

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36574
Docket No. MW-36174
03-3-00-3-371**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Soo Line Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Bridge and Building Sub-department employee T. D. Held to perform Track Sub-department work in the vicinity of Carrington, North Dakota beginning on October 1, 1998 and continuing through October 28, 1998 instead of regularly assigned Track Sub-department employee K. D. Asleson (System File R1.346/8-00369).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. D. Asleson shall now be paid ‘...the equivalent of one hundred twenty-six (126) hours at the overtime rate (\$21.36 x 126 = \$2,691.36), and have all vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.’”**

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 August 28, 1998, the Carrier posted Bulletin No. 207, advertising temporary positions for a qualified Section Foreman and a qualified Section Laborer (Flagging) with headquarters at Carrington, North Dakota, on Crew 792. According to the Bulletin, the flagging job was located on a bridge project on the Carrington Section. On September 16, 1998, the Carrier issued Bulletin No. 207A, showing the Claimant as the successful applicant for the Section Laborer (Flagging) position. The names of the other applicants who were not awarded the Section Laborer position were M. Feist, D. Nelson, T. Monge and G. Weltz.

According to the Organization, the Claimant informed the Roadmaster of his desire to work his awarded assignment as of October 1, 1998, the date the bridge project began. However, beginning on October 1, 1998, Pump Repairman T. D. Held covered the position on a daily basis until October 27, 1998. The parties do not dispute that T. D. Held worked the position a total of 21 days. On those same 21 days, the Claimant continued to work his Section Laborer job at Carrington, earning eight hours' regular pay on each date. T. D. Held earned eight hours' straight time and six hours' overtime on each of the 21 claim dates. Citing various Rules of the Agreement, including Rule 10(h), the Organization maintains that the Claimant is entitled to the compensation claimed.

The Carrier submitted that, although the Claimant was awarded the Section Laborer's position, the Roadmaster held the Claimant on his previous position from October 1 through October 28, 1998 because a replacement employee was not available. The Carrier maintained that allowing the Claimant to cover the flagging assignment without a replacement would have caused the Claimant's section to have been unprotected, resulting in train delays. The Carrier stated that the Organization bore the burden of proving its assertion that a qualified replacement was available from a pool of furloughed employees, employees working in other zones, or employees on the appropriate call list, but failed to offer such proof. The Carrier also contended that the Organization never established that the Claimant actually requested the Roadmaster to allow him to cover the awarded position.

With respect to the compensation claimed, the Carrier argued that the Claimant suffered no actual loss of wages because he was fully employed at the same rate of pay on his regular assignment, and that he is not entitled to the payment of overtime for

services he did not actually perform. Furthermore, the Carrier pointed out that the Claimant would not be entitled to any compensation until after October 5, 1998, 20 days from the date of the bulletin award.

The Board carefully reviewed the record and gave due consideration to the positions and arguments advanced by both parties. The Board finds that Rule 10, Bulletins, paragraph (h), is at the heart of this dispute. Rule 10(h) reads in pertinent part, as follows:

“(h) An employe making application for and who is assigned to a bulletined position must take the position within twenty (20) calendar days from the date of assignment, unless he is prevented from doing so because of illness or other reasonable cause.

During the twenty (20) calendar day period referenced above, an employe assigned to a bulletined position who requests to be released from his former assignment to take such position may be held to perform temporary relief on his former assignment in the event no qualified relief is available. When qualified relief is available to protect the former assignment, the employe must be permitted to take the new assignment. . . .”

According to the first paragraph of the above Rule, an employee who bids for and is assigned an advertised position must take the position within 20 calendar days. Here, the Board finds no evidence that the Claimant failed to make himself available for the flagging position he bid. Indeed, the December 17, 1998 claim denial from the Manager Track Maintenance does not state that the Claimant did not request the position or was otherwise not available. Rather, the letter asserts that the reason the Claimant was not permitted to cover the flagging position was because a replacement Laborer was not available to fill the Claimant's position of Section Laborer. Therefore, the Board concludes that the Claimant did not fail to make himself available for the position.

Regarding the issue of whether a replacement employee was available, the Board finds that the second paragraph allows the Carrier a period of 20 days from the date an assignment is made to make the necessary arrangements for the employee's release, and if qualified relief is available then the employee will be allowed to occupy the new assignment. The Board finds that the Rule presumes that the Carrier will release the

employee before the expiration of 20 days, but that if the Carrier must hold the employee on his existing assignment because of a lack of a qualified replacement, then the onus is on the Carrier to show that a qualified replacement did not in fact exist.

As a result, the record does not reflect that no qualified relief was available and, as a result, the claim must be sustained. Based on the Board's interpretation of Rule 10(h), the Claimant is entitled to compensation at the end of the 20 calendar-day period. As the Carrier points out, the 20th calendar day following the assignment date of September 16 was October 6, 1998. Therefore, the Claimant is entitled to six hours at the applicable rate of pay for each work date between October 6 through October 28, 1998, inclusive, for a total of 18 days. The Board finds that given the facts of this case, the Claimant suffered a true lost work opportunity and is entitled to 108 hours at the overtime rate. See Third Division Awards 18628 and 25601.

AWARD

Claim sustained in accordance with the Findings.

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 16th day of June 2003.