

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37337
Docket No. MW-36417
05-3-00-3-675

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
(The Burlington Northern and Santa Fe Railway Company
(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 failed and refused to assign Mr. R. J. Essler to a Group ¾ Machine Operator vacancy at Stanley, North Dakota beginning December 9, 1998 and continuing (System File T-D1689-W/11-99-0182BNR).
- (2) As a consequence of the violation referred to in Part (1), Claimant R. J. Essler shall now ‘... receive reimbursement for mileage incurred for the distance between his residence and New Rockford, ND 174 miles each trip for each Monday and Friday, at \$.325 per mile, until the violation stops. We also request that Claimant receive pay for travel time between Stanley and New Rockford, for traveling the greater distance, at two minutes per mile, 5.8 hours each trip, Monday and Friday, at Group 3 machine operators rate, until the violation stops.’”

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 Claimant holds seniority as a Machine Operator in Groups 3 and 4 dating from April 24, 1981. At the time of the events leading to this dispute, the Claimant was unable to hold a position as a Machine Operator, so on November 25, 1998 he bumped to a Grinder Operator position at New Rockford, North Dakota, displacing a junior employee who held the position under the temporary vacancy provisions of Rule 19A of the Agreement.

Not long thereafter, a new Group 3 and 4 Ballast Regulator position was established at Stanley, North Dakota, on December 9, 1998. The Claimant filed a written request to fill Group 3 or 4 Machine Operator vacancies with the Carrier. However, the Carrier declined to honor the Claimant's request because he had already displaced onto the Rockford temporary provision being filled under the provisions of Rule 19A, and, in the view of the Carrier, the Claimant could not move to another 19A temporary position prior to completing his first temporary assignment.

Instead, the Carrier recalled a junior furloughed Machine Operator to fill the New Rockford vacancy, despite the fact that he had not filed a written request to fill the position. This claim followed.

The pertinent provision in this case states as follows:

**"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 Subdepartment 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 as if regularly assigned thereto."

Focusing on the requirement in Rule 19A that preference will be given to the senior qualified employee who has on file a written request to fill such vacancy, the Organization contends that the Claimant should have been assigned to the New Rockford temporary vacancy based on his superior seniority as a Group 3 Machine Operator and the written request he had on file to fill Group 3 vacancies. In the Organization's view, the provisions of Rule 19A in this regard are clear and unambiguous. Because no other requirements are stated in order to fill the position, none can be inferred.

The Carrier argues that emphasis should instead be placed on the last sentence of Rule 19A, which states that "such employee will assume all the working conditions of the assignment just as if regularly assigned thereto." Because the New Rockford position had been established under Rule 19A, and the Claimant was occupying that position, the Carrier asserts that he had to fulfill the obligations of that temporary position before his written request could be considered for another Rule 19A position.

In examining the respective positions of the parties, the initial question is whether clear contract language governs to resolve the matter. The Organization, as the moving party in this dispute, has the burden to establish that plain and unambiguous language supports its claim that the Claimant is entitled to the Ballast Regulator position at Stanley, North Dakota.

We are not persuaded that the language is clear. Depending upon which sentence is given emphasis, a reading of Rule 19A yields conflicting plausible interpretations. At best, the language in Rule 19A is ambiguous. Under traditional

rules of contract construction, ambiguities in language can be resolved through the examination of extrinsic evidence, including the past practice between the parties.

Dueling statements from the officers of both parties have been offered to support the claims of past practice. Carrier statements attest that there is a longstanding practice which requires all employees working temporary vacancies to remain on their temporary assignments until completed. Organization statements counter that this restriction has not been applied where, as here, the employee has displaced onto the initial temporary vacancy rather than filling it through a Rule 19A request. Because the Organization carries the burden of demonstrating a violation of the Agreement, the resolution of this factual dispute in the Organization's favor was essential. As we view the record, however, it is apparent that there is an irreconcilable dispute of material facts which are central to the disposition of the claim. The Board has no way of resolving this conflict.

Under such circumstances, we find that the Organization failed to satisfy its burden of proof. The claim must be 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 19th day of January 2005.