

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Burlington Northern Railroad Company
(formerly St. Louis-San Francisco Railway Company)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to recall furloughed B&B Helper C. Shepherd to service during May, 1984 (System File B-2105/EMWC 85-7-26B).

(2) Because of the aforesaid violation, B&B Helper C. Shepherd shall be allowed pay equal to that paid to B&B Helper R. T. Hulsey from May, 1984 to April 12, 1985."

FINDINGS:

The Third 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.

The Claimant established seniority in September of 1981, and Employee Hulsey has a seniority date in January of 1982. Both the Claimant and Hulsey were displaced by senior employees on May 1, 1984. Under Rule 12, employees who are displaced are permitted to displace any junior employee from a regular assignment if they have sufficient applicable seniority.

The Claimant contacted his supervisor and advised him of a desire to exercise seniority under Rule 12 but there were no junior employees or vacancies available to which the Claimant could bump. Accordingly, the Claimant filed his name and address under Rule 78, so as to retain his seniority rights. In addition, he requested that bulletins for new positions and vacancies be furnished to him.

According to the Claimant, he submitted an application for every B & B helper position as well as other positions (totaling 23) during the time he was furloughed. Further, the Claimant asserts that he telephoned the Regional Office and discussed available positions. On each occasion, however, he states that he was advised that there were no positions available. According to the Claimant, in a telephone discussion on April 22, 1985, the Engineer mentioned that Hulsey had been working for some time and had recently been furloughed (April 12, 1985). Based upon that information, the Claimant conducted an investigation and asserts that he discovered that Hulsey had been working since May of 1984 and one of his assignments was to position #822, a copy of which bulletin Claimant states was never given to him. Moreover, Hulsey filled in on certain "short-term" vacancies and the Claimant advised that he was not aware of those vacancies.

According to the Carrier (as stated during the handling of the dispute on the property) when the Claimant was displaced in May of 1984, he was advised of three locations where he could exercise seniority; one of which was on gang 822 at Ada, Oklahoma. However, Carrier insisted that the Claimant advised that he did not desire to travel the distances involved for any of the vacancies, and when he was told that he did not have to take the position(s) in order to protect his seniority, he chose layoff and filed his name and address. Moreover, the Carrier insists that it mailed all bulletins to him and on numerous occasions, discussed upcoming vacancies.

Carrier states that Hulsey elected not to be furloughed on May 1, 1984 and, in fact, placed himself on the temporary vacancy in gang 822 at Ada, Oklahoma and successfully bid that position in June of 1984. When Hulsey was bumped from gang 822 in August of 1984, he went on a temporary vacancy on gang 827 at Clinton, Oklahoma (another one of the three locations that the Claimant refused to opt for in May of 1984) and since that time Hulsey filled numerous short-term vacancies on that gang. On April 12, 1985, Hulsey was forced to take a furlough. The Carrier asserts that between August of 1984 and April of 1985, there were six positions bulletined on gang 827 and although the Claimant received bulletins for the positions, he did not bid on any of them.

The Claimant denies Carrier's assertions and insists that he was told in May of 1984 that there were no positions available for him. He specifically denies that he received job notifications concerning the positions successfully bid by Hulsey.

The Organization concedes that this case presents a credibility dispute since the Organization and the Carrier assert divergent factual circumstances. However, the Claimant insists that the Carrier has raised an affirmative defense and thus it has the burden to present evidence to support its defense.

In its presentation to this Board, the Carrier has suggested that the claim should be dismissed because it was not timely progressed on the property. That alleged procedural defect was not raised while the matter was under review and active consideration on the property and it is too late to raise that defense to this Board in the first instance.

Proceeding to the merits, the Carrier asserts that the Organization has the burden of proof concerning the factual disagreements and it insists that the Claimant has not carried that burden.

As noted above, this case does present a significant credibility dispute and each party suggests that the other has the burden of proof. Unquestionably, the individual presenting a claim has the burden of substantiating the basis for that claim and if an affirmative defense is presented, the burden is switched. However, it is easier to state the rule than, on occasion, to identify it in a record. Here we question that the Carrier has raised an affirmative defense as such. The pertinent rule under review requires that Employees file names and addresses and they are then permitted to bid on vacancies and positions. Here, the Claimant himself has been less than precise and specific in his allegations of the specific positions that he bid on. Thus, until such time as there were more specific factual allegations presented, we question that the burden transferred to the Carrier. The Carrier has presented a reasonable explanation for Mr. Hulsey's employment over that of the Claimant.

In the final analysis, we question that the evidence preponderates to the benefit of either party and under those circumstances, the Claimant may not have a sustaining award. We will deny the claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of February 1989.