

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 32398
Docket No. MW-32078
97-3-94-3-467

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Terminal Railroad Association of St. Louis)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to assign Mr. O. Rodriguez to the track foreman's position he submitted a bid for, which was advertised within Bulletin No. 14 dated May 17, 1993, and instead assigned the position to Mr. J. J. Wilson who did not submit a bid for said position (System File 1993-30/013-293-15).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant O. Rodriguez shall be assigned to the track foreman's position involved here, with seniority as of June 3, 1993, and he shall be compensated for all wage loss suffered beginning June 3, 1993 and continuing until he is assigned to the track foreman's position in question."**

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.

The Carrier issued Bulletin No. 14 on May 17, 1993 for Track Foreman, System Gang #1. Beginning on June 3, 1993, the Carrier force assigned employee J. J. Wilson who held Track Foreman seniority to the position. The instant claim was filed on behalf of the senior employee who bid for the position. The Organization argues that there is no Agreement provision to force assign an employee who did not bid the position in preference to those who properly bid. The Organization insists that the Agreement was violated when the Claimant, who had properly placed a bid seeking promotion was denied his seniority rights and the Carrier improperly assigned the position to Track Foreman Wilson who did not bid. The Organization argues that such action had never before occurred.

The Carrier argues that its action has Agreement support from Rule 8 which states that:

"Vacancies or new positions will be filled by employees holding seniority in the rank in which the vacancy or new position occurs. If not so filled, they will then be filled by employees in succeeding lower ranks in that seniority group, subject to the provisions of the promotion rule."
(emphasis by Carrier)

The Claimant held no seniority as Track Foreman and was therefore not denied his seniority. Under the first sentence of the Rule supra, the employee holding the Foreman's seniority was assigned.

In addition, the Carrier maintains agreement support from the Memorandum of Agreement effective July 1, 1989 which established a "force rule" applicable hereto. The Carrier holds that after June 19, 1989, all employees had to protect their seniority, with exception, inapplicable herein. In this case, Track Foreman Wilson, with seniority date of April 21, 1992, had Foreman's seniority and was properly assigned in line with his seniority.

The Board has carefully read the applicable provisions of the Agreement including Rule 8 and 13 in particular. We have also carefully read the Memorandum

of Agreement between the Terminal Railroad Association of St. Louis and the Brotherhood of Maintenance of Way Employees dated July 1, 1989. We note that both parties disputing the language, applicability and meaning of the Memorandum are the negotiators and signatories of the agreement.

The full Agreement has no language force assigning employees to positions. While Rule 8 supra, includes the above Carrier stressed language, when coupled with the bulletin provision Rule 13 and the full Agreement, it contains no force assignment right. Rule 13 states that the vacancy will be bulletined "in an effort to have the successful bidder available when the position starts" and contains other applicable language to include posting to permit employees to have knowledge of and file for such positions before "assignment of successful bidders." Rule 8 gives seniority rank priority, but does not force an employee who did not bid to take the position.

The Board has studied the language of the Memorandum for evidence of applicability to support the Carrier's decision and we can find none. The Memorandum does not apply to Mr. Wilson as he did not attempt displacement. We also find no rebuttal to the Organization's assertion that:

"There has never been a (sic) employee in the Track Department that has ever been placed on a job that he did not place a bid on, when there were other employees that did place bids on the same job."

The Board finds that the Carrier's position lacks merit. Neither the Agreement nor Memorandum contains clear language permitting force assignment under the conditions of this claim. The position was bulletined and could be filled by applicants first who held seniority in rank and then by lower ranks having appropriate ability and seniority. The Claimant's rights were violated when the Carrier force assigned an employee who did not bid the position. The 1994 Seniority Roster indicates that Claimant was awarded Foreman Seniority on July 22, 1993 and the Board finds that the claim is payable until such date.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 30th day of December 1997.