

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35813  
Docket No. MW-33153  
01-3-96-3-582**

**The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.**

**PARTIES TO DISPUTE: (**  
**(Brotherhood of Maintenance of Way Employees**  
**(Burlington Northern Railroad Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- 1. The Agreement was violated when the Carrier failed to bulletin and assign the track inspector position headquartered at Minot, North Dakota which was temporarily vacated by Mr. J. Lake on February 7, 1994 (System File T-D-757-H/MWB 94-07-26AN)**
- 2. As a consequence of the aforesaid violation, Claimant G. D. Fimreite shall:**

**“\*\*\* receive the difference in the rate of pay between track inspector and section foreman of all hours beginning February 7, 1994 until this permanent vacancy is awarded and filled by bulletin provision. We further request that Claimant receive pay equal to any and all overtime worked by Mr. Meier and any others used to fill this vacancy during claimed period. We further request that Claimant be reimbursed for all out-of-pocket expenses incurred as the result of this violation during claimed period.”**

**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.

As of February 7, 1994, the Claimant and D. M. Meier were Track Foremen; Meier was junior to the Claimant; and J. Lake was a Track Inspector.

In February 1994, Lake began to perform training functions rather than his Track Inspector duties. The Organization asserts that Lake began to perform those training functions on February 7, 1994. The Carrier asserts Lake began those functions on February 12, 1994. The Carrier asserts that Lake resumed his Track Inspector duties on March 15, 1994. During the time Lake performed the training functions, his Track Inspector position was filled by Meier.

The claim was filed in this case on behalf of the Claimant asserting that the Carrier violated the Agreement when it did not bulletin Lake's vacant Track Inspector position, but instead filled that position by assigning Meier.

The Rules cited by the parties provide:

**"RULE 16. OFFICIAL, SUPERVISORY OR ORGANIZATION POSITIONS**

\* \* \*

- B. In the event a regularly assigned employee vacates a permanent position subject to bulletining under Rule 20 to accept an official or supervisory position and if such position is continued in existence, such vacancy will be bulletined as a permanent vacancy and filled in conformity with the rules of the Agreement.

\* \* \*

**RULE 19. TEMPORARY VACANCIES AND VACATION RELIEF  
NOT BULLETINED**

- A. A new position or vacancy of thirty (30) calendar days or less duration, shall be considered temporary and may be filled without bulletining. If such vacancy or position of foreman or assistant foreman in the Track or B&B Sub-department is to be filled, the "eligible list" referred to in Rule 18 will be used. If such vacancy is on any other position and is filled, preference will be given to the senior qualified employee who is not assigned in the rank in which the vacancy occurs and who has on file a written request to fill such vacancy. Such employee will assume all the working conditions of the assignment just as if regularly assigned thereto.

\* \* \*

**RULE 20. POSITIONS TO BE BULLETINED**

- A. All vacancies and new positions of more than thirty (30) calendar days' duration shall be bulletined in the seniority district for the sub-department involved."

The record shows that Lake vacated his Track Inspector position for more than 30 days in order to perform training functions - duties which were not covered by the Agreement. Whether Lake vacated his position commencing February 7, 1994 (as the Organization asserts) or February 12, 1994 (as the Carrier asserts) is immaterial. Even assuming that Lake vacated his position commencing February 12, 1994 as the Carrier asserts, according to the Carrier, Lake performed training functions until March 15, 1994. Even excluding the date of the occurrence (February 12, 1994), March 15, 1994 is 31 days after February 12, 1994. Therefore, Lake's Track Inspector position was vacant for more than 30 days. Because the vacancy existed for more than 30 days, under Rule 20(A) the Carrier was obligated to bulletin that vacancy ("[a]ll vacancies . . . of more than thirty (30) calendar days' duration shall be bulletined in the seniority district for the sub-department involved" [emphasis added]). The Carrier did not do so. Instead, the Carrier filled the position by assigning Meier, who was junior to the Claimant. A violation of Rule 20(A) has therefore been shown.

The Carrier's assertion that Lake covered the Track Inspector's position on the weekends and therefore did not vacate that position does not change the result. The Track Inspector's position at issue was a Monday through Friday assignment. Nor can the Carrier rely upon Rule 19(A) to change the result to allow the filling of the vacancy by Meier. Rule 19(A) governs vacancies of 30 days or less duration. This vacancy was for more than 30 days and therefore governed by Rule 20(A). Finally, whether the training functions performed by Lake was a "official or supervisory position" under Rule 16(B) is really irrelevant. Rule 20(A) is clear and governs. This was a vacancy for more that 30 days and should have been bulletined.

The claim shall be sustained. As a monetary remedy, the Claimant shall be made whole for the difference in pay he would have earned as a Track Inspector and what he earned as a Foreman during the period Lake vacated the Track Inspector position. The Claimant shall also be made whole for out-of-pocket expenses he had to incur as a result of not being allowed to work as a Track Inspector for the period involved.

### **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 14th day of November, 2001.