

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 4768

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

and

BURLINGTON NORTHERN RAILWAY COMPANY

AWARD NO. 62

Carrier File No. <sup>5</sup>2MWB-91-06-14

Organization File No. T-D-540-L

*Down*

STATEMENT OF CLAIM

1. The Agreement was violated when the Carrier allowed Section Foreman J. J. Bitz to return from sick leave and displace directly onto a track inspector position on December 5, 1990 instead of first displacing onto his former section foreman position at Mandan, North Dakota.

2. As a consequence of the above-stated violation, Track Foreman R. L. Roesler shall be allowed the "difference in rate of pay from grinder rate to foreman's rate at straight time from December 6, 1990 to January 4, 1991 of \$97.71. Also for the loss of overtime at the time and one-half rate as section foreman at Mandan, North Dakota per Rule 19A of twenty-nine (29) hours for \$593.20. Since Mr. Roesler was forced to bump at Glendive, Montana and his Rule 19A was not honored, he is claiming travel time from Mandan, North Dakota to Glendive, Montana for January 7, 11, 14, 18, 21, and 25, 1991 of 38.2 hours for \$504.24. Also, mileage expense on these same days for 1,146 miles for \$309.42. Also, motel lodging in Glendive, Montana in the amount of \$154.92, and meals and Glendive, Montana for fifteen (15) days for \$270.00 This claim should be paid as wages for a total of \$1189.15, and as an expense check for \$734.34."

F I N D I N G S

During October 1990, a Section Foreman was placed on sick leave from his position at Mandan, North Dakota. His position was temporarily assigned to an employee who held the position of Grinder Operator at Mandan. The Claimant, in turn, successfully bid on the open Grinder Operator position.

Rule 15, Leave of Absence, reads in pertinent part as follows:

F. An employee reporting for duty after leave of absence must return to his former position provided it has not been abolished or a senior employee has not exercised displacement rights thereon. . . .

The Section Foreman who had been on sick leave reported for duty on December 5, 1990. Instead of returning to the Section Foreman position, he was permitted instead to displace on a position as Track Inspector, which had been bulletined during his sick leave absence. Thus, this action did not comply with the clear requirement that an employee reporting from sick leave "must" return to his former position (Section Foreman). The employee holding the Section Foreman position remained in the assignment until displaced by an employee senior to him (and the Claimant) on January 28, 1991.

The Carrier does not disagree that it was contrary to the Agreement for the employee returning from leave to be placed in other than his former position. The Carrier explains this action as in conformity with an "oral understanding" with the Organization as to permitting such actions and consequently avoiding one or a

series of other displacements. (The Organization apparently does not accept the continued effectuation of such an "oral understanding", if indeed it ever applied to this location.)

The thrust of the claim, however, is that the Claimant was denied opportunity to fill the position of Section Foreman temporarily if the employee reporting from leave had (a) returned to the Section Foreman position, and (b) had thereafter exercised displacement rights on the track inspection position. The difficulty here is that it is highly speculative. There can be no certainty as to what may have happened had Rule 15-F been strictly applied. If the employee reporting from leave had returned to the Section Foreman position, he may or may not have then exercised displacement rights elsewhere. If he had done so, there are various alternatives as to who might have then assumed the Section Foreman position -- the Claimant or another employee. Thus, there is no convincing proof that the Claimant (who was at work throughout the period in question) actually was deprived of the Section Foreman assignment.

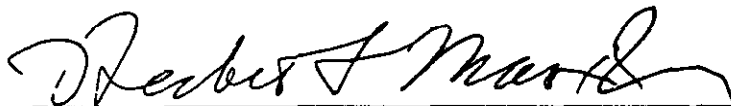
The Organization makes the point that, where agreement violation is demonstrated, it is at liberty to honor a claim by an employee as a result, even if other employees might be considered as more appropriate claimants. For example, when an employee is improperly assigned out of classification, a claim might be appropriate from any one of the employees in the group to which the work should have been assigned. Here, the situation is far more speculative, including the possibility, as noted above, that the

returning employee may have remained in the Section Foreman position, as was his right, for a short or an extended period.

On this basis, the Board finds an Agreement violation but determines that the monetary remedy is inappropriate.

A W A R D

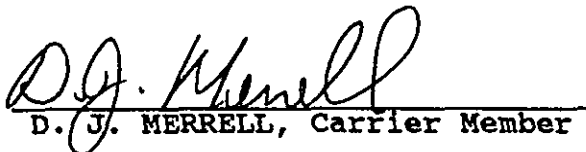
Paragraph 1 of Claim sustained. Paragraph 2 of Claim denied.



HERBERT L. MARX, Jr, Chairman and Neutral Member



MARK J. SCHAPPAUGH, Employee Member



D. J. MERRELL, Carrier Member

NEW YORK, NY

DATED:

*September 12, 1994*