

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40674
Docket No. MW-40116
10-3-NRAB-00003-070347
(07-3-347)

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF 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 to bulletin a new Group 2 Operator position to operate Speed Swing BNX-2400139 on Gang UC-01 and instead assigned Mr. R. Briney to operate said machine beginning January 17, 2005 and continuing [System File C-05-B050-1/10-05-0148(MW) BNR].
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Wilkinson shall now ‘...be paid for all straight time and overtime worked by Mr. R. F. Briney beginning on January 17, 2005 and continuing until such time as the violation no longer exists either by bulletining and assigning the position or discontinuing the position at the Group 2 rate of pay as settlement of this claim.”

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 March 14, 2005, the Organization filed a claim alleging that "Rules 1, 2, 5, 20, 21, 22, and 29, but not limited thereto, were violated . . . when the Carrier created a new position in excess of thirty (30) days and has not been bulletined and assigned as required."

On May 10, 2005, the Carrier denied the claim:

"Contrary to what is stated in the claim, a Speed Swing was not used continuously for over 30 days, beginning January 17, 2005. If the speed swing was used intermittently, the Carrier would not recall a furloughed employee for this relief work, but would fill the relief with a 19A request. There were no 19A relief requests on file with Manpower to fill a speed swing on UC-01. If Manpower had assigned an employee to relief on a speed swing for January 17, 2005, the relief would have been assigned on January 14, 2005. Mr. Wilkinson was not assigned to a position, then, thus was not eligible to 19A."

On June 27, 2005, the Organization filed an appeal, highlighting Rules 2 and 20 and noting that "the Carrier assigned Group 2 Operator R. F. Briney to operate [the speed swing]. Mr. Briney is already assigned as a Group 2 Operator as he is assigned as the relief operator on UC-01."

On August 22, 2005, the Carrier denied the appeal, remarking that the Claimant did not have a request to fill this alleged vacancy during his absence and the Organization failed to support its claim with any evidence. Based on Third Division Award 31831, when there is a dispute over an essential fact (use of speed swing) the moving party's (BMWE) claim must be denied.

The Organization issued a confirmation-of-conference letter on September 7, 2006, wherein it provided the Carrier with the employee's statement about his daily use of the speed swing. The Organization states that the Roadmaster's statement is self-serving.

The parties presented competing statements focused on an essential, dispositive fact to this claim. Specifically, the number of days' usage of speed swing BNX-2400139 on UC-01 during the period of January 17 through March 10, 2005. In support of its claim, the Organization submits the employee's statement (dated March 14, 2005; provided to BNSF on July 25, 2006) about using the speed swing daily during the claim period. The Carrier submitted the Roadmaster's statement (dated May 5, 2005; provided to BMW on July 25, 2006) that the speed swing was used as needed because the daily report shows no usage on January 21, 27, February 10, 17, 18, 24 and March 10, 2005.

The Organization, as the moving party, has the burden of proving all elements of its claim. Given the competing statements, the Organization has not established its essential and dispositive fact to this claim. Absent sufficient, probative evidence that the speed swing was used daily for more than 30 consecutive days, 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 1st day of November 2010.