

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35188
Docket No. MW-32840
00-3-96-3-170**

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: (
(Elgin, Joliet and Eastern Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier awarded a motor car repairman operator position advertised in Bulletin No. 9624 to junior employee C. Madura instead of Mr. A. McCoy (System File SAC-3-95/TM-2-95).**
- (2) As a consequence of the aforesaid violation, Mr. McCoy shall be assigned to the motor car repairman position and he shall ’*** be compensated for the difference in pay between his position in the Track Subdepartment and that of Motor Car Repairman from February 6, 1995 until he assumes said position.”**

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 propriety of the Carrier's hiring of a new employee to assume the position of Motor Car Repairman (MCR) in the Scales and Work Equipment subdepartment, rather than the Claimant, a Roadway Machine Operator in the Track subdepartment, who bid on the January 30, 1995 bulletin advertising the MCR position.

Rules 15 and 16 of the Agreement define the seniority rights of BMW employees as confined to the subdepartment and group within which they work. There are three Subdepartments - Bridge and Building (B&B), Track and Scales and Work Equipment (S&WE). The MCR position in issue was in Group 2(c) of the S&WE Subdepartment. The Claimant was employed in Group 2(b) in the Track Subdepartment and held no seniority in the S&WE Subdepartment. The Carrier received no bids for the MCR position from employees within the S&WE or subgroup involved.

The issue herein deals with which of the following two sections of Rule 32, Assignments, applies in filling the instant vacancy:

- “(a) Except as provided in paragraphs (b) and (c) of this rule, vacancies or new positions will be filled first by employees holding seniority in the group and rank in which the vacancy occurs; if not so filled, they will be filled by qualified employees in succeeding lower ranks in that seniority group in accordance with Rule 27 (a) (Making Promotions). In the event that vacancy or new position is not so filled by employees in the seniority group in which it occurs, then it will be filled by qualified employees from other seniority groups in the respective subdepartment desiring it before hiring new men. Employees so assigned will retain their seniority rights in their respective groups from which taken.
- (b) Vacancies or new positions, except those of motor car repairmen, (permanent vacancies in motor car repairmen positions shall be filled in accordance with Memorandum of Understanding of November 8, 1939 (Supplement No. 1 between committees representing Shop Craft and Maintenance of Way Employees and the EJ&E Railway Company) in the Scales and Work Equipment Subdepartment will be filled by employees holding seniority in the

group and rank in which the vacancy or new position occurs. If not so filled, they will be filled by qualified employees in succeeding lower ranks in the subdepartment. In the event the vacancies or new positions are not filled in the Scales and Work Equipment Subdepartment, they will be filled by qualified employees from Group 2 Track Subdivision desiring same or qualified employees desiring same from the Bridge and Building Subdepartment and the Track Subdepartment in that order before hiring a new employee. Employees so assigned will retain their seniority rights in the respective other groups and subdepartments from which taken."

The Organization argues that Rule 32(b) applies, and because no S&WE employees bid on the position, the Claimant should have been awarded the position prior to the Carrier hiring a new employee. It contends that the exception in Rule 32(b) is clearly limited to the rights of furloughed Machinists to fill vacancies in MCR positions, and because there were no such furloughed Machinists at the time of the bulletin, it does not apply. The Organization avers that, under Rule 29(a), the Claimant should have been afforded an opportunity to qualify for the MCR position after it was awarded. That Rule provides:

"Employees awarded bulletined positions will be allowed thirty (30) working days in which to qualify for such position and failing to do so will be notified within seven (7) calendar days of the expiration of the thirty (30) working day qualifying period at which time they will have the right to return to their former position without loss of seniority."

The Carrier initially contends that Rule 32(b) does not apply for two reasons. First, because MCR positions are specifically excepted from its coverage. Second, because the Claimant is not a qualified MCR, he would not be entitled to consideration even if no S&WE subdepartment employee bid on the posting. It notes that the method of filling MCR vacancies in Supplement 1 is not applicable because there were no furloughed Machinists at the time of the bulletin in issue.

The Carrier then argues that because Rule 32(b) does not apply, Rule 32(a) must govern as the method for filling the position. It asserts that such provision recognizes first the right of employees within in the same group and rank, next the right of

employees in the same group but lower rank, and lastly, other groups within the same subdepartment. The Carrier asserts that because the Claimant was not in the S&WE subdepartment, he has no rights to the MCR position under Rule 32(a), and it was entitled to hire a new employee.

The Carrier finally contends that, even if Rule 32(b) applied, the Claimant was not eligible for the MCR position because he was not qualified for such position. It disagrees that Rule 29(a) gives an unqualified employee the right to obtain a bid position and then a 30-day qualifying period to prove himself. Rather, it notes that on three separate occasions in Rule 32(b) it requires that non-S&WE bidders be qualified at the time of the bid, and argues that Rule 29(a) is intended to permit the Carrier the opportunity to test such qualification during a 30-day period.

A careful review of the record and language of the applicable Agreement provisions set forth above convinces the Board that the Carrier's argument has merit. Rule 32(b) clearly excludes the position of MCR in the S&WE subdepartment from its coverage. Further, even if it were applicable to the bulletined position herein, there is no contention that the Claimant was qualified to assume the MCR position at the time of his bid. Rule 32(b) makes clear that, if a vacancy or new position in the S&WE is to be filled by an employee holding seniority outside the group and rank of such position, that employee must be qualified on the position, whether employed in the S&WE or outside that subdepartment. The general qualifying period language of Rule 29(a) cannot be read to negate the specific qualification requirement within Rule 32(a) and (b).

Further, the Claimant would not be entitled to the bulletined position under Rule 32(a), if that is the applicable provision for filling the MCR vacancy in issue. That provision does not require the Carrier to go outside the subdepartment in which the vacancy occurs, here the S&WE, prior to hiring a new employee. Because the Claimant held seniority only within the Track subdepartment, he had no rights to the MCR position in S&WE under the terms of Rule 32(a).

Because the Organization failed to establish the Claimant's right to the MCR position under either Agreement Rule, the claim must fail.

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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 Third Division**

Dated at Chicago, Illinois, this 20th day of December, 2000.