Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 11196
SECOND DIVISION Docket No. 10933
2-BN-EW-'87

The Second Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

Parties to Dispute: (International Brotherhood of Electrical Workers
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(Burlington Northern Railroad Company

Dispute: Claim of Employes:

1. That in violation of the governing Agreement, the Burlington Northern Railroad Company arbitrarily and capriciously refused to allow journeyman Electrician Gary H. Herrin to exercise his seniority rights on a position occupied by a junior Electrician employee.

2. That accordingly, the Burlington Northern Railroad Company should be instructed to allow Electrician Gary H. Herrin to freely exercise his seniority rights on the position of his choice and it should then be further instructed to compensate him, starting June 1, 1984, in the amount of 8 hours per day at pro rata rate, 5 days per week plus any overtime accruing to the position which he has been denied; the claim also includes restoration of or compensation for all other rights, benefits or privileges to which he is entitled and of which he has been deprived.

FINDINGS:

The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

A review of the record established the following facts.

In 1977, the Burlington Northern (BN), and the St. Louis-San Francisco Railway Company (Frisco) initiated merger discussion. As a result of those discussions, the Parties entered into a Merger Protective Agreement dated January 26, 1981. Implementing Agreement No. 1 was also signed, which set forth the guidelines which would govern the process of merging facilities at St. Louis and Kansas City.

Claimant, a Journeyman Electrician, was furloughed for non-merger related reasons on May 31, 1984, by the Burlington Northern at its Centralia, Illinois facility. His seniority is February 17, 1976, whereas the junior employee that Claimant was not allowed to displace at Kansas City, had seniority from September 5, 1978.

Under the terms of Article IV of the Implementing Agreement, limited by Article I, Section 6(b), Shelton, the junior employee, furloughed on November 28, 1983, was certified as a Frisco Merger protected dismissed employe.

Under the provisions of Article 1(e); (f); Shelton's protection period ran from the time his position in Kansas City was abolished as a result of their merger, to the expiration of the period of time equal to his continued service prior to the merger; in this instance, three (3) years and eight (8) months.

Shelton has been performing the work in question for approximately 18 months while receiving a Merger Protective Allowance from Carrier.

The issues are: 1) Whether the Frisco Merger Protective Agreement and Implementing Agreement No. 1 supercede the Schedule Rules, which gives a senior employee the right to bump a junior employee; and 2) Whether the work in question is considered "available work" or regular work.

This involves the Interpretation of Article I, Section 6(b) which states in pertinent part:

> "(b) A dismissed employee entitled to protective benefits shall be expected to maximize his earnings by accepting promotions and by attempting to secure higher-rated regular positions in the exercise of seniority or he may be treated as occupying any position on his seniority district which might be available to him. An employee who is unable to secure a regular position in the exercise of seniority shall be obligated to fill vacancies and perform relief work or any other available work within his craft and class which does not require a change in residence. If an employee is directed to perform 'available work' which is not part of a regular assignment, he shall be given a regular starting time each work week and two consecutive rest days. This shall not, however, prevent interruption of that work schedule to fill vacancies and perform relief work on regular positions." (emphasis added)

The Organization contends that the duties and responsibilities of the position held by Shelton are beyond those contemplated by the protective Agreement as "available work."

The Organization maintains that this service required by Shelton consists of a permanent, regular assignment with all the characteristics of regular work, which should be available to a senior Electrician through exercise of Schedule Agreement seniority rights.

The thrust of the Organization's argument is that the Schedule Rules are controlling in this instance.

Carrier contends the only reason Shelton is in service at all is due to the fact that the work in question is the "available work" exception created by the terms of the Merger Agreement, not by the Schedule Rule Agreement.

Carrier maintains Article I, Section 6(b) makes a distinction between "vacancy," "relief work," and "available work." Carrier argues there has not been a restoration of forces that would trigger the applicable Schedule Rules, therefore, senior furloughed employees cannot claim "available work" which is neither a vacancy nor relief work.

The Board finds that the facts, issues, circumstances and arguments herein correspond to those which were presented to Public Law Board No. 3607, Award No. 1 and Public Law Board No. 3764, Award No. 2.

The Board is persuaded that the intent and aim of the parties was clearly expressed in the specific language of the Merger Agreement with respect to available work as opposed to regular work.

PLB 3607, Award 1, held that, "The working agreement does not provide employment rights based on seniority for 'available work' or so-called 'make work' ...We find that a dismissed employee receiving Merger Protective Benefits who is assigned to do available work does not impinge upon the employment rights of others employees, under the working Agreement, including a senior furloughed employee..." exempt from the Merger Protection.

Therefore, in the instant case, the Board concurs with the reasoning in the PLB's decisions that the Merger Agreement governs over the general Schedule Agreement with respect to Carrier's right to assign work categorized as "available work."

In order to determine what characteristizes "available work" in the instant case, the Board looks to the Interpretation guidelines set forth in the aforementioned PLB's Awards. PLB No. 3607 Award 1 gives the following examples:

> "...Work of the craft which could be deferred if a protected employee were not available to perform it; maintenance work which would result in raising the standard of maintenance above the level that the Carrier would be content with but for the fact that it had protected employees available; unskilled work which may be assigned to that craft but which is not exclusively that craft's work; and work which would not be economical to perform

but for the fact that the Carrier is incurring the protective costs for these protected employees, anyway."

Also PLB 3764 Award No. 2 summarized:

"...It is clear that it cannot be said that work is part of a regular assignment merely because work is repetitively assigned, or assigned on a five day basis. This is insufficient to show that it is part of a regular assignment.

In this case, the evidence shows that the work in question was, in fact,'available work.' After the junior employees protective benefits ran out, their 'available work' positions were abolished and not replaced with regular positions or with other employees. The work force remained at the same level as it was before they were added. This is sufficient to establish that these employees were not employed as the result of a normal reaction to business requirements, but were employed to perform work which would not be performed except for the fact that they were dismissed employees and were available."

Based upon the evidence submitted in the record here, the Board concludes the work in question falls within the guidelines describes as available work in the aforementioned PLB Awards.

The record shows that Shelton has a regular starting time; two consecutive scheduled rest days; and performs duties within his Electrician's craft, including repairs, maintenance and inspections.

The point was made that these characteristics are common to regular work as well. However, it is significant the record is replete with evidence that the "available work" position in question was an established regular position prior to Sheldon's utilization as a protected dismissed employe.

The Board notes the findings in PLB No. 3764 Award No. 2 were contingent upon the abolishment of available work positions of junior employees when their protection benefits ran out. In the instant case, the junior employee's protective benefits are equivalent to three (3) years and eight (8) months. Therefore, under the terms of the Merger Agreement, this particular employe's protective benefits extend until July, 1987.

Accordingly, the Board reasons that the junior employee is entitled to perform available work that is "left over" to which he is assigned until the expiration of his protective benefits, absent any clear and convincing evidence that Carrier is using the Protective Agreement to purposefully circumvent the Schedule Agreement Seniority Rules, the Claim is denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Second Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois this 4th day of March 1987.