

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35960
Docket No. MW-34837
02-3-98-3-536

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier:
 - (a) advertised Position No. 14013 on Bulletin TC-06 as a laborer/track inspector position at Willmar, Minnesota and assigned said position to Mr. L. A. Stoeser on March 8, 1993 and continuing; and
 - (b) failed to readvertise said position as a track inspector position and assign said position to Foreman L.J. Cain (System File T-D-625-B/MWB 93-07-27A BNR).
- (2) As a consequence of the violations referred to in Part (1) above, the Carrier shall be required to advertise said position as a track inspector and compensate Claimant Cain for eight (8) hours' straight time and all overtime worked by Mr. Stoeser until the violation ceases.”

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.

At the time of the incident in question, Claimant L. J. Cain held seniority as a Roster 1, Rank A Foreman in the Track Sub-Department.

The facts in this matter appear to be uncontested. By Bulletin No. TC-05, dated February 22, 1993, the Carrier advertised Job No. 14013, a position identified as a Laborer/Track Inspector position with headquarters in Willmar, Minnesota. The position was identified as a five-day position with Monday through Friday workdays and Saturday and Sunday as designated rest days. Effective March 8, 1993, the Carrier assigned L. A. Stoeser to the new Laborer/Track Inspector position.

According to the Carrier, the Track Inspection duties in the Willmar Yard take about two days per week to perform. When the employee assigned to this position is not working as Track Inspector at Willmar, the employee works as a Laborer on the Willmar Section.

The Organization takes the position that the Carrier violated the Agreement when it created the position of Laborer/Track Inspector. According to the Organization, the position of Laborer/Track Inspector never existed prior to the instant matter. The Carrier's action of creating, bulletining and assigning a permanent "combination" position of Laborer and Track Inspector was not allowed under the Agreement. While the Organization claims that "combination" positions are allowed under Rule 24F (relief positions), the instant case does not involve a relief position. Further, the Organization contends that the Carrier cannot find any support for the creation of such a position on the basis of any historical practice or application. Thus, the Organization claims that the claim should be sustained.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. According to the Carrier, it is a fundamental principle that a Carrier's right to lawfully manage its business is limited only by specific

Agreement of the parties. There is no language in Rule 24 that would prohibit the utilization of a combination position to perform the limited track inspection duties in the Willmar Yard. While the Organization cited a number of Rules that were violated (2, 4, 5, 21, 22, 24 and 55) the Carrier contends that the creation of a Laborer/Track Inspector position does not violate any of those Rules and in fact, does not violate any of the Rules in the Agreement. Thus, the Carrier contends that the claim should be denied.

After a review of the evidence, the Board finds that the Organization has not been able to sustain its burden of proof in this matter. We reviewed the language of the Agreement and can find no language that prohibits the Carrier's right to create the position of Laborer/Track Inspector. It is well known that absent express language in the Agreement, the Carrier is free to exercise its management rights. The Board addressed this issue in Third Division Award 19596 wherein it held:

"It is well settled that management has the right to determine how, when and where work shall be performed as well as the number of employees required to accomplish this assignment; this right is only limited by specific provisions in the Agreement with the Organization. . . ."

We agree with the Organization that the position of Laborer/Track Inspector is not a relief position. A review of Rule 24F indicates that it only governs relief positions. As we have determined that the instant position was not a relief position, Rule 24F is not applicable. However, we have nonetheless determined that the Carrier was allowed to create such a position pursuant to its management's rights.

We reviewed the record in this matter and have determined that the Carrier did properly post and fill the position of Laborer/Track Inspector pursuant to Rules 21 and 22A stated in part below:

Rule 21:

"Except as otherwise provided in this Agreement, new positions or vacancies subject to bulletin, as provided in Rule 20, will be bulletined for a period of fifteen (15) calendar days. . . ."

Rule 22A:

“Each new position or vacancy bulletined as provided in Rule 21 will be assigned to the senior qualified applicant who holds seniority on the seniority roster from which that position in question is filled and in the rank of that position. In the absence of such applicants, the senior qualified applicant in the next lower rank and in succeeding lower ranks, if necessary, on the same roster will be assigned. . . .”

Based on these determinations, we find that the Claimant was not aggrieved in this matter. The Carrier was within its rights to create the instant position. Further, not only did he not bid on the position, he also was fully employed at all relevant times and thus lost no compensation.

Based on the record in the instant case, we find that the Carrier acted appropriately when it created the position of Laborer/Track Inspector and placed L. A. Stoeser to the position. The claim is denied.

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 8th day of March, 2002.