

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37464
Docket No. MW-36447
05-3-00-3-719

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employes
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it abolished Safety Assistant A. Bertrand’s position on September 3, 1999 before the duration of the term expired and without referring the removal of Mr. Bertrand from said safety assistant position to the Safety Advisory Committee (System File MW-00-4-BNSF/1500-0014 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Bertrand shall now be compensated for the difference between the safety assistant rate of pay and the relief bridge tender rate of pay of two dollars and fifty-two cents (\$2.52) per hour for all straight time hours beginning September 3, 1999 and continuing through July 13, 2000.”

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 instant claim involves a dispute between the parties over the abolishment of a Safety Assistant position held by the Claimant, from July 13, 1998 to September 3, 1999, the effective abolishment date. The Organization contends that pursuant to a December 17, 1997 Memorandum of Understanding, the employees awarded several Safety Assistant positions bulletined on June 1, 1998 were entitled to retain their positions for two years, from the July 13, 1998 effective award date to July 13, 2000. The abolishment of the Claimant's position precluded him from fulfilling his two-year commitment, the Organization argues.

The Organization points out that the record established that the Claimant applied for the position advertised for the territory designated as the Iowa Jct. – Avondale Operating Division, represented by BMW General Chairman Sanchez. The Organization essentially argues that once the position designated as the Iowa Jct. – Avondale Safety Assistant was advertised and awarded to the Claimant, the Carrier's unilateral abolishment of the position, without referring the matter to the Safety Committee and before the Claimant had served his two years, violated the Memorandum of Understanding.

The Carrier argues that, pursuant to the above Memorandum of Understanding, its obligation only extended to establishing one Safety Assistant per operating division, in this case, the Gulf Operating Division, 180 miles of which consisted of the Iowa Jct. – Avondale line. According to the Carrier, after the Iowa Jct. – Avondale position was abolished, a BMW-represented Safety Assistant still remained on the Gulf Operating Division, under the jurisdiction of BMW General Chairman Hemphill. Thus, the Carrier stresses that it did not violate the Memorandum of Understanding when it abolished the position of second Safety Assistant on the Gulf Operating Division once "it became clear very quickly that a Safety Assistant was not needed for the Iowa Junction to Avondale line."

The Board carefully reviewed the entire record as well as the arguments set forth by the parties. The relevant paragraphs of the December 17, 1997

Memorandum of Understanding, which is central to the case, are quoted below, as follows:

"II. Safety Assistants

- A. BNSF will establish at least one full-time maintenance of way safety assistant position for each operating division. An employee holding such a position will be responsible for coordinating safety meetings, training and the like on the operating division he covers (which may cover more than one seniority district). The safety assistant shall report to the division manager of safety and rules.**
- B. Each safety assistant position will be filled by an employee designated by the BMW general committee representing employees on the covered territory. Each safety assistant shall serve for a term not to exceed two years. Each position vacated by an employee assuming a safety assistant position will be placed up for bid.**
- C. Each full-time safety assistant shall be paid the headquartered section foreman's rate of pay or the employee's previous rate of pay, whichever is higher, and will otherwise perform his/her duties under applicable schedule rules. Each safety assistant position shall be deemed headquartered at the BNSF station closest to the safety assistant's place of residence.**
- D. Safety assistants must be willing to receive and complete at least 40 hours of safety training per year.**
- E. A safety assistant shall not be called to testify or otherwise furnish evidence of any kind in any formal investigation or other disciplinary proceeding not involving charges against that employee.**

- F. Any party wishing to remove an employee from a safety assistant position before expiration of his term may refer the matter to the safety advisory committee."

Initially we note, from our review of the Safety Assistant advertisement bulletin discussed above, that the Iowa Jct. – Avondale position did appear to have been advertised in a manner which perhaps erroneously suggested that it was an operating division of its own. However, despite the confusion that may have been caused by the Iowa Jct. – Avondale line not being identified as part of the Gulf Operating Division, the on-property correspondence exchanged by the parties indicates that the Organization did not contest the abolishment from the standpoint that eliminating the Iowa Jct. – Avondale position left the Gulf Operating Division without a BMW-represented Safety Assistant. For example, we note that in certain correspondence the Organization referred to the Iowa Jct. – Avondale line as "Prior Rights Seniority Zone 1" and never contended that the Iowa Jct. – Avondale line constituted a Carrier operating division. We understand that the real crux of the Organization's position is that once the two Safety Assistant positions were bulletined and assigned on the Gulf Operating Division, the Carrier could not unilaterally abolish one of those positions.

From our analysis of the facts and circumstances in light of the relevant Memorandum of Understanding provisions quoted above, we agree with the Organization's position. It is clear to the Board that the Carrier's requirement, under paragraph A was to establish at least one full-time maintenance of way Safety Assistant position for each operating division. By the Carrier's own admission, pursuant to the safety bulletin posted on June 1, 1998, it did create two positions for one operating division by establishing one position for the Avon Jct. – Avondale portion of the Gulf Operating Division and a second position for the balance of the Division (1,100 track miles). We also note that the 14 months during which the Claimant held the position was not an insignificant amount of time. That fact undermines the Carrier's position that its decision to abolish the job was made "soon after" its establishment, on the Carrier's premise that it was operationally unnecessary to retain it. "Soon after" in this context cannot mean 14 months, we hold.

Furthermore, from our review of paragraph B, above, we find that the language therein is absolute, and that it unequivocally provides that each Safety Assistant shall serve a two-year term. There is no dispute that the abolishment of

the supposedly duplicative position held by the Claimant resulted in his inability to complete his two-year term. Thus, the Organization's contention that the abolishment prevented the Claimant from fulfilling his two-year commitment as a Safety Assistant, at a higher rate of pay, in violation of paragraph B, is supported by the clear language of the parties' Memorandum of Understanding, we rule.

Additionally, paragraph F, above, the third provision relevant to the Board's resolution of the instant dispute, states that any party wishing to remove an employee before the expiration of his term may refer the matter to the committee. We note that the inclusion of the word "may" as opposed to "shall" does not require either party to raise such issue before the committee, and that the word "abolishment" furthermore does not appear in paragraph F, either, we note. The Carrier urges the Board to interpret this provision in its favor, by ruling that if it had a right to remove, it surely could likewise abolish the duplicative position without any resulting violation of the Agreement, we understand. As numerous Boards have previously held, however, agreement language is to be applied as written. We therefore disagree with the Carrier's interpretation of paragraph F as, essentially, an attempt to add language to that paragraph beyond any reasonable reading of its terms.

The Memorandum of Understanding is therefore devoid of any provision addressing the abolishment of Safety Assistant positions. We have no basis for concluding that "removal" and "abolishment" should be read synonymously under these circumstances. We disagree with the Carrier's reading in that manner.

Again, returning to paragraph A, our interpretation of the words "at least," found in paragraph A, convinces us that the Carrier could establish more than one Safety Assistant position on a particular operating division. The record before us indicates that this was exactly the situation that occurred in the current case, as explained above. Paragraph A did not restrict the Carrier from establishing more than one position per operating division, even though it clearly was not required to do so. Thus, in 1998 this position was properly created and filled, we rule.

Second, applying paragraph B to the facts and circumstances herein, once the Iowa Jct. - Avondale position had been bulletined and filled by the BMW General Committee representing employees on the covered territory, given what we previously have stated was the clear language of paragraph B, the Claimant was then expected to serve a term not to exceed two years. Thus, as we read paragraphs

A and B together, once the Claimant was selected for what turned out to be one of two Safety Assistant positions on the Gulf Operating Division, the Claimant had an express entitlement, under paragraph B, to serve out his two-year commitment on the higher rated position, we ultimately conclude.

For the reasons set forth above, we rule that the Organization satisfied its burden of proving that the Carrier violated the Memorandum of Understanding when it abolished the Iowa Jct. – Avondale Safety Assistant position held by the Claimant under the circumstances present in this case. Thus, the claim is sustained, and the Claimant is entitled to the monetary relief requested in Part (2) above.

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 19th day of April 2005.