

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35963
Docket No. MW-33307
02-3-96-3-805

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
(Burlington Northern Santa Fe (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow Mr. M. A. Onstot to displace junior employee A. J. Stangland on a head welder position on June 14, 1993 and continuing (System File C-93-D080-2/MWA 93-11-11A BNR).
- (2) As a consequence of the aforesaid violation, the Claimant shall “... be paid any difference in pay from that of a Head Welder and positions the Claimant has been forced to work from June 14, 1993 and continuing until such time as this violation ceases and that he be given the appropriate Head Welder's seniority date he would have received had this violation not occurred. Finally, I request the Claimant be paid all overtime worked by the junior employee on the above referred to position from June 14, 1993 and to continue until he is allowed to displace onto same in accordance with the Agreement.”

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.

Section 11, of the findings and recommendations of PEB 219, imposed by Congress in Public Law 102-29 on April 17, 1991, allows the Carriers, through a process of expedited negotiations with the Organization culminating in compulsory arbitration, to establish system and regional gangs to operate over specified territory of the Carrier to perform work that is programmed during any work season for more than one seniority district, a.k.a. "Production Gangs." This case has its genesis in a Notice for the establishment of Production Gangs for the 1992 work season, served on the Organization by the Carrier on October 10, 1991, pursuant to Article XIV of the July 29, 1991 "Imposed Agreement."

Among the "Other Conditions" the Carrier proposed in its October 10, 1991 Notice were the following:

"Such employees will not be subject to displacement during the work season by senior employees . . .

* * *

Employees assigned to regional or system-wide production gangs . . . will not be subject to displacement during the work season by senior employees. . . ."

The Organization subsequently challenged the entire October 10, 1991 Notice in PEB 219 Section 11 arbitration, which resulted in an Opinion and Award, by Arbitrator Joseph A. Sickles. Although somewhat modified by the "Sickles Award," the pertinent part of Section 3(a) of the Terms and Conditions applicable to System-Wide and Regional Production Gangs, reads as follow:

“Employees assigned to regional or system-wide production gangs, including recalled furloughed employees and new hires, will not be subject to displacement during the work season by senior employees outside of their own gang, unless the employee seeking to exercise displacement rights would otherwise be forced into a status of collecting supplemental unemployment benefits under the Work Force Stabilization provisions of PEB 219. . . .” (Emphasis added)

Claimant M. A. Onstot, with established seniority in the Welding Subdepartment, was off work due to a personal injury from December 18, 1992 through June 13, 1993. During his absence, a Head Welder position, i.e., Job No. 5015 on Welding Crew RW-04, (one of the Production Gangs established pursuant to Carrier’s October 10, 1991 Notice and the Sickles Award) was advertised and awarded in Bulletin PEB-01A to A. J. Stangland, an employee junior to the Claimant in Welding Subdepartment classification seniority. On June 14, 1993, the first day after being released to return to work, the Claimant advised the Call Desk in Denver, Colorado, of his desire to return to work. At that time, the Claimant attempted to displace junior employee Stangland from the Head Welder job on Gang RW-04, but the Carrier would not allow him to displace the junior employee on the Production Gang, citing Section 3 (a), supra.

The Claimant eventually displaced to a different position and the Organization promptly filed the present claim, alleging a violation of his Rule 2 seniority rights, citing Schedule Agreement Rule 21 Bulletin Procedure, which reads in pertinent part as follows:

“F. Bids will not be accepted from an employee while on vacation, sick leave, or other authorized leave for jobs that are bulletined and closed during such absence. Such an employee will be permitted to displace a junior employee from an assignment secured by bulletin that was posted and closed during the absence of the senior employee, provided he does so within five (5) calendar days upon reporting back for service.”

The claim was denied at all levels of handling and was appealed to the Board for determination.

At the outset, we are not persuaded by the Carrier’s argument that the Board lacks jurisdiction to consider this dispute and that this matter is properly referable to

the Contract Interpretation Committee ("CIC") established under Article XVIII of the Imposed Agreement of April 17, 1991. This dispute concerns the interpretation and application of provisions in the BN/BMWE Schedule Agreement and the Terms and Conditions Applicable to System-Wide and Regional Production Gangs imposed by the Sickles Award through the 1993 season. The latter essentially comprised a BN/BMWE local Agreement, over which the CIC previously recognized that it has no jurisdiction. See CIC Decision No. 25.

The fact pattern presented in this case raises an irreconcilable conflict between the clear and unambiguous language of the second sentence of Rule 21.F of the Schedule Agreement and the first sentence of Section 3(a) of the Terms and Conditions Applicable to System-Wide and Regional Production Gangs. The Organization forcefully and persuasively argued that it is inequitable and anomalous that Section 3 (a) leaves intact the first sentence of Rule 21.F, which is detrimental to an employee in the Claimant's situation, while trumping the second sentence, which is beneficial to him. Notwithstanding that the equities might well favor the Claimant and the Organization in this particular case, no other result is possible. The contract language of Section 3(a) must prevail under the preemptive language of the Sickles Award and the single exception to the limitation of Rule 21.F displacement rights contained in Section 3(a) was not applicable in the factual situation presented in this record.

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 8th day of March, 2002.