

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44095
Docket No. MW-42784
20-3-NRAB-00003-190348**

The Third Division consisted of the regular members and in addition Referee Jeanne Charles when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier withheld Claimant R. Darling from timely reporting to his assigned position on Gang 8769 and when the Claimant was not allowed "to work beginning on June 1, 2013 thereby requiring the Claimant to observe two (2) days of unscheduled vacation time (System File D-1320U-302/1588479 UPS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Darling shall ' ... be allowed credit for the vacation forced upon him by management's refusal to allow him to take his assignment on Gang 8769. Further, Claimant must be allowed two (2) days per diem allowance at the appropriate rate for a compressed cycle gang or one hundred eighteen dollars and forty seven cents (\$118.47) for each day. Specifically, Claimant Darling's vacation Entitlement for 2013 shall be corrected to show twenty three (23) additional hours, and he shall receive a non-tax allowance of two hundred thirty six dollars and ninety four cents (\$236.94). This is compensation the Claimant would have received absent the violation of our Collective Bargaining Agreement.”**

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.

Claimant R. Darling established and held seniority within the Carrier's Maintenance of Way Department. On the dates giving rise to this dispute, he was assigned and working as a Group 26 Machine Operator and he was the bid holder of a Speed Swing Operator position on System Gang 8769.

On June 1, 2013, the Carrier failed to release the Claimant from his former position so that he could assume his Speed Swing Operator position on Gang 8769, although the Claimant had been awarded this position more than three (3) weeks earlier. The other members of Gang 8769 participated in a gang move for which they were each paid a total of twenty-three (23) hours of deferred start time to travel from their former work site reporting location in Tehachapi, CA to their new work site reporting location in Prescott, WA. In addition, members of Gang 8769 received per diem allowances for June 1 and June 2, 2013. Because the Claimant had not been released, he could not move with the new gang. In order to fill out his pay for the period, the Claimant took twenty-three (23) hours of vacation time. He was allotted no per diem.

The Organization filed a timely claim on behalf of the Claimant. The claim was properly handled by the Organization at all stages of the appeal up to and including the Carrier's highest appellate officer. The matter was not resolved and is now before this Board for resolution.

The Carrier, in denying the Organization's claim on August 21, 2013, explained the Claimant was not entitled to the deferred start because he never made the change in

assembly point move from Tehachapi to Prescott and would not be entitled to the deferred start hours observed by the rest of the employees who made the move. The Carrier argues that customarily and historically, an employee has not been provided a deferred start time when the employee is not performing work for the gang and does not make the change in assembly point move.

In reaching its decision, the Board has considered the record evidence and arguments of the parties, whether specifically addressed herein or not. As the moving party, it is the Organization's responsibility to prove by a preponderance of evidence that the Carrier committed the alleged violation(s). A careful review of the record convinces the Board that, under the circumstances of this case, the Organization has met its burden.

Rule 20(f) of the collective bargaining agreement (Agreement) requires that an employee selected for a new assignment will not be held in his former position for more than ten (10) calendar days from the date of assignment. In this case, the record evidence demonstrates that the Carrier held the Claimant in his former position for three (3) weeks. This was a clear violation of Rule 20(f).

The Organization seeks to remedy the violation by having this Board award the Claimant twenty-three (23) deferred start hours for the change of assembly point with his new gang; restoration of the twenty-three (23) hours of unexpected and unscheduled vacation pay the Claimant used in order to have a full pay check for the period; and two (2) days per diem that he did not receive when his new gang traveled to the assembly point.

While the Board agrees that the Agreement was violated, there is no basis to award the per diem or vacation pay. Employees wrongfully deprived of work but who do not actually perform work, are not entitled to overtime pay and arbitraries. Third Division Award 40938, PLB 3012 Award No. 1. Accordingly, the Claimant shall be compensated for the difference in pay for work performed and pay for the work he should have been performing beginning ten (10) days after the new position's effective date of May 19, 2013.

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 11th day of August 2020.