

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34016
Docket No. MW-31558
00-3-93-3-208**

The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Soo Line Railroad Company (former Chicago, Milwaukee,
(St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, beginning December 27, 1991 and continuing, the Carrier bulletined/assigned a Kansas City Southern Maintenance of Way employe instead of a Soo Line (former Milwaukee Road) Maintenance of Way employe to the section foreman vacancy created by the retirement of Section Foreman R. Candillo on the coordinated freight terminal facilities known as the Soo-KCS Joint Agency in Kansas City, Missouri (System File C-06-92-S310-01/013.31-451 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, the senior Soo Line (former Milwaukee Road) employe within the Maintenance of Way Track Subdepartment maintaining seniority within Prior Rights Seniority District No. 4 who has offered protest to the improper bulletining referenced above and who is awarded the position subsequent to proper bulletin shall be made whole and allowed all earnings of the position as revealed by a joint inspection of the Kansas City Southern's records beginning December 27, 1991 and continuing until the position is correctly bulletined and awarded.”**

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 case involves a claim by the Organization that the Carrier violated Section 3(b) of the April 11, 1945 Agreement ("4/11/45 Agreement") between the Organization, the Carrier and the Kansas City Southern ("KCS") Railway Company, when the Joint Agency created by the 4/11/45 Agreement refused to bulletin a Section Foreman's position to employees holding seniority on the Carrier's Milwaukee Road roster, and instead bulletined/assigned a KCS Maintenance of Way employee to the vacancy.

The 4/11/45 Agreement between representatives of the Organization, the Carrier and the KCS created the Milwaukee-Kansas City Southern Joint Agency to coordinate the freight terminal work forces of the Milwaukee Road and the KCS when the two railroads coordinated their freight terminal facilities in Kansas City, Missouri, on June 1, 1945. Under the Agreement, the coordinated forces continue to be under the supervision of the Joint Agency officers and are carried on Joint Agency payrolls. Employees of the two railroads retain their seniority standing on the rosters of the road (Soo Line or KCS) from which they have been transferred. The parties agreed to the following terms with respect to filling new positions and vacancies:

"New positions and vacancies on the Joint Agency shall be handled in accordance with the controlling [KCS] agreement, with the understanding that the Milwaukee will be entitled to one section foreman to five K.C.S. section foremen at all times, unless changed by mutual agreement; said Milwaukee position to be filled by bulletining to the Kansas City Division foremen on the Milwaukee."

See Paragraph 3(b) of the 4/11/45 Agreement. This claim involves a dispute over the meaning and application of the above quoted language.

According to the Organization, the provision, as applied, guarantees one Foreman vacancy to an employee holding seniority on the Soo Line Prior Rights Seniority District No. 4 (former Kansas City Division Seniority District on the Milwaukee Road). This was the quid pro quo, the Organization maintains, that it obtained when Milwaukee Road employees lost territory and job positions to the coordination. Thus, the Organization asserts, until a Section Foreman vacancy was filled by a KCS Maintenance of Way employee upon the December 31, 1991 retirement from service of Section Foreman R. Candillo, one Section Foreman position always has been filled by an employee with established seniority on the Milwaukee Road even when the total number of Section Foreman positions has been fewer than six.

The Carrier, on the other hand, asserts that it was not required to bulletin and assign the vacancy to a Milwaukee Road employee because only two Track Foremen's positions remain at the Joint Agency. The Carrier maintains that the Agreement does not state that the Milwaukee will "at all times" be allotted a Track Foreman's position, as asserted by the Organization. Rather, the Carrier argues, the obligation to offer a vacancy to a Soo Line employee does not arise until a sixth position is created. According to the Carrier, the Organization's claim rests entirely on past practice which, under settled Third Division precedent, does not override the clear and unambiguous language of the 4/11/45 Agreement.

After reviewing the record evidence, we have determined that the Organization's claim should be denied. Paragraph 3(b) of the 4/1/45 Agreement, which controls the filling of new positions and vacancies in the Joint Agency, simply does not guarantee a position to a Milwaukee Road (and now a Soo Line) employee. Rather, the language provides that there shall be a one to five (1:5) ratio of Milwaukee Foremen to KCS Foremen "at all times." Here, the ruling sought by the Organization would essentially rewrite the Agreement to require a one to two (1:2) ratio. Indeed, under the Organization's reading of the Agreement, if the Joint Agency had only one Section Foreman, it would have to be a Soo Line employee.

Not only would such a ruling be contrary to the plain language of paragraph 3(b), it cannot be justified by reference to the parties' practice. According to record evidence, although the 1:5 ratio was not always maintained, the lowest known ratio maintained by

the filling of vacancies or new position was 1:4. Moreover, while former Milwaukee Road Section Foreman Candillo was at his retirement just one of two Section Foremen within the Joint Agency, the record evidence indicates that when he was awarded a Track Foreman's position in 1975, the Joint Agency had five Track Foreman positions. There mere fact a 1:2 ratio was realized through attrition does not mean the Carrier is required to maintain the lower ratio when the position held by the Milwaukee Road Foreman is vacated.

Plainly, paragraph 3(b) has some ambiguity. The language does not indicate what the ratio should be if the number of KCS Foremen is fewer than five, or between five and ten. Thus, just as the Agreement does not mandate the appointment of a Milwaukee Road employee when, as here, there are only two Section Foreman positions, it also does not substantiate the Carrier's assertion that the obligation to appoint a Milwaukee Road/Soo Line employee arises only after five Section Foremen positions within the Joint Agency have been filled by employees from the KCS roster. Accordingly, while we find that the Carrier was not required to fill the instant vacancy with a Soo Line employee, we make no determination on the proper ratio under paragraph 3(b) in the event the Joint Agency increases the number of Track Foreman positions within its operations.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 19th day of April, 2000.