

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25978  
Docket Number MW-25946

Marty E. Zusman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees  
(  
(Burlington Northern Railroad Company  
(former St. Louis-San Francisco Railway Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it appointed Mr. D. R. Phillips to the temporary position of assistant foreman (Gang 444) at the Rail Welding Plant at Springfield, Missouri effective April 1, 1983 (System File B-1322/MWC 83-8- 15).

(2) The position referred to in Part (1) hereof shall be filled in accordance with Rule 39."

OPINION OF BOARD: This is a contract interpretation dispute brought by the Organization in its letter of May 17, 1983, after Carrier filled an Assistant Foreman position on Gang 444 at the Springfield Rail Welding Plant. The Organization argued on property that Carrier violated the MW-32 Agreement and Rule 39. The MW-32 Agreement between the parties pertains to the Rail Welding plant and states in pertinent part that:

"Positions of foreman . . . will be filled in accordance with the provisions contained in paragraphs (a)(1) and (2) of Rule 40 of the Agreement. . ."

Since the Carrier appointed an Assistant Foreman, the Organization maintained the Agreement was violated as the Trackman, D. R. Phillips, who was appointed failed to have Foreman's seniority as per Rule 39 which is specific to unbulletined vacancies of Assistant Foreman.

As a preliminary point, this Board underlines that all facts and/or lines or argument used by either party in their Ex Parte Submissions, which were not clearly joined on property are not properly before this Board. We have studied closely both the Organization's letter of May 17, 1983, and the Carrier's response of June 12, 1983, with regard to whether the position was temporary or permanent. In the former the General Chairman notes that:

"The MW-32 Agreement gives the Carrier the right to appoint employees who hold foreman seniority to foreman positions at the Rail Welding Plant and only to permanent vacancies."

In the latter, the Division Superintendent states the "Permanent vacancies on this position will be filled in accordance with the foregoing." This Board reads the on property correspondence as the interpretations of Agreements and not as dispute over or clarification of whether this instant case is temporary or permanent. If arguendo, it was the purpose of the parties to dispute this issue then it should have been clearly joined on property. What was clearly joined was the applicability of the MW-32 Agreement to the appointment of Assistant Foreman at the Rail Welding Plant.

It is clear from a reading of the MW-32 Agreement that it says nothing about Assistant Foreman and that lends support at first glance to the Organization's reliance on Rule 39 and against the Carrier's use of Rule 40. However, after a careful and complete review of the MW-32 Agreement and paragraphs (a)(1) and (2) of Rule 40 which reads in pertinent part:

"Rule 40: Filling Foreman Positions in System Rail  
Laying Gang

(a) Positions of foreman and assistant foreman  
in the system rail laying gang will not be  
subject to the seniority and promotion rules  
of this agreement. . . ."

This Board must conclude that in the instant particular circumstances the MW-32 Agreement section 1 directly pertains to Rule 40 section (a) which states the intent of the parties to include within the Agreement Assistant Foreman. As such, the record before this Board substantiates Carrier's position with regard to a permanent vacancy.

The National Railroad Adjustment Board has held repeatedly that the weight of the evidence for any Claim is the responsibility of the moving party (Third Division Awards 19506, 24965). In the case at bar, such clear and convincing evidence to support the Claim is lacking. As such, this Board agrees with the Carrier in the instant circumstances and denies the Claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds;

That the parties waived oral hearing;

That the Carrier and Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;


That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:   
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 14th day of March 1986.