

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38203
Docket No. MW-37740
07-3-03-3-99

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman 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 Carrier violated the Agreement when it held Machine Operator T. J. McConnell as a section laborer at Carrington, North Dakota and from his assigned (per Bulletin No. 227A) machine operator position on Production Crew No. 3 beginning October 31, 2001 and continuing through December 6, 2001 (System File RI. 702/8-00495-005).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. J. McConnell shall now be compensated for the difference in the straight time rate of pay between the machine operator rate of pay and the section laborer rate of pay for the total of two hundred twenty-eight (228) straight time hours from October 31, 2001 through December 6, 2001 and he shall be compensated for all overtime hours worked by the employee on his assigned machine operator position during said period at the respective machine 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.

At the time this claim arose, the Claimant held seniority in the Roadway Equipment Sub-department Group 4 Rank A as of May 1, 1997. The Claimant applied for and was awarded the higher-paying position of Group 4 Rank A Machine Operator on Production Crew 3, which had been bulletined on October 10, 2001. However, the Carrier retained the Claimant in his prior position until Production 3 Crew was abolished on December 6, 2001.

The Organization filed the above claim on December 21, 2001. It alleged that the Carrier had wrongfully retained the Claimant on his former (lower paying) position longer than the 20 days allowed under the provision of Rule 10(h) of the Parties' Agreement. That Rule reads, in pertinent part, as follows:

"An employee 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 employee assigned to a bulletined position who requests to be released from his former assignment to take such a 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 employee must be permitted to take the new assignment.

An employee who fails to take a position to which assigned by bulletin will forfeit all rights to such position and the position will be rebulletined. The employee will be considered furloughed, and will

be required to file his name and address per Rule 13. (Amended 1/20/89)."

The claim was denied on February 12, 2002. The Carrier contended that it had not violated the Agreement, because no qualified relief was available to fill the Claimant's former position. The Carrier also insisted that there was no basis upon which to grant the Claimant the requested travel reimbursement, because he would have incurred travel costs in his new position as well, some of which might have been greater than those he was experiencing in his former position. The claim was appealed on April 12, 2002 and was subsequently progressed up to and including conference on the property.

The Organization maintains that the Carrier exceeded its prerogative to hold the Claimant on his former position for 20 days, and that he is entitled to the higher wage he would have earned between October 31 and December 6, 2001, when the crew was abolished. The Carrier counters that the Organization has not shown that any relief was available and insists that it was, therefore, within its rights to retain the Claimant on his original position.

The Carrier's position ignores the inherent time limit spelled out in the second paragraph of Rule 10(h). The Carrier may hold a successful bidder on his former position only 20 calendar days from the date of his assignment. The only exception is if the successful bidder has not asked to be released from his former position to take the new one. Evidence on this record indicates that the Claimant did, in fact, indicate that he would take the higher pay position "once he was released from his former position." Thus, the Carrier's latitude to retain the Claimant on his old position was limited to the contractual 20 calendar days. As the Board commented in Third Division Award 35437:

"... Rule 10(h) rather clearly limits the permissible length of the holdover to the 20 calendar day period specified. It is not an indefinite right. We must find, therefore, that Carrier did violate the Agreement when it refused to release Claimant after 20 calendar days...."

We note that the original claim also contended that the Claimant was entitled to travel reimbursement for the period he was erroneously held on his former

position. The present record lends no support to that portion of the Organization's claim.

Based on the foregoing the Board finds that the Claimant is entitled to the difference between what he would have earned on the higher position from October 31 until it was abolished on December 6, 2001, and the position on which he was retained. He should thus be made whole for the difference in earnings for that period of time by means of a joint review of the Carrier's records.

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 18th day of May 2007.