

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40284
Docket No. MW-40641
10-3-NRAB-00003-080448

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(Union Pacific Railroad Company (former Chicago
(and North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign Machine Operator J. Gollob to fill a ballast regulator operator vacancy on Gang 3419 beginning on February 4 and continuing until April 6, 2007 and instead assigned Track Foreman R. Weber to operate this ballast regulator (System File R-0714C-306/1473573 CNW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Gollob shall now “*** be compensated for all hours of work that employee Weber operated the ballast regulator, at the applicable rates 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.

The Claimant has a service date of February 1, 2005 and a Machine Operator Class B seniority date of July 21, 2006. At the time this dispute arose, the Claimant was on furlough.

As a result of employee K. D. Rosel's bid to another position, a vacancy for operating a ballast regulator arose on Gang 3419 beginning February 4, 2007. The Carrier did not immediately bulletin the vacancy, but instead, Gang 3419 Track Foreman R. M. Weber operated the ballast regulator on an almost daily basis. According to the Manager of Track Maintenance, the vacancy was not bulletined after Rosel bid off the position because "... I was told that employee Roger Deerberg was coming back after a recent heart attack ... [a]s soon as I found out that his return was further ... delayed I posted the position." The position was bulletined on March 29 and assigned to another employee on April 6, 2007.

The Organization relies upon Rule 16(A) which provides that "[a]ll new or vacant positions ... known to be of thirty (30) calendar or more days duration, shall be bulletined. . . ." The Carrier mainly relies upon Rule 16(B) which provides that "[v]acancies of less than thirty (30) calendar days duration may be filled without bulletining by the senior qualified employees in the district and group making request in writing, consistent with operational requirements."

As the Organization argues, Rule 16(A) which requires vacancies to be bulletined which are "... known to be of thirty (30) calendar or more days duration ..." applies to this dispute. The Carrier's position that it did not bulletin the position because it was of the belief that Deerberg was coming back after a recent heart attack (thereby making the vacancy arguably for less than 30 days and allowing the Carrier to use other employees and not bulletin the vacancy) would be better received, but for the fact that the position was vacant from February 4 until it was bulletined on March 29 (some 53 days after the vacancy arose) and filled on April 6, 2007 (some 61 days after the vacancy arose). Giving the Carrier the benefit of the doubt, we will accept that when the vacancy arose as of February 4, 2007, the Carrier had a good faith belief that Deerberg would return in less than 30 days. We will also accept the Carrier's assertion that Deerberg would have been entitled to the position (an assertion disputed by the Organization in its June 22, 2007 letter). But even with those assumptions favorable to the Carrier, when 30 days passed and Deerberg had not yet returned, the temporary nature of the vacancy certainly became questionable. And then another three weeks passed before the Carrier bulletined the position, which

caused the vacancy to be filled more than two months after it occurred. Under the Carrier's rationale, it could wait for many months (or longer) before it could be said that a vacancy was not going to be for 30 days. Because the Carrier waited some 53 days to bulletin the position, it cannot reasonably argue in this case that it should not have known that the vacancy was going to be for 30 days.

The Carrier's assertion that the Claimant was not qualified to operate the ballast regulator is not persuasive to change the result. The Claimant held seniority as a Machine Operator. The Organization has also shown that the Claimant was previously assigned to operate the ballast regulator from August 11 until November 3, 2006. The Carrier failed to show that the Claimant was not qualified to operate the ballast regulator.

The Organization cites Rule 14(D) ("[f]urloughed employees shall be called in seniority order for extra and relief work") as the basis for the Claimant's entitlement to a remedy. Under the circumstances, we find that Rule applicable. The Claimant shall be made whole at the applicable Agreement rates for the lost work opportunities when Track Foreman Weber operated the ballast regulator between the time the vacancy arose until the position was filled on April 6, 2007 as a result of the delayed bulletining of the position.

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 1st day of March 2010.