

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28697
Docket No. MS-28728
91-3-89-3-115

The Third Division consisted of the regular members and in addition Referee George S. Roukis when award was rendered.

(John T. Kain
PARTIES TO DISPUTE: (
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"This is to serve notice, as required by the rules of the National Railroad Adjustment Board, of my intention to file an Ex Parte Submission within thirty (30) days covering an unadjusted dispute between me and the Burlington Northern Railroad. This involves the question of where my established Home Zone is, as covered by the 1967 Agreement (Orange Book) Article 4 - Section 1, A and B, between the (former) Great Northern Pacific and Burlington Lines, Inc. and the BRAC employees.

As of merger date (1970), I was employed as a Clerk in Whitefish, Montana. This, then, established my Home Zone there. In 1976, I was moved by BN to Missoula, MT., as an officer and in 1979 returned to the Union ranks. On April 10, 1982, I displaced the Agency at Bonner, MT., a job which had never been covered by a Blanket Veto.

Mr. B. W. Potter, Director of Labor Relations for the Burlington Northern Railway in 1982, specifically stated in a letter written October 8, 1982, under item 3 that if the carrier does not invoke the veto provisions of Appendix L and the protected employee moves to a point outside his Home Zone, this then will become new new Home Zone. I met this criteria, and therefore feel that my home zone became Bonner, Mt. at that point in time.

The company denies this fact and have advised me that my home zone remains in Whitefish, Mt. Upon the sale of the BN Southline through Missoula, they instructed me that, in order to protect my job guarantee, I would have to return to Whitefish, which I have done pending the outcome of this claim."

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 were given due notice of hearing thereon.

The basic facts in this case are set forth as follows:

As of August 7, 1968, Claimant was employed as a Clerk in Whitefish, Montana. He worked there as of March 3, 1970, the date of the Northern Lines merger encompassing the Northern Pacific Railway, the Great Northern Railroad, the Chicago, Burlington and Quincy Railroad and the Spokane, Portland and Seattle Railway Company. Previously on November 17, 1967, an Agreement was consummated by the Transportation Communications International Union (TCU) formerly the Brotherhood of Railway and Airline Clerks (BRAC) and Carrier to insure that employees affected by the planned merger were protected.

This Agreement is known as the "Orange Book" and the protective arrangements applied to Claimant. Whitefish, Montana, was his home zone. Between July, 1970, and September 1, 1976, Claimant was employed in an exempt position at Whitefish, Montana, until he was assigned the exempt position of Temporary Material Manager at Missoula, Montana. On January 1, 1977, he was assigned the exempt Material Manager Position on a permanent basis. Carrier paid him real estate benefits and moving allowances for his move from Whitefish, Montana, to Missoula, Montana, in accordance with policies governing moves by exempt employees.

On March 13, 1979, Claimant relinquished his exempt status and returned to a BRAC bargaining unit position at Missoula.

On March 26, 1979, Claimant took a leave of absence from the clerical ranks and entered a Brakeman's training program at Missoula.

He worked as a Brakeman out of that terminal until September 24, 1979. He returned to the clerical ranks and exercised his seniority to the position of AFE Clerk at Whitefish, Montana.

On December 1, 1980, the Burlington Northern merged with the St. LouisSan Francisco Railway Company and a new protective agreement was negotiated between BRAC and Carrier known as the "Blue Book." An employee covered under the Orange Book, who wished to be covered under the "Blue Book" had the option to choose between alternative protections.

There is no indication that Claimant elected Blue Book coverage. While at Whitefish, Claimant occupied various clerical positions until July 22, 1980, when he bid on and was assigned the Lead AFE Material MC-1 Position in the Missoula District Accounting Office. According to Carrier this position was advertised on a bulletin that contained a notation referred to as a "blanket veto," which in effect stated that an employee bidding from a home zone outside the zone where the position was located would not have his home zone changed to the new zone and could not be entitled to receive any moving or real estate benefits under the protective provisions of either the Orange or Blue Books.

It was Carrier's position that since Claimant's bid out of his home zone of Whitefish to Missoula was vetoed by virtue of the notation on the Lead AFE Material Clerk MC-1 position's bulletin, his home zone remained at Whitefish, Montana.

In the interim period and up to November 1, 1987, when the Montana Rail Link Railroad completed the purchase of the Burlington Northern's "Southline," Claimant had bid on or displaced to several positions in the Missoula home zone.

Since the above sale created surplus clerks at Missoula, Claimant was notified that his position was abolished effective October 31, 1987, and he displaced a junior employee at Whitefish, Montana.

By letter dated November 23, 1987, Claimant apprised Carrier's Senior Vice President of Labor Relations that it was his understanding his home zone was changed to Missoula under the "1970 Orange Book Guarantee" and noted that he believed the information that Whitefish was his home zone was incorrect.

He indicated that if Whitefish was to remain his home zone, then Carrier was to consider the letter as official notification to obtain real estate benefits covered by Section 1 of the 1970 Merger Agreement.

By letter dated February 5, 1988, the BN Director of Labor Relations responded that Carrier records indicated his home zone was Whitefish, Montana and also pointed out that Claimant's decisions placed him in Missoula, Montana. Further, he apprised Claimant that Claimant did not meet the requirements to meet the Orange Book's moving and real estate benefits. Later by letter dated March 12, 1988, Claimant advised Carrier's Director of Labor Relations that under Appendix L of the Clerks Blue Book that when a person covered under the Orange Book has been displaced and exercises his seniority to another position outside the home zone, Carrier may request of such employee in writing not to exercise seniority. Claimant observed that this situation occurred several times to him while he was employed in Missoula and he was never requested not to exercise his seniority. He concluded that according to his interpretation of Appendix L, his home zone was automatically transferred to Missoula.

He pursued this inquiry with a further letter dated April 2, 1988, which read in part as follows:

"Please refer to the bulletin attached, dated July 1, 1975. This includes the Agency at Bonner, Montana, and - as you can see - contains NO BLANKET VETO. After being displaced from the Missoula Accounting office in 1982, I exercised my seniority to obtain this position. No notification was ever given to me as per Blue Book - Appendix L, Section 2. Obviously, my home zone changed to Missoula at that point in time."

By letter dated May 18, 1988, the Director of Labor Relations responded, in part:

"In view of the specific circumstances of your case, this letter will confirm Carrier's intent to provide any applicable moving and real estate benefits under Article IX and X of the 'Orange Book' protective agreement to which you may be entitled in conjunction with this particular transaction."

The Director further noted a letter would follow from the EEO Manager, explaining Claimant's benefits and the conditions under which they apply.

By letter dated May 27, 1988, Claimant wrote the Director of Labor Relations that it was "refreshing" the Director confirmed his home zone was Missoula and therefore entitled to relevant protective benefits under the "Orange Book" and the labor contract.

He also wrote, (in part):

"Having now established with you that my home zone is in Missoula, I am now requesting by this letter that I be released from my position at Whitefish and be returned to my home zone of Missoula with the appropriate guarantees in my home zone."

The Director of Labor Relations disputed his understanding and answered by letter dated June 21, 1988, as follows:

"You assert in your letter that the Carrier has advised you in its letter of May 18, 1988, that your home zone is Missoula, Montana. Your assertion is incorrect. If you will reread the letter, it simply advised you that the Carrier was willing to provide you with the moving and real estate benefits of the 'Orange Book.'"

As previously discussed with you and indicated in the Carrier's letter of February 5, 1988, your original placement in the Missoula home zone was as a result of your bid from Whitefish to Missoula to a position under blanket veto. Your exercise of seniority to a position at Bonner, Montana did not, and would not, have any effect, as Bonner is within the Missoula home zone. Your home zone, therefore remained, and still remains, in Whitefish, Montana.

As indicated in my letter of May 18, 1988, however, the Carrier is willing to provide you with the applicable moving and real estate benefits under Article IX and X of the 'Orange Book.' Please advise Margaret Townsend promptly if you wish to proceed with the necessary paperwork in conjunction with this move. By copy of this letter, I am advising her that if she does not hear from you within the next sixty days, the offer is null and void."

In the meantime by letter dated June 14, 1988, Claimant filed a Claim with Carrier's Superintendent wherein he charged that since he was directed to return to Whitefish, Montana, this action violated Orange Book, Article VII (Change in Residence), Section No. 1-d and Blue Book Appendix L No. 2. He claimed travel and meal expenses amounting to \$256.04 per day for each day the asserted violation occurred beginning May 18, 1988. By letter dated June 27, 1988, Carrier denied the Claim and set forth the following reasons for its denial (in part):

"A review of my records indicates you were regularly assigned at Whitefish, Montana as Relief Clerk for the period August 7, 1968 through July 1, 1979, when you were placed as a Material Department Supervisor at the same location.

Clearly then, you established your Orange Book Protection in your Orange Book Zone at Whitefish. Records further indicate that you returned to the Clerk's Craft on March 13, 1979 to the Extra Board at Missoula, Montana, just prior to entering the Switchmen/Brakeman's Training Class at the same location. On September 24, 1979, you gave up your Switchman/Brakeman Seniority and displaced AFE Clerk at Whitefish, Montana, where you remained until July 22, 1980, when you were the successful bidder on Bulletin WE-576-80, Lead AFE Material Clerk at Missoula District Accounting Office.

When your position at Missoula was abolished as a result of the MRL Line Sale, October 30, 1987, you did exercise your seniority back to your Home Zone at Whitefish, Montana on Position No. 202, displacing D. Nygaard."

By letter dated July 11, 1988, Claimant responded (in part):

"Upon being displaced from Missoula, I exercised my seniority and bumped R. W. Clark from the Agency at Bonner, MT. This position had never been blanket vetoed per Appendix L. Please see an attached copy of the original bulletin verifying this fact.

Further, the Carrier DID NOT exercise their option per Appendix L and notify me that I was being denied the right to exercise seniority for a period of ten (10) calendar days, during which time they could request me in writing not to exercise my seniority.

Mr. B.W. Potter, former Director of Labor Relations, specifically addressed this problem, saying that if the Company does not invoke the veto provisions of Appendix L and the protected employee moves to a point OUTSIDE HIS HOME ZONE, the new place will become his Home Zone."

The Superintendent responded by letter dated August 3, 1988 wherein he stated:

"As previously reviewed with you, you initially left your home zone of Whitefish, Montana, through a voluntary bid and subsequent move to a vetoed position in the home zone of Missoula, Montana. You have indicated in your letter that you subsequently exercised your seniority to displace R. W. Clerk (sic) at Bonner, Montana, on a position within the Missoula, home zone. The provisions of Appendix L of the current Schedule Agreement (Blue Book) requiring protected employees to change their residence to a point outside their home zone, as referred to in your letter, would not be applicable in the instant circumstances."

At this point Claimant apprised the Superintendent by letter dated August 8, 1988, that he was forwarding the Claim to the General Chairman of the "Transportation Union" for further processing and the Local Chairman at Whitefish, Montana appealed the Claim by letter dated August 19, 1988. It was the Local Chairman's position that when Claimant exercised displacement rights over the Bonner, Montana Agent-Telegrapher position in 1982, Claimant's home zone became Bonner, because Carrier did not veto his displacement.

The Organization noted that Bonner was within the 30 mile home zone of Missoula, Montana, and asserted that the Director of Labor Relations office recognized this when they offered to pay Claimant's moving expenses from Missoula to Whitefish. The Local Chairman also stated the Claim was supported by Appendix L of the Blue Book Agreement.

By letter dated September 23, 1988, the Superintendent wrote, (in part):

"As I understand the facts of this claim, Material Clerk John Kain was regularly assigned at Whitefish, Montana, at the consummation of the original Northern Lines Merger, Whitefish is his home zone and he is a Northern Lines protected employee under provisions of the Orange Book Agreement. The record indicates that on July 22, 1980, the claimant left his Relief Manifest Clerk Position at Whitefish, which was assigned under provisions of Bulletin 47-80 and bid Bulletin WE576-80 at Missoula, Montana. It is agreed by all that that bulletin contained standard veto provisions.

From Missoula, the claimant subsequently displaced the Agent/Telegrapher, at Bonner, Montana, which remains within the Missoula Home Zone. It is my understanding, that provisions of Appendix L, of the current schedule agreement (Blue Book) require protected employees to change their residence to a point outside their home zone. Clearly, the claimant was not required to do so in his displacement of R. W. Clark at Bonner, and it remains my position that his home zone is and remains at Whitefish, Montana...."

This letter was answered by the General Chairman on November 14, 1988. He wrote, (in part):

"The circumstances herein are that on July 22, 1980, Claimant was awarded position of Lead Material Clerk at Missoula, Montana, as advertised on Bulletin WE-576-80. Upon being displaced therefrom in 1982, he displaced Agent R. W. Clark at Bonner, Montana. Such displacement was not vetoed by Carrier pursuant to the provisions of Article VII of the November 17, 1967 Protective Agreement and Appendix L of the December 1, 1980 Working Agreement. Because Claimant's displacement was to a point over thirty miles from his home zone (Whitefish, Montana) he then acquired a new home zone (Bonner, Montana).

With the advent of MRL, Claimant was unable to hold a position with Burlington Northern in his home zone and subsequently filed for protective benefits under the November 17, 1967 Agreement, which were denied by Carrier on the basis that his displacement at Bonner was within thirty miles of his work location at Missoula, which was acquired under a blanket veto on Bulletin WE-576-80. Such reasoning is rejected by the Employees."

By letter dated December 29, 1988, Carrier's Assistant Vice President of Labor Relations denied the General Chairman's appeal and set forth the following reasons for the denial (in part):

"This dispute stems from the fact the Carrier has determined claimant's home zone to be Whitefish, Montana. Claimant Kain is an 'Orange Book' protected employee with a seniority date of May 14, 1956. He contends his home zone should be Missoula, Montana, however, several undisputed facts clearly prove Mr. Kain's home zone is Whitefish. Claimant was employed as a Material Supervisor in Whitefish at the time of the Northern Lines merger in 1970. Under the provisions of the 'Orange Book,' Mr. Kain's home zone became Whitefish. Mr. Kain worked several different positions for the Burlington Northern between 1970 and July 22, 1980. On that date, claimant bid on and was assigned Bulletin WE-576-80, Lead AFE Material Clerk in Missoula, Montana. This bulletin contained the 'Blanket Veto' provisions and Mr. Kain's home zone was not changed from Whitefish. On April 10, 1982, claimant displaced a position in Bonner, Montana. Since Bonner is within 30 miles of Missoula, and Claimant Kain had been 'vetoed' when he bid to the Missoula home zone, no additional veto of claimant's moves within the Missoula home zone was necessary. Even after displacing to Bonner, claimant's home zone remained Whitefish."

The Claim was conferenced on January 30, 1989, and then appealed to the Board in accordance with the pertinent provision of the Railway Labor Act, as amended.

Ex Parte Submissions were filed with the Board and a Referee Hearing was held on July 27, 1990 at the NRAB offices in Chicago, Illinois.

In considering this dispute there are several points this Board is compelled to make.

Firstly, the parties are constrained by the Railway Labor Act, as amended and Circular Rule 1, of the National Railroad Adjustment Board to incorporate in their Submissions only the materials and position asserted on the property. Neither side is permitted to offer new arguments or advance new positions that were not considered during the on-situs appeals process. In the Submission before us, Carrier has raised procedural arguments that were not considered on the property namely that Claimant failed to handle his dispute in accordance with the procedures set forth under the provisions of

Article XII of the November 17, 1967 Agreement and his parallel failure to process the Claim in accordance with the time limitations set forth in Rule 59 of the parties controlling Agreement. It also contended that he did not have the right to initiate an intermediate appeal which was the agreement prerogative of the Local Chairman. These assertions are new positions and not properly before the Board.

Specifically as we review the on-situs appeals correspondence, the central question at issue is whether Whitefish, Montana, is Claimant's home zone. Carrier contends that when Claimant bid on and was assigned the Lead AFE Material Clerk MC-1 position in the Missoula District Accounting office, the position was advertised on a bulletin containing a "blanket veto" (Bulletin WE-576-80). Thus, since he bid out of his home zone of Whitefish, the blanket veto notation on the bulletin, his home zone remained at Whitefish, Montana.

Contrawise, Claimant initially maintained that his home zone was Missoula, Montana, (see June 14, 1988 claim letter) and then indicated that it should be at Bonner, Montana. (See, appeal letter of July 11, 1988) The Local Chairman's August 19, 1988, appeal letter requested his home zone be located at Missoula, while the General Chairman's appeal letter dated November 9, 1988, requested his home zone be located at Bonner.

To be sure there is a stand off in positions, but we are not convinced that Claimant proved his home zone was in Missoula, Montana.

Firstly a review of the initial informational correspondence particularly Claimant's November 23, 1987, letter indicates Claimant was not sure, though he believed Whitefish was not his home zone. Secondly, he read into the Director of Labor Relation's May 18, 1988, letter a conclusion not supported by the contents of the letter. This conclusion was that the Director confirmed his home zone was in Missoula.

Thirdly, as the claim progressed on the property Claimant changed his position with respect to the location of his home zone indicating that it was Bonner and/or Missoula. In the Superintendent's letter of September 23, 1988, which was written in response to the Local Chairman's August 19, 1988, letter, the Superintendent noted in the second paragraph "it is agreed by all that that bulletin contained standard veto provisions." This statement was never addressed in subsequent rebuttal correspondence.

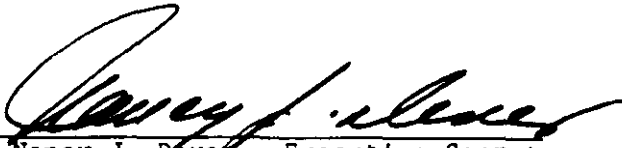
In comparing the parties respective handling of the Claim on the property and comparing the relative argumentative positions, we find Carrier's position consistently more persuasive. Consequently, since Claimant has not proven his home zone was Missoula or for that matter, Bonner, Montana, then we are constrained to accept Whitefish as his home zone. As the moving party Claimant has the responsibility to prove his claim, but we are not convinced by this record that he met this requirement.

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 28th day of February 1991.