

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36058
Docket No. MW-35361
02-3-99-3-233**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Santa Fe Railway
(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 refused to allow Mr. J. S. Johnson to exercise his seniority to the position of sectionman on Tie Gang TP-05 in accordance with Rule 21F (System File NBNB-105-B/MWB 98-05-14AB BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. J. S. Johnson shall now be compensated for all wage losses beginning January 13, 1998 and continuing. “*** Wage loss is meant to include all straight-time and overtime worked by junior employe and all accreditation for vacation, Railroad Retirement months of service and Feb 7th. ***”**

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 was off work on a sick leave of absence from October 17, 1997 through January 12, 1998. During this absence, the Carrier advertised all of the positions on Tie Gang TP-05, a regional production gang within the meaning of the parties' Agreement. The advertisement closed on December 12, 1997 and 11

Sectionman positions were awarded to a like number of employees, all of whom were junior to the Claimant in terms of Sectionman seniority. The bulletin noted that the tentative starting date for the positions on the gang was to be April 6, 1998.

Upon returning to duty on January 13, 1998, the Claimant became aware of the regional production gang positions that had opened and closed during his leave of absence. He sought to exercise his seniority against one of the Sectionman positions. When the Carrier refused to allow him to do so, this claim arose.

The Organization and the Claimant rely on the provisions of Rule 21F for their claim. It reads 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 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 Carrier, on the other hand, relies on the Terms and Conditions applicable to regional production gangs that resulted from the findings and recommendations of Presidential Emergency Board 219, which were imposed by Congress in Public Law 102-92 on April 17, 1991, as well as the implementation provisions resulting from the compulsory arbitration mechanism provided therein. The Terms and Conditions in question read, in pertinent part, as follows:

“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 the Recommendations of PEB 219.” (Emphasis added)

It is undisputed that the exception pertaining to collection of supplemental unemployment benefits did not apply to the Claimant.

The record developed by the parties during their handling of the matter on the property presents a fact pattern that is essentially identical with that confronting this Board in Third Division Award 35963. In denying the claim in that Award, the Board found that the restriction on displacement rights expressed in the Terms and Conditions applicable to regional production gangs preempted the displacement right afforded by

Rule 21F. Rather than restate the Board's rationale here, we merely adopt it and incorporate it by reference. This claim is denied accordingly.

We note also that the immunity from displacement provided by the Terms and Conditions applies, by its terms, "... during the work season. ..." On this record, the tentative start date for Gang TP-05 was April 6, 1998 and the Claimant sought to displace in mid-January, nearly three months earlier. Whether the Claimant's attempted displacement occurred "... during the work season ..." was not an issue joined by the parties on the property. Accordingly, we make no findings thereon.

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 21st day of May, 2002.