

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41579
Docket No. MW-41425
13-3-NRAB-00003-100234**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Mr. C. Mireles to a utility/backhoe operator vacancy pending bulleting assignment, and instead called and assigned junior employe H. De Leon beginning February 18, 2009 and continuing (Carrier’s File 1517242 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Mireles shall now be compensated at the respective and applicable rates of pay for all straight time and overtime hours worked by junior employe H. De Leon on the aforesaid position beginning February 18, 2009 and continuing.”**

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 on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement when it failed to call and assign the Claimant to a vacant utility/backhoe Operator position pending bulletin assignment, and instead assigned a junior employee to perform this work.

The Organization contends that the claim should be sustained in its entirety because (1) the Carrier violated the Agreement by failing to recognize the Claimant's superior seniority by failing to assign him to the vacant position pending bulletin and assignment (2) there is no merit to the Carrier's defenses, and (3) the requested remedy is proper under the circumstances. The Carrier counters that the claim should be denied in its entirety under the stare decisis doctrine because the issue presented here has been previously resolved by the Third Division.

The Board carefully reviewed the record and finds that the Organization met its burden to prove that the Carrier violated the Agreement when it failed to call and assign the Claimant as a utility/backhoe Operator to a vacancy pending bulletin assignment and instead called and assigned a junior employee.

There is no question that the Claimant had more seniority than the employee whom the Carrier brought in to perform the work at issue. Moreover, Rule 12 states the following:

"Positions undergoing advertisement and assignment or vacancies of thirty (30) calendar days or less duration that are to be filled will be filled in the following order:

- (a) By the senior employee of the class in the gang or at the location who through force reduction is working in a lower class;
- (b) By calling in seniority order employees in the class who through force reduction are working in a lower class and are within a reasonable distance;"

The Carrier, in essence, admits that it did not call the Claimant, who was the senior employee. The Carrier states that instead it allowed the senior employee who made his availability known to perform the work involved. The Carrier also states that once the Claimant contacted the Manager, he was told to report to work the next

available day. There was no statement by the Carrier that it had actually attempted to call the Claimant to perform the work at issue.

In its Submission, the Carrier argues that Rule 18 applies, but it never presented that argument at an earlier stage in this proceeding. The Carrier merely argued that the individual who was selected to perform the work had indicated that he was available and the Carrier permitted him to do the work. The Carrier states that it used the most senior employee who let his availability be known.

There is no question that the Claimant had the ability to perform the job because he subsequently went to work at that very job. The Carrier simply failed to call the Claimant as is required by the Rule before it assigned a more junior employee.

For all the above reasons, the 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 18th day of March 2013.