

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35719
Docket No. MW-33776
01-3-97-3-249

The Third Division consisted of the regular members and in addition Referee Robert L. Douglas when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Fort Scott, Kansas Gang Foreman R. D. Hall to flag for a contractor at Olathe, Kansas beginning June 13 through 19, 1995, instead of assigning Mr. J. D. Boyd who holds foreman seniority and was working in a lower classification during said period (System File B-2483-5/MWC 95-08-01AD SLF).
- (2) As a consequence of the aforesaid violation, Mr. J. D. Boyd shall be compensated ‘ . . . at foreman rate for 56 hours and any overtime worked by Mr. Hall and any other hours worked.’”

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.

Rule 38 (Assignment of Employee) provides, in pertinent part, that:

“(a) Assignments to new positions, or to fill regular vacancies on exiting positions, will be made in accordance with the following:

* * *

(6) Except as otherwise provided, employees will not be permitted to work unbulletined temporary positions or vacancies in class where they hold sufficient seniority to entitle them to a regular position.”

Rule 39 (Filling Unbulletined Vacancies) provides, in pertinent part, that:

“(a) Unbulletined vacancies of foremen and assistant foremen in the Track Sub-department 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 employe 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.

* * *

(b) If such unbulletined vacancies cannot be filled in accordance with the provisions contained in paragraphs (a) (1), (2), (3) or (4), they may be filled by any available qualified employe.”

The present dispute requires determining whether a vacancy existed under the specific facts and circumstances that required the Carrier to assign an employee from a lower classification to perform the disputed work of flagging for a contractor. The Organization asserts that the amount of the disputed work warranted the filling of the temporary unbulletined position of Flagman. The Carrier denies that any vacancy existed.

The referenced Rules constitute an effort by the parties to enable employees, who are working in a lower class, to have an opportunity to serve in a higher class for which such employees hold seniority.

A careful review of the record indicates that the disputed work constituted a significant amount of work that was not merely extra work. As a result, an unbulletined temporary position arose as soon as the Carrier decided to have the work performed. The Carrier therefore had a contractual obligation to comply with the referenced requirements.

The record reflects that the Carrier improperly permitted a Foreman, who already held a position as Foreman, to perform the disputed work. Instead, the referenced requirements obligated the Carrier to assign 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. The Claimant met the necessary requirements. As a result, the Carrier had a contractual obligation to have assigned an employee, such as the Claimant who was working in the lower position of Trackman-Driver, to perform the disputed work. By failing to do so, the Carrier violated the Agreement in this specific instance.

As a remedy, the Carrier shall compensate the Claimant, who was working at the time as a Trackman-Driver, for the difference in pay between the position of Trackman-Driver and Foreman for all of the hours that the Foreman performed the disputed work. In addition, the Claimant shall receive pay at the Foreman's overtime rate of pay for any hours that the Foreman performed the disputed work on an overtime basis.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 24th day of October, 2001.

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

INTERPRETATION NO. 1 TO AWARD NO. 35719

DOCKET NO. MW-33776

NAME OF ORGANIZATION: (Brotherhood of Maintenance of Way Employes

NAME OF CARRIER: (BNSF Railway Company

On October 24, 2001, the Board issued Third Division Award 35719 sustaining the claim "in accordance with the Findings." The Award stated in part:

"As a remedy, the Carrier shall compensate the Claimant, who was working at the time as a Trackman-Driver, for the difference in pay ... for all the hours that the Foreman performed the disputed work. ..."

The Carrier paid the Claimant \$50.96.

By letter dated September 30, 2002, the Organization requested Interpretation of the Award, with specific reference to the language, "for all the hours that the Foreman performed the disputed work. . . ." The Organization contends that the amount claimed extends over several months. The Carrier contends that the time lost is limited to the Statement of Claim.

The Organization asserted later in the on-property handling that the Foreman performed work from May 1995 until October 1996. The Carrier never responded to this assertion during the on-property handling. Because the record does not contain sufficient information to determine the exact time period that was properly presented to the Carrier at the time the claim was in process on the property, we can only determine that the liability was greater than the named dates. Therefore, the Board determines that the monetary remedy in this case shall be an additional \$1,000.00.

**Serial No. 402
Interpretation No. 1 to
Award No. 35719
Docket No. MW-33776**

Referee Robert L. Douglas who sat with the Division as a neutral member when Award 35719 was adopted, also participated with the Division in making this Interpretation.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 22nd day of September 2005.