organization notified the Carrier of its default by letter dated June 29, 2009 but received no response to its appeal until July 16, 2009, when it received a letter *via fax*, with an attachment notifying the Organization that the appeal was being denied. In accordance with the clear and unambiguous language of the Agreement, the Carrier's default on appeal required that the claim be allowed as presented. The majority grievously erred when it failed to sustain the claim based on the Carrier's default and allow said claim "as presented".

Had the Majority not committed its first error, it would not have been necessary to reach the merits of the claim and, therefore, would not have had the opportunity to commit its second error. There was no dispute that the position to which the Claimant attempted to displace was on a System Bridge gang. There is no dispute that the Agreement provides for allowances to defray the costs associated with working on a System Bridge gang which is a mobile gang with no fixed headquarters. When the Carrier failed to allow the Claimant to displace, it also failed to provide the Claimant such allowances and caused the Claimant to incur unreimbursed expenses as a direct result of the Carrier's violation. Consequently, the Majority erred when it failed to order compensation for those unreimbursed expenses.

Inasmuch as the Majority failed to make a finding concerning the Carrier's default, this award cannot serve as precedent on that issue in any future proceeding.

Respectfully submitted,



Gary L. Hart
Labor Member