

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32586
Docket No. MW-31235
98-3-93-3-270

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Southern Pacific Transportation Company
((Eastern Lines)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Foreman J. Kitchen and/or Assistant Foreman P. R. Watson to work with the rail grinding train between Flatonia and Hearne, Texas beginning February 24, 1992 and continuing instead of advertising and assigning a position to the rail grinding train as required by the Agreement (System File MW-92-101/MofW 92-92 SPE).**
- (2) As a consequence of the violation referred to in Part (1) above, Foreman H. R. Stahl shall be compensated, at the foreman's straight and overtime rate of pay, for the total number of man-hours expended by Messrs. Kitchen and Watson while working with the rail grinding train beginning February 24, 1992 and continuing."**

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This dispute turns on a singular issue of evidence.

The Organization filed a claim for Mr. H. R. Stahl, because he was not used as a Foreman on a rail grinding train that worked between Flatonia, Texas, and Hearne, Texas, beginning February 24, 1992 and ending April 8, 1992. The Organization contends that the Foreman position on that train was not bulletined, and instead Carrier used two junior employees, a Mr. Pete Wilson, a Track Foreman, and a Mr. Jerry Kitchens, an Assistant Track Foreman as rail grinding train temporary Foremen, on an alternating day basis. As a penalty for the violation the Organization asks that Stahl be paid the equivalent of all the straight time and overtime hours worked by Kitchens and Wilson during this period.

Carrier says that the rail grinding train Foreman position was bulletined on January 1, 1992, that Wilson and Kitchens bid on the job and were assigned to operate the train between February 24, 1992 and April 8, 1992. It argues that while Stahl, was senior to Wilson and Kitchens, he did not make application for the job, and this was mentioned in the Superintendent's denial letter. Carrier, further argues that Stahl was fully employed at the time, and if a violation of the Agreement occurred, he would not be eligible for reparations in any event.

The Organization contends that the evidence offered in support of Carrier's argument that the Foreman job was bulletined is flawed for two reasons. First evidence supporting this result was never presented on the property before this claim was docketed with this Board, and as such, under well defined authority, in Awards legion in number, it cannot be considered by the Board. Secondly, the copy of the bulletin submitted by Carrier as an exhibit to its Submission is not the evidence that it says it is. While it shows Foreman's jobs being bulletined on January 3, 1992, one was canceled and the other is for a different district.

The Board considers the Organization's challenges to Carrier's evidence valid, on both grounds, procedural and substantive. If the evidence was appropriately before the Board it would be necessary that it be rejected because it does not specifically

indicate that a rail grinding train Foreman position was being bulletined, as alleged. Instead, the January 3, 1992 bulletin seems to indicate that two Track Foreman positions were bulletined, with one later being canceled. Moreover, there is no showing that either Kitchen or Watson were the successful applicants, so as to indicate that they were properly placed as the Foremen on the rail grinding train that worked between Flatonia Texas, and Hearne, Texas, from February 24, 1992 to April 8, 1992. Accordingly the claim will be sustained for that period.

Carrier has argued that Claimant is not entitled to the reparations sought because he was fully employed at the time. These arguments are rejected in this matter. The Board fully embraces the conclusion stated in Third Division Award 31569: "If the [we] were to accept the Carrier's argument that the Claimants were fully employed and not entitled to a monetary award, it would be tantamount to giving the Carrier the right to violated [the Agreement] at will."

The claim will be sustained as presented.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 22nd day of May 1998.