

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35185
Docket No. MW-32432
00-3-95-3-329**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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 improperly removed Mr. O. Rodriguez’ track foreman’s seniority because he did not submit a bid for one of the track foreman positions advertised within Bulletin Nos. 15 and 16 dated April 21 and 22, 1994 and instead chose to remain on his assigned machine operator position (System File 1994-30/013-293-15).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. O. Rodriguez’ name and foreman’s seniority shall be reinstated in its proper place within the appropriate seniority roster (s) as listed prior to the date of the incident 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.

This claim involves the issue of whether the Carrier properly removed the Claimant's seniority as a Foreman when he refused to bid on a Foreman's position in response to Bulletin Nos. 15 and 16 on April 21 and 22, 1994, but chose to remain working as a Machine Operator.

The Claimant established seniority as a Track Foreman on July 22, 1993 and was working as a Machine Operator at the time of the Bulletins in issue. After Bulletins 15 and 16 were posted for the positions of Track Foreman and Relief Track Foreman on System Gang No. 3 respectively, the Claimant was informed by his Supervisor that if he did not bid on these positions, his Foreman seniority would be eliminated. He submitted a written protest on April 22, 1994 indicating that he did not feel that he had to take the position due to the fact that a younger man had bid on the position. On May 6, 1994, the Carrier posted a written announcement that the bulletined positions had been assigned to two named employees.

In the initial claim filed by the Organization on June 5, 1994, it protested both the Supervisor's threat of loss of Foreman seniority and the actual removal of the Claimant's name from the roster as a violation of the July 1, 1989 Memorandum of Agreement (dealing with dovetailing of seniority rosters), paragraph 2 Note, which states, in pertinent part:

"NOTE: It is understood that employees with established seniority dates on both the Foreman's and Large Machine Operators' Seniority Rosters on the signatory date of this Agreement will not be assigned nor will they be required to exercise seniority (bid or bump) to Foremen positions in order to retain both seniority dates. However, if, after the effective date of the Agreement, such employees voluntarily exercise seniority (bid or bump) to a Foreman's position, they must, thereafter, exercise their seniority rights in such rank before displacing employees with less seniority rights in succeeding lower ranks (including Group I(b) established herein) in order to retain their Foreman's seniority consistent with the Schedule Agreement."

During the processing of this claim on the property, the Organization argued that this provision protects the Claimant's Foreman seniority in this situation, as he

chose to stay in a Machine Operator position and did not voluntarily choose to exercise his seniority to the Foreman's position. It contended that the Carrier could not unilaterally force assign an employee into a position subject to bid, noting in its April 4, 1995 letter confirming the conference, that the Carrier had employees qualified and willing to take the positions in issue, and had assigned them to other employees. The Organization asserts that this claim is covered by Third Division Awards 32398, 33209, 33342 and 33475 involving the same issue between these parties on this property.

The Carrier contends that Rules 8(a) and 13(f) support its position that it was permitted to force assign the Claimant to the Foreman's position because he was the senior furloughed Foreman, and that his refusal to accept such assignment effectively forfeited his seniority from the Foreman's roster. In its Submission to the Board, the Carrier asserts that it received no bids "from Foremen working in such rank at the time." It differentiates this case from the others cited on the basis that no other bids to Bulletin Nos. 15 and 16 were received.

The parties agree that this is the last in a series of cases submitted to the Board concerning the application of the July 1, 1989 Memorandum of Agreement in a situation involving forfeiture of Foreman's seniority. A careful review of the record convinces the Board that this case is on all fours with the prior cases decided by the Board in Third Division Awards 32398, 33209, 33342 and 33475 involving the same parties. The Board, therein, found that there was no Agreement language permitting the force assignment of employees to positions, that assigning a bulletined position to an employee who did not bid was improper, and that the Memorandum of Agreement did not apply to situations where the involved employee did not attempt displacement.

While the Carrier attempts to distinguish this case on the basis that no bids were received in response to Bulletin Nos. 15 and 16, the record does not support such an assertion. On the property both the Claimant, in his April 22, 1994 written protest, and the Organization in its April 4, 1995 letter confirming conference, state that there were other interested employees who bid on the positions. The Carrier never disputed these assertions on the property, and, in fact, awarded the bids to two named employees on May 6, 1994. It was not until its Submission to the Board filed in September 1995 that the Carrier first mentions the absence of bidders, and only to the extent that it avers that there were no bidders from the ranks of working Foremen. This statement comes too late in the proceeding to be considered by the Board, and, in any event, does not sufficiently rebut the Organization's statements that there were,

in fact, interested and qualified bidders for the positions in issue at the time of the Bulletin postings.

Thus, we find that the rationale of the Board in the cases cited above applies equally to the instant case, that the holding is not palpably erroneous, and that such precedent requires that the instant claim be similarly sustained.

AWARD

Claim sustained.

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 20th day of December, 2000.