

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40844
Docket No. SG-40808
11-3-NRAB-00003-090088**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of L. J. Froyd, for \$20.00 per day from June 22, 2007 until August 8, 2007 (48 days) for a total of \$960.00, account Carrier violated the current Signalmen’s Agreement, particularly Rule 53, when it held the Claimant on his former position on Gang 7026 and did not release him to his new position until the end of his shift on August 8, 2006. Carrier compounded the initial violation by failing to respond to the original Claim within the time limit provisions of Rule 69. Carrier’s File No. 1486057. General Chairman’s File No. UPGCW-53-1480. BRS File Case No. 14074-UP.”

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.

This claim seeks penalty pay for holding the Claimant on his position as Signal Maintainer on Gang 7026 for an additional 48 days after his job was re-advertised under Rule 32 and awarded to another employee, under the following language of Rule 53 - Assignments to New Positions or Vacancies:

“Notice of assignment to bulletined positions will be posted five (5) days after the bulletin closes. Transfer of successful applicants to new assignments will be made within fifteen (15) calendar days after date of assignment. If the successful applicant is not so transferred within the above specified period and held by direction of the management, the employee will be allowed a penalty allowance of \$20.00 per calendar day until such time as the employee is placed on said position.”

The following provision of Rule 32 - Signal Maintainers Headquarters is also relevant to this dispute:

“. . . The incumbent of the position to be re-advertised will remain on the position until assignment is made, and he will then make his displacement in accordance with Rule 58.”

The Organization argues that the language of Rule 53 covers this situation and clearly provides that transfers to new assignments will be made within 15 days, and if that time limit is not met, the employee will be paid \$20.00 per day as a penalty allowance until permitted to transfer. It asserts that the provision must be applied as written, citing Third Division Awards 12632, 19695 and 20687, and that the Claimant is entitled to the penalty allowance in this case. The Organization contends that the Claimant did not voluntarily agree to remain on his old position and sacrifice his Agreement displacement rights, but was held on that position by his Manager due to the fact that the incumbent did not assume the position after it was awarded, and needed to be trained.

The Carrier contends that Rule 53 does not apply to the facts in this case since the Claimant was not a successful applicant to a bulletined position, but was given displacement rights to be exercised under Rule 58 after he requested that his position be re-advertised under Rule 32. It contends that the \$20.00/day penalty payment only applies to the specific situation where an employee bids and is a successful applicant on a bulletined position and he is held back from assuming that position by management for a period in excess of 15 days, and it has no application to displacement rights under Rule 58, which the Claimant was exercising in this case, citing Third Division Awards 20956 and 31132. The Carrier argues that, even assuming Rule 53 applies in this case, the Organization failed to meet its burden of proving that the Claimant was held back by management, since there is a fundamental dispute of fact between the Manager's statement indicating that the Claimant voluntarily remained on his position until the incumbent was ready to assume it, and the Organization's interpretation of the Claimant's notes indicating that he was not being released until August 8, 2007, relying on Third Division Awards 26478, 37204, 33895 and 36977.

A careful review of the record convinces the Board that the Organization failed to meet its burden of proving a violation of Rule 53 in this case. We agree with the Organization that the Rule is clear and must be applied as written. It relates specifically to transfers of applicants to new assignments, and not to the exercise of displacement rights under Rule 58, which is what occurred in this case. It is undisputed that the Claimant's position was re-advertised at his request under Rule 32, which provides that the incumbent is to remain on the position until assignment is made, and then make displacement under Rule 58. This is not the situation encompassed by the language contained in Rule 53. Additionally, the record has conflicting statements as to the issue of whether the Claimant was held on his position by management until August 8, 2007, or whether he voluntarily agreed to remain on his position when he was informed that the incumbent was not ready to assume it. Thus, even if the Board was to consider Rule 53 applicable in this case, as argued by the Organization, we would find that there is an irreconcilable dispute of material fact which prevents the Organization from meeting its burden of establishing a violation in this case, and dismiss it. See, Third Division Award 37204.

**Form 1
Page 4**

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AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 11th day of January 2011.