

SATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26380

Docket Number MU-26135

Marty E. **Zusman**, Referee

PARTIES TO DISPUTE: (**Brotherhood** of Maintenance of Way **Employees**
(Burlington Northern Railroad Company
(Former **St.** Louis-San Francisco Railway Company)

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

1. The Carrier violated the Agreement when it assigned either **Track-**man J. **Copeland** or J. **Gambriel** to fill a temporary vacancy as foreman (Gang 443) beginning July 12, 1983 instead of using cut-back Foreman R. L. Hires who was available, willing and qualified to fill that vacancy (System File B-1322-2/MWC 83-11-9A).

2. Because of **the** aforesaid violation, Mr. R. L. Hires shall be allowed the difference **between** what he was paid at the trackman's rate and what he should have received at the foreman's rate from July 12, 1983 to September 8, 1983."

OPINION OF BOARD: Claim is **on** behalf of Claimant that Carrier violated Rule 39 of the Agreement in the filling of **unbulletined** vacancies. The **Organization** alleges that Claimant made a request to fill a Foreman vacancy on Gang 443 and was denied although he had Foreman seniority and was working a lower classification. Junior employees were used in **place** of **the** Claimant **in** violation of **the** Rule. Rule 39 lists the order in offering the position and states in pertinent part:

"(a) **Unbulletined** vacancies of foreman . . . will be offered **to employees** in the following priorities:

(1) To the assistant foreman in the gang if the vacancy is **on** the foreman's **position** of that gang.

(2) To the senior qualified **employee** working in **the** gang, or a: **the** location, who holds foreman's seniority and who is working in a lower class, or furloughed account force reduction."

In advancing this Claim **the** Organization states that "Mr. Hires **is** assigned to Gang 444 which **is** at the same location as Gang 443." As such, **the** Claimant was denied his rights under the Agreement.

The Carrier **points** out on the property that Claimant had previously rejected this same vacancy and when it was finally bulletined he first bid and then withdrew his bid **on this** same vacancy. The Carrier argues that Claimant neither had an interest **in** the position, nor a right to it since it was in a different gang and a: a different location. In its letter of January 3, 1984, the Carrier states that:

"Inasmuch as **the** vacancy occurred in Gang 443, the Panel Plant Gang, and Mr. Hires was working on Gang 444, the Welding Plant Gang, which are **not** found at the same location, the Claimant did not have preference **to** fill the position because he was neither working on the gang or at the location."

In the instant case, this Board is confronted with a conflict of fact over which the determination of a violation must be made. This Board is not **constituted** to make factual determinations. The case must be made on the property with sufficient probative evidence to establish and perfect all elements of the proof. In this case, the location is clearly disputed, rebutted by the Carrier and central to this Board's determination of any Agreement violation. As the burden of proof lies with the Organization, the Claim must be denied for lack of proof (**Third** Division Award 25978).

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

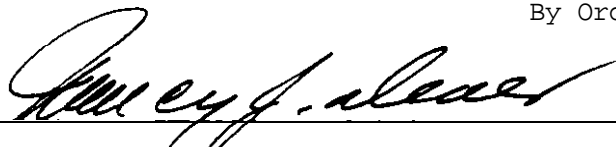
That **the** Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, **this** 25th day of June 1987.