

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36397
Docket No. MW-36126
03-3-00-3-299**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Union 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 call Mr. J.L. Pospisil for Group 18 Extra Gang Laborer service in the vicinity of Missouri Valley, Iowa on November 29, 30 and December 1, 1998 and instead assigned junior employee D. Ford to said service (System File UPND-9007T/1182400).**
- (2) As a consequence of the violation referred to in Part (1) above, Trackman J. L. Pospisil shall now be compensated for thirty (30) hours' pay at his respective straight time 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.

In the instant claim, the Organization asserts that the Carrier violated the Agreement when it used furloughed junior employee D. Ford to fill a temporary Track Laborer's vacancy on November 29, 30 and December 1, 1998 while the Claimant was furloughed. The Organization relies upon Rule 20 (k), which states as follows:

"Rule 20 (k) Positions undergoing the advertisement and assignment process, or vacancies of less than thirty (30) days' duration shall be filled in the following sequential order:

- (1) The senior employe of the group and class in the gang or at the location who is working in a lower class. . . ."**

The Carrier advances two reasons for denying the claim. First, it contends that Ford is senior to the Claimant. However, the applicable seniority roster shows that the Claimant is listed as senior to Ford. No credible explanation was forthcoming from the Carrier sufficient to rebut the presumption that the relative standing of the two employees on the seniority roster is correct.

The Carrier's second argument is more persuasive. The Carrier asserts that the onus was on the Claimant to advise the Carrier of his availability to work the temporary assignment in accordance with Appendix Q of Rule 20, which states:

"It is recognized furloughed employees holding seniority in the group and class in which the vacancy occurs should, after making their availability known, be afforded the opportunity to work interim vacancies, with preference afforded the nearest furloughed employee(s) of the class within forty (40) rail miles of the work site. Such employees, may, however, be displaced by a senior furloughed employee in the group and class."
(Emphasis added)

In contrast to Third Division Award 36396, in which the Board concluded that an employee's bid submission was sufficient notice of his availability to work the temporary position pending the bid assignment under the terms of Appendix Q, there is no comparable evidence in the instant case to suggest that the furloughed Claimant made his availability known or in any way notified the Carrier of his interest in the extra work.

The Board carefully reviewed the Awards cited by the Organization. Unlike the contract provisions cited in those cases, the controlling language in this matter expressly states that furloughed employees must make their availability known as a prerequisite to being afforded the opportunity to work interim vacancies. In accordance with that language, there must be some action taken by the employee to provide the Carrier notice of availability. The record shows that Ford complied and the Claimant did not. As a result, the Carrier did not violate the Agreement when it assigned Ford, rather than the Claimant, to perform the extra work.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

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

Dated at Chicago, Illinois, this 18th day of February 2003.