

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35815
Docket No. MW-33160
01-3-96-3-591**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed to recall furloughed Group 2 Machine Operator D. T. Schimetz to fill a temporary vacancy on Jimbo BNX88-0005 on January 24, 1994 and continuing (System File T-D-758-H/MWB 94-07-26AO).
2. As a consequence of the aforesaid violation, the Claimant shall:

‘ . . . receive pay equal to any and all pay received by Mr. Wegner beginning January 24, 1994 continuing until such time that the violation is corrected. We further request that Claimant be accredited for any and all other benefits, lump sum accreditation, vacation accreditation, insurance, retirement and unemployment payments.’”

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 24, 1994, V. Wegner vacated his Group 2 Machine Operator position on Jimbo Tie Handler BNX88-0005 headquartered at Minot, North Dakota, to operate Group 1 Machine No. MC-100 on Yellowstone Division Track Gang 44180. Wegner worked that position from January 24 through January 31, 1994. Wegner was then assigned to operate Group 2 Front End Loader Machine No. X24-0157 headquartered at McLaughlin, South Dakota, which he operated from February 1, through March 24, 1994.

The vacancy created by Wegner on the Jimbo at Minot, therefore existed from January 24 through March 24, 1994 - a period of two months. At the time, the Claimant was a furloughed Group 2 Machine Operator. During the two-month period of Wegner's absence from the Jimbo at Minot, the Carrier filled that vacancy with Group 2 Machine Operators junior to the Claimant. However, Rule 9 provides that "... when vacancies of more than thirty (30) calendar days' duration occur, employees ... will be called back to service in the order of their seniority." Based on his seniority, the Claimant should therefore have been recalled. A violation of Rule 9 has been shown.

As it turns out, the assignment of Wegner to the Front End Loader position at McLaughlin was improper and the Carrier paid a claim filed on behalf of N. H. Singer for 464 straight time hours. However, the misassignment and settlement concerning Singer for the Front End Loader position at McLaughlin do not change the result in this case regarding the Claimant's contractual entitlements to the Jimbo vacancy at Minot. Even though Wegner was improperly assigned to the Front End Loader position at McLaughlin, there was still a vacancy on the Jimbo at Minot, in excess of 30 days which could only be filled in accord with the terms of the Agreement - i.e., in this case, under Rule 9 - and therefore by the Claimant. Thus, notwithstanding the settlement regarding Singer for the erroneous assignment to Wegner for the Front End Loader at McLaughlin, the Claimant is still entitled to relief for the vacancy on the Jimbo at Minot.

These are not duplicate claims as the Carrier argues. Here, the Carrier made two improper assignments - first, to Wegner for the Front End Loader at McLaughlin, (for

which the Carrier paid Singer) and second, to employees junior to the Claimant on the Jimbo at Minot, (which this claim is about). When all is said and done, after Wegner was improperly assigned to the Front End Loader at McLaughlin, there was still a vacancy to be filled on the Jimbo at Minot, created by Wegner's assignment away from that position. The only way to fill the vacancy on the Jimbo at Minot, was to follow the provisions of the Agreement. Because the Carrier did not do so, the Claimant is entitled to relief.

With respect to the scope of the relief, the Claimant shall receive compensation and other contractual entitlements at the appropriate contract rate for the period January 24 - March 24, 1994 - the period of Wegner's vacancy on the Jimbo at Minot, which should have been filled by the Claimant. The Claimant shall be made whole.

AWARD

Claim sustained.

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 14th day of November, 2001.