

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40104
Docket No. MW-40389
09-3-NRAB-00003-080212**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

(Brotherhood of Maintenance of Way Employes Division -

(IBT Rail Conference

PARTIES TO DISPUTE: (

(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign Soo District employe L. Helland to fill a truck operator position in connection with picking up ties on the Elbow Lake Sub-division on February 6, 7, 8 and 9, 2006 and instead called and assigned Milwaukee District employe F. Goytowski (System File C-06-160-015/8-00435-007).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Helland shall now be compensated at the applicable truck operator pay for all straight time and overtime hours worked by Mr. F. Goytowski in the performance of the aforesaid work.”**

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.

This is a seniority district dispute. The Organization alleged that despite the fact that the Claimant was on furlough from the Soo District and had his name on the applicable call list, the Carrier nevertheless utilized Material Truck Operator Goytowski from the Milwaukee District to pick up ties on the Soo District on the four claim dates, rather than calling the Claimant in to perform the work to which he is entitled pursuant to his seniority. In the correspondence on the property, the Carrier repeatedly stated that Goytowski was assigned by bulletin to a Cross System position on Production Crew No. 2, entitling him to work on both districts under Memorandum No. 10, and that the Organization failed to specify what work he allegedly performed and at what location. The Organization's response to the Carrier's contentions asserted that the Cross System crew that Goytowski was bulletined to had been abolished on December 15, 2005 and he exercised seniority to the position of Material Truck Operator on the Milwaukee District in which he was working on the claim dates. The Carrier took issue with the assertion that the crew had been abolished and that Goytowski displaced onto a different position, and continued to assert that, according to the Manager, he was working on the Cross System crew at the time. Other than the original bulletin to the Cross System crew in March 2005 and the call list showing that the Claimant had signed on for different positions at different times, there was no documentary or testimonial evidence produced to support the parties' assertions.

The Organization argues that the Agreement preserves an employee's right to preference for work on his seniority district over an employee with no seniority in that district, citing Third Division Awards 17931, 25964 and 30797, and that Carrier failed to furnish relevant documents in its possession to support its affirmative defense requiring that the claim be sustained, relying on Third Division Awards 15444, 17051 and 20892. The Carrier contends that the Organization failed to sustain its burden of proving a violation of the Agreement because assertions alone are insufficient to establish probative evidence of the alleged facts, necessitating the

dismissal of the claim, relying on Third Division Awards 24052, 20356, 20094, 19916, 10637, 10601, 10201, 9961, 9788, 8486.

A careful review of the record convinces the Board that the Organization failed to sustain its burden of establishing a violation of the Agreement in this case. As noted by the Board in Third Division Award 19916, mere statements without supporting documentation do not constitute probative evidence. In this case, the Organization's case is premised upon the fact that Goytowski no longer held a Cross System position - which may work on both the Soo and Milwaukee seniority districts under Memorandum No. 10 - on the claim dates based upon the abolishment of that crew. However, when the Carrier challenged both assertions, it was incumbent upon the Organization to provide proof that Goytowski was in a Milwaukee District position when he performed work on the Soo District on the claim dates. Because the record is devoid of probative evidence establishing without question the position held by Goytowski on the claim dates, or that he actually performed work on the Soo District, there appears to be an irreconcilable dispute of a material fact, leading to the conclusion that the Organization has not met its burden of proving a violation of the Agreement. See Third Division Award 24052. Therefore, 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 19th day of November 2009.