

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35743  
Docket No. MW-35264  
01-3-99-3-112**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(Consolidated Rail Corporation)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to allow employe W. V. Huling to displace junior Machine Operator C. M. Boose from a front end loader position on the Juniata Works Gang 1381 beginning September 22, 1997 and continuing (System Docket MW-5075).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. V. Huling shall ‘ . . . be compensated for all hours worked by Mr. Boose since September 22, 1997, so as to be made whole, plus his record should reflect that he actually worked these days for reasons of all credits and benefits.’”

**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.**

**The Claimant has a seniority date of August 12, 1976. He was the incumbent of a Machine Operator position on TO Tie Gang from April 21 until September 11, 1997, when he was displaced after the position was abolished.**

**The Organization claims that on September 16, 1997 the Claimant spoke to the Assignment Clerk and inquired as to what positions were available to him for his exercise of seniority. The Organization asserts that the Assignment Clerk told the Claimant that, although there was a Machine Operator Class 2 position on the Juniata Works 1381 Gang, he would not be allowed to displace employee C. M. Boose, who was junior to the Claimant, because the position was not in the Claimant's work zone.**

**The instant claim, submitted on October 14, 1997, alleged that the Carrier violated Rule 4 of the Agreement when it did not allow the Claimant to displace junior Machine Operator Boose from the front end loader position on the Juniata Works 1381 Gang.**

**The December 1, 1997 denial from the Carrier stated that the Claimant's records did not reflect that he was qualified to operate a front end loader, and therefore he was not entitled to displace the junior incumbent. In response, the Organization submitted a copy of the Claimant's qualifications, which indicated that he was qualified to operate the front end loader.**

**In further correspondence, the Carrier's Manager-Labor Relations stated that the Assignment Clerk had attested in writing that she had no recollection of making the statement attributed to her by the Claimant. The correspondence further noted that Assignment Clerks lack the authority to allow or disallow displacements. Further, it was noted that there was no evidence that the Claimant actually attempted to assume the duties of the position and was refused such attempt. The Organization argues that the Claimant could not have attempted to exercise his displacement rights because he had been told by the Assignment Clerk that he was unable to do so.**

**Based on our review of the record in its entirety, it is apparent that the crux of the case turns on a question of fact as to the nature of the conversation that took place between the Assignment Clerk and the Claimant. The Organization claims that the Claimant was told he could not displace the junior employee, while the Carrier contends**

that no such statement was made. The Organization argues that the Carrier failed to produce the written statement it claimed to have from the Assignment Clerk, and therefore the Board should draw an adverse inference from this omission. The difficulty with that argument is that this leaves the Board with mere assertions not only from the Carrier but also from the Organization regarding the disputed conversation. It is well established that the Board, in its appellate capacity, cannot resolve such impasses. See Third Division Awards 27195, 28924, 33900 and 35440.

The burden of proof rests with the Organization as the moving party in this dispute. Because the Organization failed to support with probative evidence its contention that the Carrier improperly disallowed an attempted displacement by the Claimant, the claim is hereby 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 24th day of October, 2001.