

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25144
Docket Number MW-23996

Wesley A. Wildman, Referee

(Brotherhood of Maintenance of Way **Employees**
PARTIES TO DISPUTE: (
(Illinois Terminal Railroad Company

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

(1) The **Carrier** violated the Agreement when it assigned and used T. Throne instead of W. Burg to fill a **temporary** vacancy of track foreman, **System Gang #1** for **the** period November 12, 1979 to January 2, 1980 (System File **ITRR 1980-2**).

(2) Mr. W. Burg be allowed the difference between what he would have received at **the** track foreman's rate and what he was paid as a large machine operator during the period referred to in Part (1) hereof.

OPINION OF BOARD: A track foreman on Carrier's System Gang No. 1 (headquartered in Edwardsville, Illinois) became disabled for a period of approximately six **weeks**. **His** position was filled temporarily by a truck driver attached to Gang 1. Claimant, here, a large Machine Operator not a **part** of Gang 1, asserts that, being qualified for the temporary promotion and being **senior to the truck driver**, he (Claimant) should have been given the job. It appears on the record before **us** to be **uncontroverted** that **Claimant was**, indeed, qualified and senior.

The relevant **contract** language is **11(c)** of the Agreement between the parties which reads as follows:

"New position or vacancies of fifteen (15) days or less duration shall be considered temporary and may be filled without bulletining, except that senior men will be given preference."

The essence of Carrier's response to the claim here is that it has been **an** established practice when filling temporary vacancies under **11(c)** to upgrade only qualified **employees in the gang in which the vacancy occurs** rather than (in the words of the Carrier) **...canvassing** employees from all over the railroad to **work** such vacancies...'. .

The Organization representing Claimant correctly argues that if past practice is to be successfully asserted by a Carrier as controlling in a given case, the burden falls **on Carrier** to prove through adequate evidence the existence of the alleged practice. In the processing of this case **on** the property. Carrier, in the final appeals decision document, asserted for **the first time** the existence of the practice but offered no evidence with respect to same. Subsequently, **Carrier**, in its **ex parte** submission to this Board, offered time slips indicating that on six occasions prior to the claim period here (**as** well as on numerous occasions subsequent to the claim period) the truck driver temporarily promoted in our case filled the same foreman position without protest from the Organization.

While **the** practice of filling temporary vacancies only from the gang in which the vacancy occurs may make good operating sense and while this practice may be widespread on Carrier's property, we must conclude on the basis of the slim record before us that Carrier has not met adequately, in this instance, its obligation of **demonstrating** the existence of the practice **with** a sufficient volume of credible evidence. The fact that Carrier's belated assertion of the practice was not supported by **evidence** proffered during processing **"on** the property. precludes this Board from drawing **an inference** of Organization acquiescence to the assertion of the existence of the practice. The evidence of practice in Carrier's **ex parte** brief to the Board has not been submitted to even the slightest degree of adversary **"testing"** and is, in any event, not necessarily sufficient to prove the practice asserted by Carrier. **Accordingly, the** claim is sustained.

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:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 9th day of November 1984.