

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36071
Docket No. MW-35672
02-3-99-3-605

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 assigned junior employe K. Maki to a Group 5 machine Operator position on Mini Tie Gang TP-27 by corrected version of Bulletin M-22 as posted September 2, 1997 and when it refused to assign Mr. J. G. Rasmussen to said position (System File T-D-1432-H/MWB 97-12-09AI BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. G. Rasmussen shall now ‘ . . . be made whole for any and all losses, including lost work opportunity, pay differentials, and lost overtime opportunities beginning when he should have been directed to report to the affected Group 5 machine operator’s position, September 3, 1997 and continuing until such time Claimant is assigned to the affected position. We also request that Claimant receive the \$42.50 per diem meal and lodging allowances to which he would be entitled upon assignment to the position. We also request that Claimant be accredited for any and all fringe benefits that would have accrued to him had he been properly assigned, including accreditation for vacation and job protection benefits.’”

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.

On August 6, 1997, the Carrier bulletined two temporary Group 5 positions on District 15. By bulletin dated August 20, 1997, the two jobs were awarded to employees who had bids on record and who were senior to the Claimant.

On September 8, 1997, a corrected bulletin was issued, changing the assignment on one of the jobs to an employee who was junior to the Claimant. The Organization alleges that it called the Manpower office to inquire as to why the Claimant's bid was not accepted. The Manpower office informed the Organization that it did not have a bid from the Claimant and asked the Organization if it had the copy of the bid that all employees are supposed to file with the General Chairman in accordance with Rule 21 D, which states:

"Employees (including those on furlough) desiring positions or vacancies on bulletin will file their applications in writing in duplicate not later than 5:00 p.m. on the date of expiration of the bulletin, one copy with the General Chairman and one copy with the proper officer of the Company, and assignment will be made not later than ten (10) calendar days thereafter. . . ."

No bid was supplied by the Organization and, because the Manpower office did not have a copy of the bid, it denied the Organization's request to have the Claimant placed on the position.

The Organization thereafter filed the instant claim, alleging that the Carrier failed to honor the Claimant's bid in violation of Rule 22A. In support thereof, the Organization provided statements from co-workers L. Bouchard and L. M. Bailey. Bouchard stated that she faxed in the Claimant's bid for him and then called the Manpower office to confirm its receipt. Bailey stated that he saw the Claimant fax his bid in and overheard Bouchard verify receipt of the fax via phone.

The Carrier denied the claim, contending that it never received the Claimant's bid. Manpower Planner R. Scott submitted a written statement during the on-property handling of the case stating that there was no record of a bid from the Claimant despite a thorough search. The statement further indicated that the first time the Manpower office became aware that he claimed to have submitted a bid was on September 2, well after the closing date for the bulletined position. The Carrier argues that the Organization cannot meet its burden of proof on this record and therefore the claim must be denied.

The Board concurs with the Carrier in this matter. We are unable to determine which version of the facts presented in the Submissions is correct. The Organization carries the burden of demonstrating a violation of the Agreement, and the resolution of the factual dispute herein is essential to the Organization's proof. Rule 21D provides a means by which a bid submission can be substantiated. Because the Claimant did not comply with the Rule by filing a copy of his bid with the General Chairman, the Board is left with conflicting evidence, equally weighted. Under the circumstances, the Board must decide the case against the Organization as the party which has the burden of proof.

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 18th day of June, 2002.