

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36263
Docket No. MW-35675
02-3-99-3-609**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway
((former 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 and refused to assign Mr. J.A. Olson to a Group 3 Machine Operator vacancy on Crew SC-174 beginning September 2, 1997 and continuing (System File T-D-1446-H/MWB 98-02-04AA BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. A. Olson shall now be compensated for “*** the difference in rates of pay between that of truck driver and Group 3 machine operator for all hours beginning September 2, and continuing until Claimant is placed upon the position. We are requesting that Claimant receive pay equal to any and all overtime worked by the surface crew during claimed period. We request that Claimant receive meal and lodging per diem allowances of \$42.50 for each and every calendar day beginning September 2, and continuing until Claimant is placed upon the position.”**

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.

G. Ferrell was assigned to a Group 3 Ballast Regulator position on District 17 surface crew SC-174. He bid off that position on September 2, 1997, creating the vacancy at issue until the position could be filled by bulletin.

The Organization filed claim, contending that the Group 3 Ballast Regulator position should have been filled by the Claimant, in accordance with Rule 19A, which states:

“A new position or vacancy of thirty (30) calendar days or less duration shall be considered temporary and may be filled without bulletining. If such vacancy or position of foreman or assistant foreman in the Track or B&B Subdepartment is to be filled, the ‘eligible list’ referred to in Rule 18 will be used. If such vacancy is on any other position and is filled, preference will be given to the senior qualified employee who is not assigned in the rank in which the vacancy occurs and who has on file a written request to fill such vacancy. . . .”

The Carrier denied the claim, contending that the Claimant did not have a written request on file to work the position. In support thereof, the Carrier submitted a memo dated March 24, 1998 from Manpower Associate R. Scott, which states: “I have reviewed the records that we have on file, and J. A. Olson did not have a 19A request on file requesting any group 3/4 machine vacancy on District 17 for Surfacing Crew 174 on September 2, 1997. . . .”

According to the Organization, however, the Carrier’s position conflicts with an earlier statement made in a claim involving the Claimant in a nearly identical dispute involving temporary Group 3 positions on the same surfacing crew in May 1997. In that earlier matter, the Carrier stated in an October 9, 1997 letter to the Organization:

“Reference is made to your letter dated August 14, 1997, 11 of 14 letters, filing a claim on behalf of J.A. Olson . . . for alleged violation when Rule 19A request was not honored to fill a Group 3 Machine Operator position beginning June 30, 1997.

In reference to the Rule 19A you state Mr. Olson had on file with the Manpower Office. Our investigation reveals that there is a Rule 19A on file in the Manpower Office dated 5/16/97, but was not received in the Manpower Office by fax until August 22, 1997, at 11:01. . . . Since Mr. Olson did not have request on file until August 22, 1997, he would not have been eligible to fill the vacancy. . . .”

The Carrier’s Submission contends for the first time that a 19A request must be specific to the job the applicant wishes to temporarily fill. According to the Carrier, 19A requests require that the employee state the position by both job title and position number to prevent confusion and assure proper assignment when a gang has multiple positions with the same title. Those arguments would have been given due consideration had they been raised on the property. At this juncture, however, the de novo arguments are not properly before the Board.

So stating, we find that the claim has merit. The Carrier characterized this case as an irreconcilable conflict of fact, but the only conflict lies in the contradictory positions taken by the Carrier with respect to the Claimant’s 19A request. The Claimant is to be made whole for monetary losses incurred. However, there is no evidence that he occupied a position which required him to incur out of pocket expenses for meals and lodging. That portion of the claim is denied.

AWARD

Claim sustained in accordance with the Findings.

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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 28th day of October 2002.

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THIRD DIVISION**

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**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 28th day of October 2002.

**Carrier Members' Dissent
To Award 36263 (Docket MW-35675)
Referee Kenis**

The Majority has sustained this claim on the basis of evidence concerning a prior claim that was made three(3) months after the fact in that matter. Carrier had denied the prior matter because there was no Rule 19(a) request on file by the Claimant concerning a May 16, 1997 claim.

Organization's supposition that such belated information supports this claim ignored the fact that no such documentation was ever produced to show that Claimant did have a Rule 19(a) request on file on September 2, 1997 for this group 3 vacancy. Carrier had specifically pointed out that, on September 2, 1997, there was no Rule 19(a) request on file from anyone.

Assumption is not a valid basis to substantiates a claim.

We Dissent.


Paul V. Varga


Martin W. Fingerhut


Michael C. Lesnik