

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26380
Docket Number MW-26135

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 assigned either Trackman J. Copeland or J. Gambriel to fill a temporary vacancy as foreman (Gang 443) beginning July 12, 1983 instead of using cut-back Foreman R. L. Hires who was available, willing and qualified to fill that vacancy (System File B-1322-2/MWC 83-11-9A).

2. Because of the aforesaid violation, Mr. R. L. Hires shall be allowed the difference between what he was paid at the trackman's rate and what he should have received at the foreman's rate from July 12, 1983 to September 8, 1983."

OPINION OF BOARD: Claim is on behalf of Claimant that Carrier violated Rule 39 of the Agreement in the filling of unbulletined vacancies. The Organization alleges that Claimant made a request to fill a Foreman vacancy on Gang 443 and was denied although he had Foreman seniority and was working a lower classification. Junior employees were used in place of the Claimant in violation of the Rule. Rule 39 lists the order in offering the position and states in pertinent part:

"(a) Unbulletined vacancies of foreman . . . will be offered to employees in the following priorities:

(1) To the assistant foreman in the gang if the vacancy is on the foreman's position of that gang.

(2) To the senior qualified employee working in the gang, or at the location, who holds foreman's seniority and who is working in a lower class, or furloughed account force reduction."

In advancing this Claim the Organization states that "Mr. Hires is assigned to Gang 444 which is at the same location as Gang 443." As such, the Claimant was denied his rights under the Agreement.

The Carrier points out on the property that Claimant had previously rejected this same vacancy and when it was finally bulletined he first bid and then withdrew his bid on this same vacancy. The Carrier argues that Claimant neither had an interest in the position, nor a right to it since it was in a different gang and at a different location. In its letter of January 3, 1984, the Carrier states that:

"Inasmuch as the vacancy occurred in Gang 443, the Panel Plant Gang, and Mr. Hires was working on Gang 444, the Welding Plant Gang, which are not found at the same location, the Claimant did not have preference to fill the position because he was neither working on the gang or at the location."

In the instant case, this Board is confronted with a conflict of fact over which the determination of a violation must be made. This Board is not constituted to make factual determinations. The case must be made on the property with sufficient probative evidence to establish and perfect all elements of the proof. In this case, the location is clearly disputed, rebutted by the Carrier and central to this Board's determination of any Agreement violation. As the burden of proof lies with the Organization, the Claim must be denied for lack of proof (Third Division Award 25978).

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

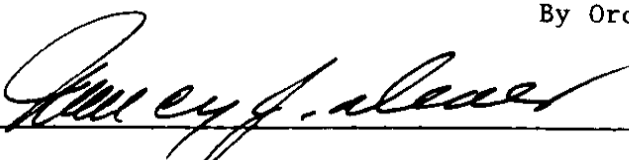
That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

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 25th day of June 1987.