

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36059
Docket No. MW-35365
02-3-99-3-244**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway
(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 refused to allow Mr. J. K. Stewart to exercise his seniority, effective March 15, 1997, in accordance with Rule 21F (System File T-D-1293-H/MWB 97-05-20AC BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J. K. Stewart shall now ‘ . . . be made whole for any and all losses incurred as the result of this violation, including lost work opportunity, including overtime and reimbursement of any away from home expenses incurred. As Claimant is in furloughed status, we further request that he receive accreditation for any and all benefits he loses as a result of the Company’s violation.”

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.

An automobile accident in September 1996 caused the Claimant to be off work on medical leave of absence for several months thereafter. While he was on the leave of absence, bulletins advertising positions on Regional Gang RP-11 for the 1997 work

season were posted on December 1, 1996. The posting closed on December 14 and positions were awarded in late December. Although the Claimant bid on one of the positions, it is undisputed that he was ineligible to do so while on leave of absence per Rule 21F. A Group 5 Machine Operator position that was mistakenly awarded to him was corrected by bulletin dated January 20, 1997, which awarded the position to a junior Machine Operator. On February 26, 1997, the Claimant obtained a medical release to return to full duty effective March 15, 1997. Despite the delayed effective date of his release, the Claimant immediately sought to displace the junior Machine Operator. The Carrier refused his attempt. Regional Gang RP-11 actually began its work season approximately one week prior to March 15.

The Organization and the Claimant rely on the provisions of Rule 21F for their claim. It reads as follows:

- "F. Bids will not be accepted from an employee while on vacation, sick leave, or other authorized leave for jobs that are bulletined and closed during such absence. Such employee will be permitted to displace a junior employee from an assignment secured by bulletin that was posted and closed during the absence of the senior employee, provided he does so within five (5) calendar days upon reporting back for service."**

The Carrier, on the other hand, relies on the Terms and Conditions applicable to regional production gangs that resulted from the findings and recommendations of Presidential Emergency Board 219, which were imposed by Congress in Public Law 102-92 on April 17, 1991, as well as the implementation provisions resulting from the compulsory arbitration mechanism provided therein. The Terms and Conditions in question read, in pertinent part, as follows:

"Employees assigned to regional or system-wide production gangs, including recalled furloughed employees and new hires, will not be subject to displacement during the work season by senior employees outside of their own gang, unless the employee seeking to exercise displacement rights would otherwise be forced into a status of collecting supplemental unemployment benefits under the Work Force Stabilization provisions of the Recommendations of PEB 219." (Emphasis added)

It is undisputed that the exception pertaining to collection of supplemental unemployment benefits did not apply to the Claimant.

The record developed by the parties during their handling of the matter on the property presents a fact pattern that is essentially identical to that which confronted the Board in Third Division Award 35963. In denying the claim in that Award, the Board found that the restriction on displacement rights expressed in the Terms and Conditions

**Form 1
Page 3**

**Award No. 36059
Docket No. MW-35365
02-3-99-3-244**

applicable to regional production gangs preempted the displacement right afforded by Rule 21F. Rather than restate the Board's rationale here, we merely adopt it and incorporate it by reference. See also Third Division Award 36058 which also followed Award 35963. This claim is denied accordingly.

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 21st day of May, 2002.