

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36268
Docket No. MW-35782
02-3-99-3-764

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 Employees
(Soo Line Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Mr. T.J. McConnell to fill the vacancy of the machine operator (speed swing) position on the Peddle Crew beginning January 5 through February 27, 1998, instead of assigning Mr. R. F. Barten in recognition of his superior seniority and in compliance with the provisions of Rule 14(b) (System File R1.248/8-00219-023.
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R.F. Barten shall now be compensated the difference in pay between the speed swing operator's rate of pay and the tractor operator's rate of pay for three hundred twenty (320) hours' straight time and he shall be compensated for eight (8) hours' pay at the speed swing operator's time and one-half rate of pay.”

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.

It is the Organization's position that the Carrier violated the controlling Agreement when Machine Operator T. J. McConnell was assigned to a short vacancy on the position of Speed Swing Operator on the Peddle Crew working in the vicinity of Carrington. McConnell occupied the position for the period beginning January 5 through February 27, 1998. The Organization contends that the Claimant, who is senior to McConnell, should have been called for the work from the call list in accordance with Rule 14 (b), which states in pertinent part:

"RULE 14 - INCREASING FORCES

- (b) 'Call lists' to protect short vacancies will be established within each sub-department of the Maintenance of Way Department. Each employe may place himself on as many 'call lists' as he chooses by written notice (or wire) to the applicable Personnel Department. Employes placing themselves on a 'call list' must specify the groups and ranks in which they wish to protect work but are limited to those groups and ranks in which they are qualified. For purposes of this rule employes who do not retain seniority in a particular group and rank must have worked in the group and rank for at least 30 days to be considered qualified to protect that group and rank from a call list.

Qualified employes on a call list who have indicated they wish to protect work in a particular group and rank in which the vacancy occurs will be called in seniority order and must protect the vacancy for which called (except in cases of personal illness or other unavoidable cause). Employes who do not desire to protect work of less than 5 days may waive their right to be called for such work by providing written notification to the applicable personnel office in accordance with Paragraph 4 below."

The Carrier argues that it had the right to utilize the junior employee in this case. In support thereof, it advances three arguments. First, the Carrier contends that during the time period involved, the Claimant was already filling a short vacancy and therefore he was ineligible to fill the vacant speed swing vacancy. Second, the Carrier asserts that because the Claimant was under pay, he suffered no loss of compensation. Third, the Carrier maintains that the short vacancy in dispute was not in the same seniority group as the one in which the Claimant was working at the time, and thus the Claimant was not

entitled to be called for the short vacancy in accordance with the side agreement to Rule 14 dated December 1, 1998, which states:

“Employees in active service will be allowed to place themselves on ‘Call Lists’ and stand for short Vacancies in the Seniority Group in which actively employed provided that they will only be entitled to be called to Short Vacancies in ranks higher than that in which they are actively employed.”

Based on our review of the record, we find that the Organization met its burden of establishing that the Carrier violated the Agreement. Rule 14(b) provides for the establishment of “call lists” to protect short vacancies within each subdepartment of the Maintenance of Way Department. The Rule expressly provides that employees are entitled to place themselves on as many call lists as they choose, so long as they are qualified. There is no indication from this record that the Claimant was unqualified for the position. Accordingly, when the vacancy on the speed swing arose, the Claimant was entitled to be called and assigned thereto from the call list in preference to McConnell, the junior Machine Operator.

The Carrier’s defenses to the claim are not well-founded, in our view. The Carrier’s assertion that the Claimant was already working a short vacancy was disputed by the Organization on the property. Moreover, even if he was working a short vacancy, the Carrier failed to identify any provision in the Agreement that would support its position that the Claimant was not entitled to consideration for subsequent short term vacancies.

In addition, prior decisions of the Board dispose of the Carrier’s contention that the Claimant was unavailable to be called. As explained in Third Division Award 24897:

“The main thrust of the Carrier’s argument in denying the claim is that the Claimant was not available to do the work because he had been assigned to do other work by the Carrier. Here, however, as it has done in past Awards, the Board rejects denial of a claim such as this on ‘availability’ grounds. If the Claimant was not assigned where and when the disputed work took place it was because he was not assigned there by the Carrier (See Third Division 13832 and 15497, inter alia).”

Finally, the Carrier’s reliance on the side agreement to Rule 14 is misplaced. The side agreement limits employees from placing themselves on certain call lists within their seniority group. Specifically, they are entitled to be called to short vacancies only in ranks within their seniority group that are higher than their current rank. The side agreement

does not limit or prohibit employees from placing themselves on call lists outside of their seniority group. Indeed, because such a proscription would directly conflict with the provisions of Rule 14(b), the Carrier has not persuaded the Board that such an interpretation would be reasonable.

The claim will be sustained as presented. In addition to the request for the difference in earnings between the Speed Swing Operator position and the earnings the Claimant made as a Tractor Operator for the period in question, the Organization requested payment for eight hours overtime incurred between February 24 and 27, 1998. An objection to the overtime request was raised by the Carrier for the first time in argument before the Board. Because the issue was not raised during the on-property handling of the case, it is deemed waived at this juncture.

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 28th day of October 2002.