

NATIONAL RAILROAD **ADJUSTMENT** BOARD

THIRD DIVISION

Award Number 19647
Cocker Number **MW-19469**

Robert M. O'Brien, Referee

(Brotherhood of Maintenance of Way **Employees**)
PARTIES TO DISPUTE: (
(Burlington Northern Inc.
((formerly Spokane, Portland & Seattle Railway Company)

STATEMENT OF CLAIM: Claim of the System **Committee** of the Brotherhood that:

(1) The Carrier violated the Agreement beginning on or about July 1, 1970 and continuing up to August 10, 1970 when it used section laborer K. **Prochaska** instead of R. Crow as acting foreman on Section No. 36. (System File 324 **F/MW-6** (d) - 1, 9-25-70)

(2) Section Laborer R. Crow now be allowed the difference between section laborer's straight time and time and one-half rates of pay and the rate of pay of section foreman on Section 36 at Finley, Washington during the period July 1 to August 10, 1970.

OPINION OF BOARD: Claimant is a regularly assigned section laborer on Section 35. He is, according to the Organization, the senior section laborer qualified to perform section foreman's work. Section laborer K. **Prochaska** is a regularly assigned section laborer on Section 36. It is undisputed that he is junior to claimant in seniority. Between July 1, 1970 and August 10, 1970, the regularly assigned foreman's position on Section 36 was vacant and Carrier assigned K. Rochaska to fill it.

It is the Organization's position that when Carrier used K. Rochaska, and not claimant, to fill the foreman's position it violated Rule 2 of Article II, the Seniority Rule, and Rules 16 and 22 (**e**) relative to Promotions. The Organization contends that claimant's ability to perform the work of the foreman's position is undisputed; he having previously served as relief section foreman. Thus, they feel that seniority should have prevailed and claimant given the assignment. They further maintain that the fact that claimant works on Section 35 while the vacancy occurred on Section 36 is immaterial since Rule 6(b) of Article II establishes system seniority for section laborers, such as are involved herein.

The Carrier admits that claimant is senior to **Prochaska** but was not assigned to the temporary foreman's position because past practice on the former **SP&S** was that when a temporary vacancy exists for a foreman on a section, a laborer who is qualified to work as a foreman is called from the section on which the vacancy occurs. The **Organization denies the** existence of such a past practice.

The awards of this Board are legion in holding that when a party asserts past practice, and such practice is challenged, it **is** incumbent upon that party to prove such practice. It is not enough that a party asserts past practice for it must actually prove it. Carrier has alleged a past practice of "sing the **senio**

qualified section laborer on the section on which the vacancy arises. Yet **it** has failed **to prove** such assertion. Since Carrier cannot avail itself of this defense and since claimant's qualifications for the vacancy were not questioned, the Rules relied on by the Organization are applicable and claimant, as the senior qualified section laborer, should have been allowed to fill the foreman **vacancy.**

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are **respectively** Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

A W A R D

Claim sustained.

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

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 27th day of February 1973.