Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37676
Docket No. MW-36592
06-3-01-3-101

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig 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 Agreement was violated when the Carrier failed to advise displaced (effective September 13, 1999) Truck Driver G. W. Gray that junior employee K. P. Ahner was in service on a truck driver position on September 10, 1999 and thereby denied Mr. Gray from exercising his seniority over Mr. Ahner beginning September 13, 1999 and continuing through September 21, 1999 (System File S-P-722-O/11-99-0542 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. W. Gray shall now be compensated for all straight time hours and overtime hours worked by Mr. Ahner beginning September 13, 1999 through September 21, 1999 at the applicable truck driver's rate of pay."

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.

Claimant G. W. Gray has established and holds seniority in various classes within the Track Subdepartment, including Sectionman (September 22, 1996) and Truck Driver (July 5, 1999). Employee K. P. Ahner has established and holds seniority as a Sectionman within the Track Subdepartment. His seniority, dating from April 28, 1998, is junior to that of the Claimant.

The facts in this matter are not in dispute. Prior to September 10, 1999, the Claimant was displaced from his position. He immediately contacted the Carrier's Manpower Office and inquired whether he could displace any junior employees. He was specially advised that there were no junior employees that he could displace. He was informed that he would likely have to comply with the requirements of Rule 9 within ten calendar days in order to retain his seniority. On September 17, 1999, the Claimant again contacted the Carrier's Manpower Office and learned that the junior employee K. P. Ahner was working a temporary vacation vacancy on a Truck Driver position at Parkwater, Washington, but that the vacancy was to close that day. He again contacted the Manpower office on Tuesday, September 21, 1999 to inquire as to whether he could exercise his seniority. He was advised that he could now exercise his seniority. The Claimant was informed that he could displace junior employee Ahner on the position of truck driver headquartered at Sandpoint, Idaho. The Claimant displaced junior employee Ahner effective Wednesday, September 22, 1999.

The Organization claims that this is a very straightforward case. According to the Organization, the Carrier refused to recognize the Claimant's seniority when it failed to allow him to displace junior employee Ahner while Ahner was filling a temporary Truck Driver vacation vacancy on the Parkwater Section. According to the Organization, this case should be sustained because the Claimant was entitled to

perform the work executed by Ahner in a temporary Truck Driver vacancy on the Parkwater Section. The relevant rules are 19(B)(3) and 19(A).

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that employees filling vacation relief pursuant to any portion of Rule 19(B) are not subject to displacement. According to the position statement of the Carrier, "This is to say: if *the position is a vacation relief position, then it is not bumpable - period.*" In addition, the Carrier contends that Rule 19(A) is not applicable.

The issue in this case is relatively simple. The Claimant was displaced and the Organization claims that the Claimant was entitled to fill a vacation vacancy that was being filled by a junior employee, K. P. Ahner. The Carrier denied that request, claiming that employees filling vacation vacancies are not subject to being bumped out of such vacancies. We remind the parties that the burden of proof in this matter is on the Organization.

In the instant case, we have carefully reviewed all evidence regarding whether the Organization has proven that the Claimant was entitled to fill the vacation vacancy being filled by junior employee Ahner. We cannot find that sufficient evidence has been presented to prove that the Carrier was required to place the Claimant in Ahner's temporary vacation placement position, pursuant to Rule 19(B)(3). Further, Rule 19(A) does not apply in the instant case, as it does not pertain to vacation vacancies.

Thus, we find that the Organization has not met its burden of proof and the claim is therefore denied.

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 30th day of January 2006.

LABOR MEMBER'S DISSENT
TO
THIRD DIVISION AWARD 37676, DOCKET MW-36592
Referee Bierig

Although some dispute resolution practitioners view a dissent as merely a regurgitation of a position not accepted by the Majority, at times it becomes necessary to object to erroneous findings. Such is the situation here wherein the Majority has operated in a manner where one of the cornerstones of the collective bargaining agreement is threatened. The cornerstone under attack in this instance is seniority. Hence, a Dissent is mandated.

The facts in this case were clear and straightforward. At the time this dispute arose, neither the Claimant nor junior employe K. Ahner held a bulletined position. In an attempt to exercise his seniority, the Claimant called the Carrier's call desk to inquire where he could place himself. The Carrier's call desk personnel informed him that there was no position to displace. Because the Claimant had ten (10) calendar days to exercise his seniority before he was forced to furlough, he again called the call desk before his ten (10) days expired. At this time he specifically asked where junior employe Ahner was working. The call desk personnel informed him that Mr. Ahner was working a position at Sandpoint, Idaho and the Claimant displaced him. That was the first time the Claimant was aware that junior employe Ahner was working. The dispute that was presented to the Board involved the interim period where the Claimant was attempting to exercise his seniority and the Carrier's failure to allow him to do so.

Clearly, our position throughout the handling of this dispute was that the Claimant's superior seniority should have been honored in preference to the junior employe. As we mentioned above, this case involves seniority, one of the cornerstones of the Agreement. The Carrier put forth the position that temporary positions filled pursuant to Rule 19(B) are immune to the seniority provisions of the Agreement. Where that language appears in the Agreement remains a mystery. In any event, the Majority in this instance clearly did not read the rule, otherwise it would not have held:

> "*** We cannot find that sufficient evidence has been presented to prove that the Carrier was required to place the Claimant in Ahner's temporary vacation placement position, pursuant to Rule 19(B)(3). Further, Rule 19(A) does not apply in the instant case, as it does not pertain to vacation vacancies."

It is crystal clear that the only relevance Rule 19(B) has is to a vacation vacancy. Rule 19(B), Sections (1) and (2) extend preference to such vacation vacancies to those who are working at the location where the vacancy occurs. Rule 19(B), Section (3) states:

"(3) Employes who have filed written requests under Section A of this rule who are not working at the location of the gang where relief is to be provided, and who will be subject to Rules 35 and 36."

An elementary reading of the language of Rule 19 reveals that the Majority in this case is simply wrong. Clearly, the Majority in this case failed in its responsibility to read, comprehend and apply the clear and unambiguous language of the Agreement and for the reasons set forth above, I emphatically dissent to the findings in the Award.

Roy C. Robinson
Labor Member