

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37641
Docket No. CL-38083
05-3-03-3-566**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood (GL-13054) that:

- a) Carrier violated the rules of the current Clerk’s Agreement at Topeka, Kansas on August 31, 2000 when it failed and/or refused to call B. S. Raine, to protect a short vacancy of Position No. 5025; and
- b) Claimant B. S. Raine shall now be compensated eight (8) hours’ pay at the rate of Position No. 5025 for each work day of the position commencing August 31, 2000 and continuing until the short vacancy has expired, in addition to any other compensation Claimant may have received for these days.”

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 basic facts of this case are not in dispute. On August 31, 2000, a short vacancy existed on Coordinator Position No. 5025. The vacancy also expired on that date. Position No. 5025 is assigned to work from 7:45 A.M. to 3:45 P.M. The Claimant was the regularly assigned occupant of Guaranteed Extra Board (GEB) Position No. 6448 in the Crew Management Office in Topeka, Kansas. The Carrier did not call the Claimant to fill the short-term vacancy. Rather, it called overtime.

On October 8, 2000, the Organization filed a claim on the Claimant's behalf. In that claim the Organization contended that the Claimant, as the first out, qualified employee on the GEB, should have been called to do the work at issue. The Organization cited Appendix 10 in support of its position. In its October 16, 2000 denial of the claim, the Carrier insisted that Appendix 10 was not the controlling language in this situation. Instead, the Carrier maintained, because Coordinator Position No. 5025 is a "Promotion, Assignment, and Displacement" (PAD) or Partially Excepted (PE) position, the applicable section of the Agreement is Appendix 12. That language, the Carrier contended, gives Management the right of selection concerning the filling of such assignments.

The Agreement language at issue in this matter reads as follows:

"Appendix 10, Article 13:

When a short vacancy exists, and if it is to be filled, qualified employees on GEB positions in that zone will be used to fill such vacancy before applying the provisions of rule 14 provided the employee is available at the straight time rate. Employees on GEB positions shall have no claim to work more than 40 straight time hours in their work week beginning with Monday.

Appendix 12, Article 1:

Partially excepted positions will be identified as "PE" positions and will not be subject to the promotion, assignment or displacement rules of the Clerks' Agreement, but the incumbents of partially excepted positions are subject to the other rules thereof, except as otherwise agreed. Assignments to vacancies on these positions may be made without regard to the promotion rule, with Management having the right to select the employees to be assigned thereto. Assigned

employees cannot be displaced from these positions through the exercise of seniority rights.

Rule 8 – Promotions, Assignments, Displacements

Employees covered by these rules shall be in line for promotion. Promotions, assignments and displacements under these rules shall be based on seniority, fitness and ability; fitness and ability of applicants being sufficient, seniority shall prevail.

NOTE: The word “sufficient” is intended to more clearly establish the prior rights of the senior of two or more qualified employees having adequate fitness and ability for the position or vacancy sought in the exercise of seniority.”

The Organization insists that the language of Appendix 12 specifically exempts PE positions from the “promotion, assignment or displacement” Rule (Rule 8, above) of the Clerks’ Agreement. It contends that Appendix 12 does not, however, exempt the Carrier from the provisions of Appendix 10, having to do with the calling of GEB employees. In support of that view, the Organization cites Public Law Board No. 4304, Award 32.

In response to the Organization’s view, the Carrier argues that any assignments to PE positions are governed by the language of Appendix 12, Article 1 (quoted above). Under that language, the Carrier insists, there is no restriction on the Carrier’s right as to whom it may select or assign to vacancies, including short vacancies involving Partially Excepted positions. It maintains that, absent a contract provision, the Carrier is free to select employees to be assigned to any and all vacancies on PE positions. Otherwise, the Carrier argues, there would be no need to have Appendix 12 in the Agreement.

During processing of the claim on the property, the Carrier offered numerous statements regarding the filling of PAD/PE vacancies. Despite the volume of these statements it is not completely clear that the PAD/PE vacancies to which the “testimonials” are referring to are of as short a duration as the one at issue. Further, many of the statements refer to posting or bidding – which is not at issue in this case. Moreover, the Organization provided written testimony of its own that short vacancies on PE positions were regularly filled from the GEB. In addition, the Organization points out that “temporary” vacancies are, essentially, a subset of permanent vacancies

whose duration is more than 15 working days, according to the clear language of Agreement Rule 11-A. On the other hand, "short" vacancies are those of 15 work days or less duration (Rule 14-A).

After lengthy consideration of all the evidence and the Awards cited in this case the Board is persuaded that the language of the Agreement supports the Organization's position.

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 October 2005.