

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20366
Docket Number MU-20477

Joseph A. Sickles, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (
(Norfolk and Western Railway Company (former **W&LE**)

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

(1) Beginning on December 15, 1971 the Carrier violated and continues to violate the agreement **when** it failed and refused to advertise a vacancy of one second-class carpenter on BE5 Gang No. 3 at Brewster, Ohio (System File **MW-BRS-72-2**).

(2) Second-class Carpenter Bruce E. Gainey now be made whole for 142.4 miles per day at the rate of two minutes per mile for each day he is required to **commute** to Norwalk, Ohio from Massillon, Ohio.

(3) Claimant Gainey be reimbursed for mileage at the rate of 9 cents per mile for 142.4 miles per day until claim is disposed of or claimant is permitted to exercise his seniority in compliance with the rules of the agreement.

OPINION OF BOARD: **Claimant** worked on B&B Gang No. 3 **prior** to a military leave of absence. Upon completion of that leave, there was no vacancy in Gang No. 3 and he was reemployed **on** Gang No. 2. As a **result**, he drove approximately 142 miles per day (round trip).

In September, 1971, a "second class carpenter" on Gang No. 3 was reassigned. In early October, 1971, a bulletin was issued advertising such a position on Gang No. 3, however, **that** bid was cancelled due to certain force reductions. On December 15, 1971, all B&B forces were recalled, but Gang No. 3 still did not have a full complement of second class carpenters.

Claimant relies upon **Rule** 40(m) as follows:

"A gang in the Bridge and Building Department shall consist of one foreman, one leading mechanic, two first class carpenters, three second class carpenters and a suitable number of helpers."

Rule 40(m) is singularly clear, and is mandatory. A thorough review of the handling of the matter on the property leads us to the conclusion that Carrier conceded a violation.

While there was some speculation as to whether or not a specific vacancy had been filled, and some reference to past practice, we feel that the record, as developed on the property, demonstrates that a required (second class carpenter) position was not advertised for bid, and the Agreement was violated.

Claimant seeks damages concerning the necessity to travel 142 miles per day during the period that Carrier violated Rule 40(m). Agreement violations should have a remedy, and in this regard, we reject Carrier's argument that no damages may be imposed because Rule 40(m) fails to impose any specific penalty. (See Second Division Award 4487 (Seidenberg)). However, we are unable to award damages under this record. In Award 19899 we considered, at length, a number of aspects of the issue of damages. But, in that case we noted that the Board should not entertain speculative claims. We feel that the claim here is speculative.

Claimant indicates, in his Submission to this Board, that his job on Gang No. 2 was "temporary." The record fails to substantiate that assertion. Thus, Claimant chose to live a great distance from his permanent employment site as a voluntary act. Moreover, Claimant's automatic entitlement to a position on Gang No. 3, had one been advertised, is open to some question.

While we find a violation of Rule 40(m), we are not able to find that Claimant established a clear entitlement to damages. We do not, in any manner, diminish our findings in Award 19899, but merely find that the damage claim is too speculative to suggest a sustaining of that portion of the claim.

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.

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Claim (1) is sustained.

Claim (2) is denied.

Claim (3) is denied.

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

ATTEST: *A. W. Pauls*
Executive Secretary

Dated at Chicago, **Illinois**, this 23rd day of August 1974.