

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40318
Docket No. MW-39982
10-3-NRAB-00003-070189
(07-3-189)**

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 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 Carrier violated Agreement when it failed to call and assign Mr. S. Robinson to fill a short vacancy, an Engineering Services Equipment and Machine Sub-department Group 4A (tractor) position, at Glenwood, Minnesota on December 20 and 21, 2004 and instead assigned junior employee M. Smith (System File C-05-160-003/8-00228-113 SOO).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Robinson shall now be compensated for sixteen (16) ‘ . . . hours at the Group 4 Rank A Machine Operator rate of pay \$18.13 per hour and have all overtime, 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.

The Claimant was on furlough during the latter part of the 2004 work season. He has a Machine Operator seniority date of May 1, 1997. Furloughed employees are entitled to place their names on appropriate "call lists" to be considered for recall to short term vacancies pursuant to Rule 14.

This claim contends that the Claimant faxed a call list request to the Carrier on November 1, 2004. The Claimant's handwritten statement attached to the call list request identifies the fax number of the Carrier as the recipient. It further states that a call was placed to confirm that the fax had been received and that "Gigi" said it was received. "Gigi" is CP Staffing Services Representative Gigi Sutherlin, the person designated to receive such information.

On December 20 and 21, 2004, a temporary vacancy occurred on the Glenwood tractor position, a Group 4 Rank A position. An employee junior to the Claimant was contacted to fill the temporary vacancy. The Carrier asserts that the Claimant was not contacted because he was not on the Machine Operator call list and no request for placement on the list had been received by the Carrier. The Carrier asserted during claim handling that Sutherlin had confirmed no receipt of such request from the Claimant, but it did not offer any statement to support its assertion.

In a similar evidentiary dispute regarding the facts underpinning an employee's disqualification, the Board in Third Division Award 32712 stated:

"At all levels of handling on the property, the responding Carrier officials asserted that the Claimant maintained that he was unable to operate the speed swing due to his medical condition. However, the Carrier presented no evidence from individuals with personal knowledge, such as the Foreman or the Roadmaster, in support of this assertion. Had the Carrier done so, the result we reach may have been different. However, as the record now stands, the only evidence is the Claimant's unrefuted signed statement that he voiced

no complaints about operating the speed swing. The assertions of Carrier's officials to the contrary, unsupported by probative evidence, cannot create a conflict in the facts. See Third Division Awards 21224, 21222, 18870. Based on the record developed on the property, the claim must be sustained." (Emphasis added)

The Organization presented uncontroverted evidence that the Claimant faxed the call list to the appropriate Carrier individual. Although the Carrier doubts the sufficiency of that evidence, its reliance on unsupported assertions are not sufficient to rebut the Organization's prima facie case. This claim must be sustained.

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.