

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36979
Docket No. MS-35837
04-3-99-3-830

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(Paul M. Schwartz, Kevin R. Klundt, Billy W. Robinson,
(Andrew E. Dilworth, Jay L. Hatfield, Eric A. Jessen, and
(all other similarly situated members of the Brotherhood
(of Maintenance of Way Employees

PARTIES TO DISPUTE: (

(The Burlington Northern and Santa Fe Railway Company
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"This letter confirms that consistent with the Uniform Rules of Procedure of the National Railroad Adjustment Board, on August 16, 1999, the undersigned filed a Notice of Intent Letter with the Board indicating an intent to file an ex parte submission within seventy-five days covering an unadjusted dispute between Paul M. Schwartz, Kevin R. Klundt, Billy W. Robinson, Andrew E. Dilworth, Jay L. Hatfield, Eric A. Jessen, and All Other Similarly Situated Members of the Brotherhood of Maintenance of Way Employees; and involving a dispute with the Burlington Northern and Santa Fe Railroad. The Complaint with the Railroad involved the Complainants' employment and specifically representations made by the Railroad to the employees which were breached. The facts and claim are more particularly described in a letter dated August 16, 1999, and addressed to the railroad. A copy is attached herein and incorporated by reference.

In sum, the Complainants request that they be immediately placed on the active rolls of the Train Service for the railroad, and that the Complainants receive the employment that was promised by the

railroad, as well as their costs in bringing the complaint, and a reasonable attorneys fee."

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 Claimants were Maintenance of Way Department employees who took steps commencing in 1998 to voluntarily transfer crafts from the Maintenance of Way Department to positions working as Switchmen, Trainmen, or Conductors on through trains or in rail yards. With the exception of Claimant K. R. Klundt (who did not mark up for Train Service work but returned to the Maintenance of Way craft before his training was completed, thus making his claim moot) the Claimants took leaves of absence, with extensions, completed training for the transfers and were added to the appropriate Trainman/Yardman seniority rosters. Those Claimants were advised as their leaves of absence expired that they forfeited their Maintenance of Way seniority.

According to the Carrier, the Claimants worked in train service. During argument before the Board, the Claimants stated that they marked up for train service, went on the boards and made runs.

This claim followed when, after successfully completing training and establishing seniority as Trainman/Yardman, the Claimants were furloughed on various dates in 1999.

The governing Rule in effect at the relevant time was Rule 15. LEAVE OF ABSENCE which reads, in pertinent part, as follows:

"E. An employee on leave of absence accepting other employment without first obtaining written permission from the Company and the duly accredited representative of the employees, will be considered as having left the service and all seniority rights will be forfeited.

An employee failing to report for duty on or before the expiration of their leave of absence will forfeit all seniority rights, unless an extension is obtained."

Simply put, at their request, the Claimants were given leaves of absence that expired and the Claimants established seniority and worked in train service. By doing so, the Claimants forfeited their Maintenance of Way seniority. The Claimants' leaves of absence expired and they could not hold seniority in two crafts. The Rule in effect at the time was self-enforcing. By the terms of the Rule, the Claimants knew what they were getting into - forfeiture of their Maintenance of Way seniority if their leaves of absence expired and if they moved into the train service. Indeed, in the August 18, 1998 notice addressed to "Furloughed Track Laborers" about craft transfers, the Carrier specifically advised the employees including the Claimants that "you will forfeit your seniority in your old craft once you establish a seniority date in the new craft." Further, during argument before the Board, the Claimants conceded that they were told that if they marked up in train service, they could not go back to their Maintenance of Way positions. The Claimants knew what they were getting into.

There is no evidence of guaranteed employment for the Claimants once they entered train service. Employment opportunities are dictated by the Carrier's business levels and needs and, unfortunately, those levels and needs were not of sufficient degree to avoid furloughs. The Claimants were junior employees on the train service seniority rosters. Their furloughs were the result of the Carrier's lack of need for their services. Having forfeited their Maintenance of Way seniority, they could not return to their former Maintenance of Way positions.

Subsequent Rule or policy changes do not require a different result. Any such changes did not have retroactive effect that would have benefited the Claimants in this dispute.

The result is obviously an unfortunate one for the Claimants. However, in these proceedings, the Claimants have the burden of demonstrating a violation of the relevant Agreement Rules. The Claimants have not carried that burden of proof.

In light of the result, the Carrier's procedural arguments are moot.

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 12th day of May 2004.