

CORRECTED

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31608
Docket No. MW-30852
96-3-92-3-711**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employees**
(**Southern Pacific Transportation Company (Eastern Lines)**)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Assistant Foreman R. R. Bejarano to perform foreman's work (inspect track), between Del Rio, Texas and Mile Post 534 on August 12 through 23, 1991 instead of assigning Track Foreman J. Galvan to perform the work (System File MW-91-119/503-24-A SPE).
- (2) As a consequence of the violation referred to in Part (1) above, Track Foreman J. Galvan shall be allowed eighty-one (81) hours' pay at his straight time rate, twenty-two (22) hours' pay at his time and one-half rate and he shall be credited with ten (10) days for vacation qualifying purposes."

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 waived right of appearance at hearing thereon.

The facts which led to this dispute are as follows. From August 12 - 16, 1991, Foreman L. Caston was on vacation. When Foreman Caston returned from vacation on August 16, 1991, he was promoted to Assistant Roadmaster. Foreman Caston's position was advertised, however Carrier elected not to fill the position while it was under bulletin. During Mr. Caston's vacation, Assistant Foreman R. Bejarano performed requisite track inspections and continued that duty until the vacancy was assigned. Before, during and after claim dates, T. Galvan (Claimant), who is senior to Assistant Foreman Bejarano, was in furlough status.

The Organization submitted a claim asserting that the track inspection work performed by Assistant Foreman Bejarano "constituted Foreman's work", and maintained that T. Galvan (Claimant) should have been recalled from furlough to fill the vacancy created by Mr. Caston's vacation and subsequent promotion.

Carrier denied the claim noting that Article 8, Section 4 is "entirely permissive concerning vacancies during bulletin," and that it is "the policy of the Company to not fill assignments while they are under bulletin." Carrier further noted that Mr. Caston's promotion to Roadmaster was not effective until August 16, 1991. Therefore, Carrier contended, the portion of the claim dealing with August 12 through 15 was improper in that no vacancy existed on those dates.

Carrier went on to assert that inspecting tracks is a "proper function" of an Assistant Foreman, and could not be considered filling the Track Foreman vacancy. Finally, Carrier maintained that there was no basis to compensate Claimant for the entire claim period; noting that had Claimant been recalled, it would have taken him at least eight (8) calendar days from the date of recall to perform first service.

The Organization replied to Carrier's denial asserting that Carrier knew "well in advance" when the position was to be vacated, and could "easily" have had the vacancy filled from the first day. Further correspondence on the property did not resolve this issue which is now before the Board for adjudication.

As a predicate for a viable claim, the Organization bore the burden of proving, by reference to a specific Agreement rule or exclusive systemwide past practice, that the work in dispute is reserved to employees in the Foreman classification to the practical exclusion of Assistant Foremen. Carrier insisted throughout handling that: "Assistant Foreman can and do perform track inspection as a normal portion of their assignment."

The Organization did not offer any substantive evidence which effectively refuted the factual accuracy of Carrier's assertion. Nor has the Organization drawn our attention to clear and express language in the cited Agreement rules which reserves the disputed work to Foremen.

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 29th day of August 1996.