

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37841
Docket No. MW-37187
06-3-02-3-195

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
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Mr. L. L. Norton to fill a vacancy (flagman position) working in connection with a state bridge project at Bridge 730 between Mile Posts 729 and 730 beginning on March 8, 1999 and continuing through April 27, 1999 and when it failed to issue a bulletin for said position and instead assigned Mr. K. H. Isaacson (System File T-D-1814-W/11-99-0446 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. L. Norton shall now ‘. . . receive pay for eight hours each work day, Monday through Friday between March 8, 1999 and April 27, 1999 exclusive. Thirty-seven (37) days, 8 hours per day equaling two-hundred ninety-six (296) hours at sectionman’s straight time rate. We further request that Claimant receive pay equal to any and all overtime paid on this position during claimed period of time, and that Claimant be accredited for any and all other benefits, vacation and lump sum payment accreditation, insurance, retirement and unemployment payments.’”

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.

During the period of March 8 through April 27, 1999, Sectionman K. H. Isaacson provided flagging on a state bridge project near Redfield, South Dakota. By letter dated May 3, 1999, the Organization filed the instant claim alleging that Flagman's work was performed in excess of 30 days, and, therefore, the Carrier was required to bulletin a Flagman vacancy in accordance with Rule 20, which provides:

"A. All vacancies and new positions of more than thirty (30) calendar days' duration shall be bulletined in the seniority district for the sub-departments involved."

The Organization contends that the Claimant, who was furloughed at the time, should have been recalled and assigned to the vacancy based on his seniority and pre-existing rights on the Flagman roster.

The Carrier argues that the Organization failed to meet its burden of proof in this case. In the Carrier's view, the record is devoid of evidence establishing that flagging was necessary on more than an intermittent basis. Lacking the requisite factual predicate, the Organization has not shown that the Carrier violated Rule 20 when Sectionman Isaacson provided flagging as part of his regular job duties.

Looking at the record developed on the property, the Board finds assertions and counter assertions as to the work performed during the relevant time period.

The Organization argues that Sectionman Isaacson performed flagging work full time; the Carrier insists that this was not so. Based on this conflicting record, we cannot ascertain the extent to which flagging duties were required. The Organization submitted evidence that flagging vacancies had previously been bulletined, but such evidence is not material or relevant to the basic inquiry as to whether a contractual vacancy existed for a Flagman in the matter at hand.

The Organization, as the moving party in this dispute, had the burden of proving the elements of its claim. It did not do so. Absent evidence that sufficient flagging was performed on a regular basis to justify the establishment of a regular Flagman's position, the claim must be 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 1st day of August 2006.