

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40459
Docket No. MW-38117
10-3-NRAB-00003-040001
(04-3-1)

The Third Division consisted of the regular members and in addition Referee David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(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 and refused to assign Mr. H. W. Weeks to the District 7 Foreman’s position advertised on Bulletin EL-09 and instead listed ‘NO BIDDERS’ when it posted Award Bulletin EL-09A on May 15, 1998 (System File C-98-A080-9/MWA 98-8-27AD BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. W. Weeks shall now ‘. . . be paid all straight time hours and overtime hours worked on the Foreman’s position in question and that he be given a District 7 Foreman’s date of May 15, 1998.’”

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 Carrier and Organization are parties to a 1996 National Agreement (the "Agreement") which has been in effect at all times relevant to this dispute, covering the Carrier's employees in the Maintenance of Way craft, including the Claimant.

At the time of the incident, the Claimant was regularly assigned to mobile Regional and System-Wide Gang TC-01 as a Group 3 Machine Operator on District Seven. He had held this assignment for more than 30 days. The Claimant has a seniority date of July 18, 1995. The gang consisted of 74 employees.

In a bulletin dated May 1, 1998, the Carrier advertised and the Claimant timely bid on a Section Foreman position headquartered at Table Rock, Nebraska. If the Claimant had been awarded the headquarters position, he would have left the gang.

The Agreement states that no more than 10% of a gang is allowed to bid off during a one-week period. The Carrier allowed seven of the gang's members to bid off during the week of May 10-16, 1998. All seven held greater seniority than the Claimant.¹

The Carrier's bulletin cycle is twice per month, with job awards being made on the 15th and last day of the month. The bulletin for the headquarters Section Foreman position sought by the Claimant closed on Sunday, May 10, 1998. On Friday, May 15,

<u>¹Name</u>	<u>Seniority Date</u>
G. W. Bradford	5/5/76
F. H. Harrison	5/3/77
S. A. Hrenchir	5/7/79
A. R. Jonas	5/16/94
C. L. Russell	5/16/94
B. L. Behm	5/16/94
K. M. Ferguson	3/27/95
H. W. Weeks, Claimant	7/18/95

1998, the Carrier posted an Award Bulletin stating "No Bidders" for the Section Foreman position.

The Claimant remained on the System Gang at a lower pay rate than had he received the position on which he bid. He continued to collect the gang's travel allowance which would not have been available had he been awarded the Foreman's position. The Organization protested the failure and refusal of the Carrier to award the Claimant the position.

The Carrier argues that the Organization failed to meet its burden to prove that the Carrier violated the Agreement. It asserted that the ten percent limit was properly applied during the week when bids were considered and awarded. It contends that it followed its past practice of not rounding up to the nearest whole number when determining how many employees may bid off of a Region/System Gang during a week on the basis that to round up would allow more than ten percent of a gang to bid off during such period.

The Carrier contends that it considered bids of all employees electing to leave the gang and determined that the Claimant was not one of the seven most senior employees bidding from the gang during the week beginning Sunday, May 10, 1998. The Carrier further argues that, contrary to the Organization's allegations, it recognized the Claimant's seniority when it denied the Claimant's attempt to bid off of his gang. Employees senior to the Claimant were permitted to bid off, while the Claimant, who was junior in seniority, was not.

In rejecting the Organization's contention that the ten percent limit should be calculated and applied once each week, that is, on a weekly basis, the Carrier points to Article XVI, Section 3(b) of the Agreement, which states in part:

"... the employee will be entitled to bid for other jobs with the carrier, subject to the limitation that no more than ten percent of a gang may bid off during a one week period."

The Carrier asserts that it also followed its past practice of using Sunday as the first day of the week and using the day when a bulletin closes as the day when the Carrier determines whether an employee is entitled to bid off of the Region/System Gang to which he is assigned.

In arguing that it complied with all aspects of the Agreement, the Carrier cited on-property Third Division Award 36277. In that decision, the claimants included three bidders who were denied positions on which they had bid for outside of their gangs based on the ten percent limitation in Article XVI, Section 3(b) of the Agreement. Award 36277 held, in pertinent part:

“The phrase ‘bid off’ might be read to apply to the timing of an employee’s bid on a bulletin position or the timing of the effective starting day of the assignments. The Carrier reasonably utilizes the latter definition, but, assuming uniform application, the outcome would be identical whichever definition is used. . . .

. . . the wording of Article XVI, Section 3(b) does not permit rounding off. ‘No more than ten percent’ can mean only ten percent or less. . . .

. . . the Organization points to inequities in Article XVI, Section 3(b) in that employees in a single gang may be subject to varying frequencies of bulletin posting, dependent on different Agreements under which employees are covered. All such Agreements are, however, subject to National Agreement Article XVI. Remedy for this, however, does not rest with the Board.

The denial of bids involved in these claims was in conformance with Article XVI, Section 3(b). . . .”

The Carrier responds to the Organization’s claim for damages on behalf of the Claimant by asserting that it is excessive and unproven. It contends that the Claimant was fully employed on the Region/System Gang that pays both a per diem and a travel allowance. Thus, the Carrier contends that the Claimant suffered no loss of earnings or allowances. It argues that any damages would be punitive for which the Agreement does not provide.

As to the Organization’s claim for payment of the difference in rate between the Claimant’s gang position and the Foreman position on which he bid, the Carrier asserts that the Organization failed to prove any violation. Consequently, any claimed loss of wages is moot. It further asserts that, even if the Claimant had been awarded the

Section Foreman position, he would not have been entitled to expenses for which he was paid on the Region/System Gang, so there is no proven monetary loss.

The Organization argues that it met its burden to prove the Carrier to have been in violation of the Agreement. It points to the wording of Article XVI, Section 3(b) of the Agreement as well as on the following language in Rule 22 entitled "Assignment Procedures:"

"A. Each new position or vacancy bulletined . . . will be assigned to the senior qualified applicant. . . ."

It asserts that the Claimant was the senior qualified applicant for the headquarters Section Foreman position and he should have been awarded the job.

The Organization cites the above-quoted on-property Third Division Award 36277 as well as Third Division Awards 12371, 11072, and 19758 for the propositions that (1) the Carrier is obligated to honor the provisions of the Agreement (2) it may not make unilateral assignments and (3) the purpose of job bidding Rules is to protect the rights of senior employees.

The Board concludes that the Organization failed to prove that the Carrier violated Article XVI, Section 3(b) or any other provision of the Agreement

The record establishes that the Carrier allowed ten percent (seven employees) of the Claimant's Region/System Gang to bid off during the relevant one-week period. The Claimant did not have sufficient seniority to be one of the seven employees allowed to leave the gang during the week of May 10, 1998. The clear and unambiguous language of Article XVI, Section 3(b) of the Agreement precludes more than ten percent of a gang to bid off during any week. To have allowed more than seven members to bid off at one time would have exceeded the contractual ten percent cap. The Organization failed to establish any contrary past practice or any history with respect to the intent of the Parties. Consequently, the claim will be denied.

AWARD

Claim denied.

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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 14th day of May 2010.