

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

**Award No. 14177
Docket No. 14042
17-2-NRAB-00002-150005**

The Second Division consisted of the regular members and in addition Referee Don A. Hampton when award was rendered.

PARTIES TO DISPUTE: (
(International Brotherhood of Electrical Workers
(BNSF Railway Company

STATEMENT OF CLAIM:

- “1. That in violation of the governing Agreement, Rules 10 and 37(f) in particular, the BNSF Railway Company filled the Alliance, Nebraska Electronic Technician Foreman position with an outside applicant instead of promoting one of the six (6) internal candidates, in addition to failing to meet the sixty (60) day time limit as required by Rule 24 (a) for filing Claims or Grievances.**
- 2. That accordingly, the BNSF Railway Company be required to comply with the aforementioned rules and to compensate affected Telecommunications Department employees Ken Huff, Justin Edwards, Doug Edwards, and Bryan Sherlock each the difference in pay between an Electronic Technician II and an Electronic Technician Foreman until an internal candidate is selected for the position.”**

FINDINGS:

The Second 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.

On or about January 28, 2013 the Carrier hired an outside applicant to the vacant Electronic Technician Foreman position. The Organization filed the aforementioned claim contending that the Carrier was in violation by failing to promote internally per Rule 10 and 37(f) of the Agreement. The Organization strongly argues that the Controlling Agreement does not permit the Carrier to bypass current employees and employ an applicant who is not a member of the Bargaining Unit. The Rules in question are:

“Rule 10. Promotions: Department employees in service will be given preference for promotion to appointive supervisory positions relating to the craft.”

“Rule 37. Employment Classifications: (f) All Telecommunication Foreman positions are considered to be Partial Exempt (PE), therefore are selected by management of the Carrier. Foremen shall not be subject to displacement provisions of Rule 9 and assignment provisions of Rule 22 of this agreement. All new and vacant Foreman positions will be bulletined and available for any Telecommunications employee to submit an application. Upon management’s review of the applicants, the one deemed most qualified will be awarded the position. Employees will be given full cooperation by management in their efforts to develop their supervisory skills. A Foreman may be removed by management at any time for failing to demonstrate supervisory skills without the use of a formal investigation. An employee who is removed as a foreman will exercise his seniority in accordance with Rule 9. A foreman who volunteers to remove himself from the foreman position must either bid a position per Rule 22 or displace the junior employee on the employee’s respective seniority roster or place himself on an un-bid position.”

The Organization argues that no provision of the rule permits the Carrier to bypass a current employee in favor of an outside applicant.

The Carrier counters that the language in question does not require the Carrier to promote the Senior employee, but to simply give current employees preference in hiring to Supervisory positions.

The Carrier further argues that the rule is clear and unambiguous, as the position is Partial Exempt (PE). The Carrier notes that the Organization is attempting to make “Telecommunication Employee” synonymous with “applicants.”

The Board has reviewed in detail the entire record, one that is replete with claims and counter claims regarding the interpretation of the rules in question. While the record does reflect some procedural issues, there is insufficient evidence in the record to persuade the Board to rule on procedure, therefore the Board will rule on the merits of this case.

There is indeed a past history supporting the Carrier’s interpretation of the rules in question. While past practice is, at times, an indication of the Parties intent, we would note, however, that clear and concise contract language takes precedent over past practice. In the instant case, we do not find that the language in question is clear and concise. We would also note that a litany of decisions has held that the Employer maintains all rights not specifically granted by Agreement with the Organization.

In summary, the Controlling Agreement does not require that the Carrier only consider applicants which are current employees. There is no language that specifically restricts the Carrier from considering and employing applicants which are not employees.

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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 Second Division**

Dated at Chicago, Illinois, this 21st day of February 2017.