Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35439
Docket No. MW-34314
01-3-97-3-912

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Soo Line Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Sectionman A. A. Knutson to relieve on the section assistant foreman position at Kenmare, North Dakota on November 1, 4, 5, 6, 7, 8, 9 and 10, 1996 instead of assigning W. S. Matejovic who had properly registered his name on the call list for such vacancies in accordance with Rule 14 (System file R1.100/8-00293).

(2) As a consequence of the violation referred to in Part (1) above, Claimant shall be ' . . . reimbursed for the difference in pay between the Assistant Foreman and the Section Laborer rate of pay for the 53 hours of straight time, and 7 hours and 40 minutes at Assistant Foreman overtime rate. . . .'"

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.

Despite the reference to Rule 14 in the Statement of Claim, the focus of this dispute is a past practice that supplements the operation of Rule 14. The Organization asserted the existence of the practice in its letter dated June 7, 1997 during the handling on the property. The three page letter provided a detailed description of the mechanics of the asserted long-standing practice. In addition, the attached example call list showed that, indeed, the Carrier had placed the Claimant's name on the call list with a December 31, 1995 date as called for by the practice. There is no other explanation for how else the Claimant's name would have appeared on the Carrier's list with such a date but for the existence of the asserted practice. In accordance with the practice, the Claimant should have been offered the temporary assignment ahead of the other employee whose name was not on the call list. Oddly enough, it appears that once the Organization's view of the original assignment became known to the Carrier, the Claimant was assigned to fill the remaining temporary Assistant Foreman vacancy after November 10, 1996.

The Carrier did not respond to the detailed assertions of material fact contained in the Organization's June 7, 1997 letter. At no time did the Carrier dispute the existence of the asserted practice. Moreover, the Carrier did not object to the Organization's shift in the nature of the claim from being a violation of Rule 14 to a violation of the practice that supplements Rule 14. Therefore, we have no choice but to accept the Organization's unrefuted assertions as established material facts. It is well settled that such practices are as much a part of a Labor Agreement as the terms expressed in writing therein.

Given the foregoing circumstances, we must sustain the claim.

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 26th day of April, 2001.