

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 34039
Docket No. MW-33230
00-3-96-3-697**

The Third Division consisted of the regular members and in addition Referee Robert L. Hicks when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(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 Agreement was violated when the Carrier assigned junior employe H. D. Barger to fill temporary foreman vacancies at the Welding Plant in Springfield, Missouri beginning July 1, 1993 and continuing, instead of assigning Mr. J. M. Gambriel who holds foreman’s seniority and was working in the lower classification of trackman during the period involved here (System File B-858-1/MWC 94-02-23AA SLF).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. M. Gambriel shall be compensated at the foreman’s rate of pay for all time worked, including overtime, by Mr. Barger beginning sixty (60) days retroactive from the date of December 22, 1993 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.

The Welding Plant in Springfield, Missouri, has a set of Agreement Rules applicable only to the facility and the employees working thereat.

Agreement MW-32 refers specifically to the Rail Welding Plant at Springfield. Item 1 of that Agreement reads:

"1. Position of foreman on each of these two gangs will be filled in accordance with the provisions contained in paragraphs (a)(1) and (2) of Rule 40 of the Agreement effective August 1, 1975."

Rule 40(a)(1) and (2) read as follows:

"(a) Positions of foreman and assistant foreman in the system rail laying gang will not be subject to the seniority and promotion rules of this agreement. Permanent vacancies on these positions will be filled in accordance with the following:

(1) During the month of July in each calendar year any employe holding seniority as foreman in the Track Sub-department or System Rail Laying Sub-department and desiring to be considered for position of foreman or assistant foreman in the system rail laying gang will indicate such a desire in a letter to the Chief Engineer.

(2) As permanent vacancies occur on positions of foreman or assistant foreman on the system rail laying gang, consideration will be given to those employes who have requested that they be considered for such assignments as provided in paragraph (a) above, with due regard to their ability and merit to fill the position."

When the Organization first presented the claim, no Rule was cited as having been violated. When challenged by the Carrier, it cited Rule 39, which is the mechanism used by track employees to fill temporary Foreman vacancies. Rule 39 is not applicable to the two gangs working at Springfield.

Item 1 of the MW-32 Agreement covers the filling of Foreman vacancies, and because the parties who drafted MW-32 did not differentiate between temporary and permanent vacancies, it is clear to the Board that both parties to the Agreement fully agreed that any Foreman vacancy, temporary or permanent, would be filled without regard to seniority.

Furthermore, the Carrier repeatedly advised the Claimant that if he was interested in the Foreman's position on the Welding Gang, he should gain some experience by working thereon as a Laborer, like the others have who do work as Foremen. Although the Claimant's letter of February 28, 1994 accuses the Carrier of disrespecting his seniority, when he had the opportunity to displace on the gang as a Laborer to gain the experience the Carrier believed he needed, the Claimant elected to go on furlough.

Despite the Carrier's reason for not appointing the Claimant to the Foreman's position, the concise language of the special Agreement MW-32 clearly supports the Carrier's position. The Carrier does have the right to appoint whomever it believes is best qualified without regard to seniority.

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 25th day of May, 2000.