

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22726  
Docket Number MW-22661

George S. Roukis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Norfolk and Western Railway Company (Lake Region)

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

(1) The Carrier violated the Agreement when it failed to assign Mr. J. E. Morris to one of the extra gang foreman positions as advertised by Bulletins Nos. 8-77, 10-77, 17-77 and 20-77 dated March 10, 1977 but assigned Messrs. Sitterly, Witherspoon, Rohrer and Stapleton thereto (Carrier's File MW-BVE-77-27).

(2) Claimant J. E. Morris shall be allowed the difference in what he received in a lower-rated position and what he should receive at the extra gang foreman's rate of pay beginning April 4, 1977 and continuing until Assignments Nos. 8-77, 10-77, 17-77 and 20-77 dated March 25, 1977 are cancelled and Claimant Morris is assigned to the extra gang foreman's position of his choice as advertised by the bulletins referred to in Part (1) hereof."

OPINION OF BOARD: After carefully reviewing the record, this Board finds several procedural irregularities that warrant immediate comment.

The inclusion of Carrier's exhibits G, H and I were not exchanged on the property during the handling of this grievance and thus are inadmissible under the requirements of Circular 1. The same is also true regarding petitioner's assertion raised in the submission briefs that he voluntarily left the Assistant Foreman's position to accept the extra gang cook's position. Careful examination of the on situs documentary record does not reveal that this line of argument was pursued or implicitly discussed.

Unfortunately, the record in this case is replete with factual omissions, which make reconstruction of the precise pattern of events difficult. This Board is not empowered to interpolate the missing facts. At best, we have a classic standoff between Carrier's assertion in its September 29, 1977 letter to the General Chairman that Claimant was disqualified as Assistant Foreman in March, 1977 and the General Chairman's March 17, 1978 response that Claimant wasn't disqualified until the instant claim was filed. There is no mention in the latter communication that

Claimant voluntarily left the Assistant Foreman's position to accept the extra gang cook's position, except reference to the corrected appointment bulletin dated April 12, 1977 that Claimant was the occupant of the Assistant Foreman's position at the time the contested foremen positions were filled. It may well be that Claimant was technically the occupant of the Assistant Foreman's position, when the foremen appointments were made in late March, 1977, but there is no proof before us that he wasn't disqualified from this position because of purported subperformance.

Claimant, as the initiating party in this type of dispute, has the burden of proving that Carrier violated Agreement Rule 12(b) and we do not believe that he adequately met this evidentiary requirement. Claimant did not adduce evidence of persuasive probative value that he wasn't disqualified from the Assistant Foreman's position or alternatively that he was qualified for the foreman positions within the context and meaning of Rule 12(b).

While we express some concern with the degree of proficiency Carrier manifested at times in the handling of this dispute, we do not find that it acted arbitrarily or capriciously in making this promotional fitness determination. We will deny 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 Employee involved in this dispute are respectively Carrier and Employee 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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

ATTEST:

  
Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1980.