

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39697
Docket No. MW-38359
09-3-NRAB-00003-040296
(04-3-296)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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 retained junior Machine Operator C. Schmidt to move and load Production Gang 3 equipment beginning December 5, 2002 through December 12, 2002 instead of senior Machine Operator C. Urlaub (System File C-03-290-004/8-00219-091).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Urlaub shall now be compensated for forty (40) hours' pay at his respective machine operator's straight time rate of pay and he shall have all overtime, vacation, benefits and other rights restored which were lost to him as a result of this 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.

The Organization filed the instant claim alleging that the Carrier violated the parties' Agreement when it improperly retained a junior Machine Operator, instead of the Claimant, to perform certain loading work during the period from December 5 through December 12, 2002.

The Organization initially contends that the Carrier's explanation for how the junior Machine Operator was chosen to perform the work in question is unsupported by any probative evidence whatsoever. There is no evidence that the junior employee did not operate the machines for 40 hours, or that the Claimant had left work and therefore could not be contacted. The Organization asserts that the Carrier never indicated that it attempted to contact the Claimant during the claim period and offer him the opportunity to perform the subject work.

The Organization argues that during the processing of this claim, the Carrier confirmed that the junior employee was assigned to perform the work described in the claim, while failing to comment on whether the Carrier attempted to contact the Claimant to offer him the work opportunity. As for the Carrier's argument that the Claimant knew about the loading work but did not request it, the Organization emphasizes that this is an obvious red herring, totally unsupported by the record, and an attempt to improperly suggest that it is the employee's responsibility to have his seniority respected.

The Organization points to the Claimant's statement that on December 5, 2002, the rail gang was cut to five senior employees, and he did not make the cut. Citing Rule 12(a) the Organization emphasizes that when the Carrier reduces force, it must retain the senior employees in the affected classifications, which it unquestionably failed to do in this instance. The Organization additionally asserts that the Claimant did not know that the junior Machine Operator had been retained to work on the gang until later the following week, so the Claimant was not aware of the availability of the disputed work until well after his furlough on December 5, 2002.

The Organization maintains that arbitral Boards long have recognized that seniority is a valuable property right of an employee. Moreover, prior Awards support the Organization's position in this matter. The Organization argues that the Carrier's decision to intentionally disregard the Claimant's superior Machine Operator seniority and to assign a junior Machine Operator to perform the work in question on the claim dates unquestionably deprived the Claimant of valuable seniority rights along with the inherent monetary benefits.

As for the Carrier's repeated contention that the Claimant was not working or had voluntarily left work early on December 5, the Organization argues that the record demonstrates that if the Claimant and other members of the production crew had indeed left work, it was under the direction of the Foreman in charge of the gang. Moreover, if the Carrier subsequently decided to retain more employees than originally planned, Rule 12(1) required the Carrier to retain the most senior employees in the affected classification. The Organization insists that the Carrier failed to do this in the instant case, and the record also does not show that the Carrier attempted to contact the Claimant before assigning the disputed work to a junior Machine Operator.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the claim presented to the Board is not the original claim herein. The Carrier asserts that the original claim alleged a violation only of Rule 4, asserting the utilization of a junior Machine Operator. More than a year after the alleged violation occurred, the Organization amended the claim to present an alleged violation of Rule 12, asserting the retention of a junior Machine Operator. The Carrier argues that this constituted a new claim, which is untimely and therefore invalid. The Carrier points out that the Organization also failed to provide any evidence to support its new claim.

Citing prior Awards, the Carrier contends that the Organization is restricted in its presentation to the Board to the matter contained in the original statement of claim. Anything added thereafter would be considered a new claim, untimely, and invalid.

The Carrier emphasizes that it properly abolished the positions in question in accordance with the Agreement. After subsequently realizing that additional help was required to move the machinery to a new location, the junior employee was asked to assist. The Carrier argues that the Organization failed to provide evidence of what Rule the Carrier violated in so doing. The Organization has not established that Rule 4 was violated, and the fact that both employees were furloughed and received proper notice confirms that there was no violation of Rule 12.

The Carrier insists that it is obvious that there was no way the supervisor could have known that the Claimant was required to be retained, and the Organization failed to meet its burden of proving the same. Although the Organization claimed a violation of Rule 4, it failed to establish any such violation. The Carrier emphasizes that both the Claimant and the junior employee received the proper five-day abolishment notice, and the Claimant vacated the property prior to anyone's knowledge that equipment had to be moved to a new location. The Carrier further asserts that the junior employee was utilized, but the Organization never established for what, for how long, and for how many days. Moreover, the Organization failed to establish that such usage violates Rule 4.

The Carrier contends that had the Claimant remained and worked on Friday, he would have been provided the opportunity to move the equipment. The Claimant did not remain and work, however, so he could not be afforded the opportunity to perform the work in question. The Carrier argues that there was no violation of either Rule 4 or Rule 12, and the Organization failed to meet its burden of proof by establishing otherwise.

The Carrier asserts that there is nothing here other than a claim presented by an individual who had no desire to perform this work, who accepted his furlough and departed the property, and who now alleges that he would have worked had he known. The Carrier contends that the Claimant was unavailable and therefore is not a proper Claimant.

The Carrier argues that there is no evidence that it acted arbitrarily, in bad faith, or in a deceitful manner. The positions were properly abolished, the Carrier was unaware of the need to move the equipment, and the Claimant could have performed the work in question had he been on the job and available. The Carrier asserts that Rule 4 does not require the Claimant to call the Claimant once he was

furloughed. The Claimant and the junior employee both were properly furloughed, and there was no improper force reduction. The Carrier points out that while on furlough status, the Claimant had no rights to the work in question, and the Organization has not shown a violation of Rule 4 or Rule 12.

The Carrier asserts that the Claimant clearly had departed the property prior to the decision to load the new equipment at a new location, and he could not be contacted when the decision was made to change the loading location. The Carrier emphasizes that the Organization has not contradicted this, nor has the Organization provided any evidence of the Claimant's desire to work, particularly in light of the fact that the Claimant's desire not to perform any additional work was demonstrated by his decision to depart the property early. The Carrier asserts that the Claimant was aware that the equipment had to be loaded at the original location, and there is no evidence that the Claimant would have been willing to perform this work once the location had changed and he would have been required to travel further.

The Carrier insists that attempts were made to reach the Claimant, but to no avail. Moreover, the Organization failed to establish that the Claimant was available and willing to perform the work in question.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the procedural argument raised by the Carrier, and we find it to be without merit.

The Board reviewed the record and finds that the Organization met its burden of proof that the Carrier violated the Agreement when it retained a junior Machine Operator to move and load production Gang 3 equipment instead of the more senior Machine Operator, who was the Claimant. There is no evidence to show that the Carrier made an effort to contact the Claimant to offer him the opportunity to perform the work at issue. The Carrier states that the Claimant did not request the work, but it is clear that it is not the employee's responsibility to request to have the Carrier offer the work first to the senior employee. When the Carrier reduces its forces, it must retain the senior employees before it assigns the junior employees to perform the work.

Because the Organization met its burden of proof, the claim must be sustained in part. However, with respect to the remedy, there is insufficient evidence in the record to back up the requested 40 hours of pay for the Claimant. Consequently, the Board orders that the parties ascertain the actual number of hours that were worked by the gang with which the Claimant should have been working on the days at issue between December 5 and December 12, 2002. Once they have determined the number of hours, then the Claimant shall be paid the actual number of hours that he would have worked had he been called in to perform the work.

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 26th day of May 2009.