

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38045
Docket No. MS-38401
06-3-04-3-392**

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

(Michael D. Allen
PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Mr. Allen’s question to the NRAB is:

Why was I not allowed to displace S. L. DeMontel from scheduled job 6001 on August 6, 2003?”

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 filed a claim on August 6, 2003, alleging that the Carrier violated the Agreement in failing to permit displacement onto Position 6001, occupied by S. L. DeMontel. In support of the claim, the Claimant argues a

violation of Rule 6, in that the Claimant was not properly permitted displacement, forcing the Claimant to displace onto another position.

The Carrier argues that its action was proper. The Claimant was not permitted to displace to the Head Janitor position due to Item No. 4 of the Memorandum of Agreement dated August 14, 2002. The language of Item 4 reads, in pertinent part, as follows:

“The Carrier may designate in writing to the General Chairman one employee on the second shift as a head janitor that will only be subject to displacement by a senior employee if the senior employee is unable to hold a position in the seniority district. . . .”

As a preliminary point, the Board received a request dated August 11, 2004 from the Claimant to attend a Referee Hearing. The Board met on May 18, 2006 and the Claimant, who had been properly informed of the Hearing, was not present. The Board postponed the Hearing for three hours to permit time for the Claimant to attend, and when he did not, continued the Hearing to conclusion.

Turning to the facts of record, the Carrier notified the Claimant on the property that the position filled was that assigned to S. L. DeMontel as the Head Janitor. The Claimant argued on the property that under Rule 6 he had the right to exercise seniority to displace a junior employee and further, that DeMontel was junior. The Claimant argues that the Carrier's position that job Number 6001 was partially excepted (PE) giving the Carrier the right of selection was not born out by history or seniority rosters.

The claim might have merit if there were no jobs the Claimant, as the senior employee, could hold, but that is not the fact of record. The Carrier stated in its October 15, 2003 letter that not only was Head Janitor position 6001 properly assigned under the Memorandum of August 14, 2002, but also that, “The Claimant was able to hold another position in district 431.” The Board finds no evidence to the contrary. Nor is there any evidence that the position is partially excepted. The position is a full position of Head Janitor which is exempted by Agreement.

Form 1
Page 3

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The Memorandum is applicable and Rule 6 has not been violated. Accordingly, the claim must be denied for lack of proof.

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 December 2006.