

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29537
Docket No. MW-29719
93-3-91-3-55

The Third Division consisted of the regular members and in addition Referee Thomas J. DiLauro when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employees
(Soo Line Railroad Company (former
(Chicago, Milwaukee, St. Paul and
(Pacific Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned junior employe B. M. Olson instead of Mr. E. P. Mashak to fill a track laborer position at Red Wing, Minneapolis on May 29, 30, 31, June 1 and 2, 1989 (System File C #23-89/800-46-B-341 CMP).

(2) As a consequence of the aforesaid violation, Mr. E. P. Mashak shall be allowed forty (40) hours of pay at the track laborer's straight time rate and he shall be made whole for all health and welfare benefit losses suffered."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

At the time this dispute arose, Claimant had established and held seniority as a section laborer in the Track Subdepartment, and was regularly assigned and working as such. The junior employee had also established and held such seniority as a section laborer in the Track Subdepartment. On May 29, 30, 31, June 1, and 2, 1989, the Carrier assigned the junior employee to fill a temporary vacant position as a track laborer at Red Wing, Minnesota.

The Organization maintains that the Carrier violated the Agreement because it did not afford Claimant an opportunity to fill the job vacancy at Red Wing and perform this track laborer work in accordance with his Track Subdepartment seniority. The Organization argues that Claimant was fully qualified and readily available to perform this work had the Carrier afforded him an opportunity to do so. The Organization further argues that this dispute involves bad faith on the part of the Carrier. The Organization contends the Carrier's actions in this matter represent an example of the Carrier's total disregard for its contractual obligation regarding the seniority and job vacancy provisions of the Agreement, and its failure to live up to that obligation.

The Organization asserts that the Claimant suffered economically from the Carrier's action through loss of 40 hours of straight time pay as well as health and welfare benefits. The Carrier contends that Claimant never made a proper request to fill the vacant track laborer position nor did he attempt to secure such position once he learned that a junior employee had been assigned to it. The Carrier maintains that Claimant is therefore not entitled to any award of straight time pay for the above mentioned 40 hour period or health and welfare benefits.

The Organization alleges that Rule 8(c) of the Agreement provides that job vacancies of 30 days or less involving non-emergency service may be filled upon proper request to the Division Engineer, and that available, qualified employees such as Claimant shall be given preference. The Carrier contends that Claimant offered no dispositive proof that he had telephoned any such request to its St. Paul, Minnesota, personnel office prior to the job vacancy at Red Wing being filled. The Carrier further argues that Claimant had previously expressed his preference of working near his home and not having to travel as far as Red Wing.

The Organization maintains that Claimant did in fact telephone the Carrier's personnel office on May 26, 1989, and was told that the job vacancy at Red Wing had been filled. The Carrier contends that Claimant never sought to gain the job once he learned that a junior employee had filled it. The Organization asserts that Claimant did not discover that the job vacancy at Red Wing had been filled by a junior employee until approximately two weeks after the May 26, 1989, telephone call. The Organization further argues that Claimant had worked in Red Wing as recently as May, 1988.

The Carrier argues that Claimant is not entitled to a monetary remedy based upon eight hours per claim date. The Carrier contends that Claimant was aware of the job vacancy at Red Wing and failed to follow the proper procedure to affirmatively request that he be afforded the opportunity to fill such position. The Organization maintains that Claimant should be compensated for the full eight hours per claim date as well as all health and welfare benefit losses suffered as the Carrier shirked its responsibility to assist him in securing the job vacancy at Red Wing contrary to the provisions of the Agreement.

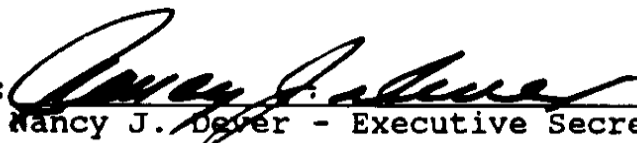
Both parties have cited several awards to support their respective positions. After reviewing said awards, the Board finds the awards cited by the Organization, primarily Third Division Award 13869 regarding the failure of Carrier to allow Claimants the opportunity to exercise their seniority to displace a junior employee, to be dispositive in this case.

The Board reviewed the file as developed on the property. Based on that information, the Carrier is directed to pay the Claimant eight hours of pay at the track laborer's straight pay rate for each claim date, for a total award of 40 hours of straight pay. The Carrier is further directed to compensate Claimant for any and all health and welfare benefit losses incurred for each claim date.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1993.

CARRIER MEMBERS' DISSENT
TO
AWARD 29537, DOCKET MW-29719
(Referee DiLauro)

In Third Division Award 28924 (Marx), a veteran arbitrator of Railroad disputes, adopted the language found in Award 28401, (also Marx):

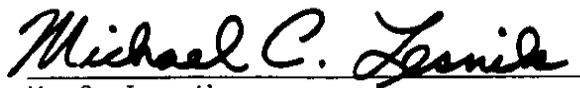
"This uncertainty as to the facts of the matter has led to irreconcilable differences between the parties' positions which the Board, in its appellate capacity, cannot resolve. Based on such differences, the Board is without sufficient factual information to take any action."

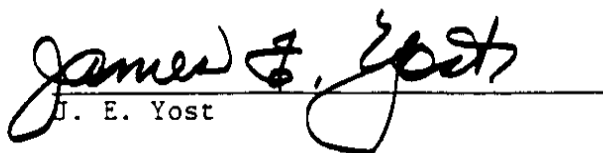
In this dispute, Claimant, through his Union, alleged he was not allowed to exercise his seniority as he wanted. Carrier denied this. The Union produced a statement from Claimant alleging that on a certain date he called in his request for a displacement. Carrier responded with a statement from the employee handling displacements stating that Claimant did not call. Based upon these facts, this Majority determined that Claimant was telling the truth and Carrier wasn't.

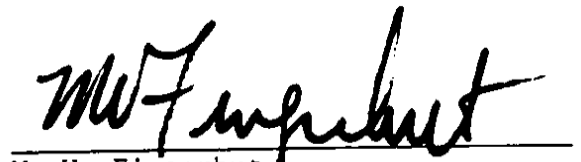
Obviously, we have now met a clairvoyant. This dispute should have been dismissed following the irreconcilable dispute in facts precedent set forth in Awards 28924, 27612, 26679, 26486, 26200, furnished the neutral who, if he read them, ignored this principle.

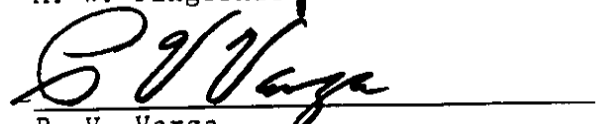
We dissent.


R. L. Hicks


M. C. Lesnik


J. E. Yost


M. W. Fingerhut


P. V. Varga