

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40463
Docket No. MW-39326
10-3-NRAB-00003-060193
(06-3-193)**

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Atchison, Topeka
(and Santa Fe Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to assign Mr. M. L. Stakes to B&B Foreman Position #82529, assigned to work on the Louisiana prior rights seniority zone, by award bulletin on March 14, 2005 [System File JFSF-05-01/15-05-0002(MW) ATS].
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now correct the award bulletin of March 14, 2005 by assigning Claimant M. L. Stakes to B&B Foreman Position #82529 and the Claimant shall be compensated for the difference in pay between what he earned and all straight time and overtime hours worked by the foreman on Position #82529 beginning March 14, 2005 and continuing.”

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 Claimant, a former Southern Pacific Railroad (hereinafter "SP") employee was employed by the Carrier as a Maintenance of Way employee.

Prior to the incident from which this claim arose, the Claimant was regularly assigned to a position working within BNSF Seniority Zone 1 in Louisiana. During his railroad career, the Claimant has obtained seniority in various classes including Welder Helper, Welder and Lead Welder.

On March 3, 2005, the Carrier advertised a Bridge and Building (hereinafter "B&B") Foreman position on a non-headquartered District Mobile Gang to work at locations including but not limited to the Lafayette, Louisiana, Subdivision (MP 10.5 to MP 205.4) and Galveston, Texas, Subdivision (MP 2.2 to MP 218.1). The job bulletin authorized motel accommodations. The Claimant submitted a bid form identifying two desired positions on Mobile Gang BBCX0377. The Foreman position paid \$20.78 per hour. The Claimant's second choice, Welder, paid \$19.52 per hour. These assignments were to begin operations in Morgan City, Louisiana, on the former Lafayette Subdivision, a prior rights seniority zone.

Prior to advertising these assignments, the Burlington Northern Railroad acquired the Atchison, Topeka and Santa Fe Railroad (hereinafter "ATSF") and became the BNSF. Many former ATSF territory employees remained governed by the ATSF Agreement. Subsequently, the Union Pacific Railroad (hereinafter "UP") acquired the SP and SP's trackage in the southwestern and southern states including Louisiana. In connection with the UP-SP merger, the BNSF and the Organization entered into the UP-SP Trackage Rights Implementing Agreement 1 (hereinafter "TRIA"). The TRIA created a new Louisiana prior rights seniority

zone. This new zone was to be governed by the ATSF-BMWE Agreement. Currently the RIA is Appendix 48 of the parties' Agreement (Form 2634, as revised in 2004). The preface to the TRIA and Article 2, Section 2A1, Article 2, Section 2A2, Article 2, Section 3A, Article 2, Section 3B and Article 4, Section 1A read, in part, as follows:

"1. The purpose of this agreement is to provide for expedited changes in . . . seniority districts. . . . The purpose is also to enable the company to provide effective competition to the combined UP-SP in these corridors, and to . . . provide certain protection for employees affected by this transaction.

2. This particular Agreement covers track maintenance and Bridge & Building operations in the Iowa Junction - Avondale corridor. . . .

Article 2, Section 2A1.

SP employees who come into BNSF's employ. . .

Article 2, Section 2A2.

. . . who take positions in the newly established Louisiana prior rights zone will have prior rights to assignments in that zone. This will include the right to promotion to assignments in a higher class than those in which an employee presently holds seniority. . .

Article 2, Section 3A.

Former SP employees who take positions in the newly established Louisiana prior rights seniority will have prior rights to assignments in that zone. . .

Article 2, Section 3B.

. . . BNSF employees with a seniority date earlier than the date this Agreement is executed on the Santa Fe Southern Region Seniority District No. 2 rosters will have prior rights to assignments on the district as it was configured prior to this Agreement.

Article 4, Section 1A.

This Implementing agreement supersedes all previous and existing agreements . . . in conflict with this Agreement. . . .”

The Louisiana prior rights zone created by the TRIA covered former SP track – now BNSF track – between Iowa Junction, Louisiana, (MP 202.2) and Avondale, Louisiana, (MP 12) within the Avondale corridor. The mobile gangs referred to in the position advertised could be assigned work between these two points and also are assigned work on the Galveston Subdivision, that is, anywhere within the new consolidated Seniority District 800. The jobs advertised initially reported to Morgan City, Louisiana. That city is located between Iowa Junction and Avondale and is within the Louisiana prior rights zone. Galveston, Texas, and the Galveston Subdivision are not located in Louisiana or within the Avondale corridor. The Louisiana prior rights zone and the Galveston Subdivision are both within Seniority District 800, which is the territory within which the mobile gang operates and covers the area for which the jobs were advertised.

After the application period closed on March 7, 2005, the Carrier assigned the Foreman job to D. McWilliams with a seniority date of July 6, 1996, because he was the most senior employee on the Consolidated District 800 seniority roster of all those who bid on the position. McWilliams had no prior rights seniority. He began working on March 14, 2005 on BBCX0377. The Claimant had no B&B Foreman seniority. He was assigned his second choice as a Welder on this District 800 mobile gang based on the Carrier’s interpretation of the TRIA and the Seniority Consolidation Agreement of August 12, 1999 (hereinafter “SCA”).

The SCA was also part of the plan that consolidated 47 former BNSF/MW seniority districts into nine seniority districts. The SCA was added to the Agreement as Appendix 49 in the revised 2004 Agreement. Portions of the SCA applicable to this dispute include:

“Paragraph 4A.

Each BMW-represented employee who holds seniority on the effective date of this Agreement shall retain prior rights for all

exercises of seniority to all headquartered positions on his/her former seniority district. . . .

Paragraph 4B.

. . . For mobile positions on the newly consolidated seniority districts, . . . the successful bidder will be determined by the earliest seniority date on the rosters applicable to the position.

Paragraph 4C.

For headquartered positions on the newly consolidated seniority districts to which prior rights . . . apply, the successful bidder will be determined by the earliest seniority date on the rosters applicable to the position who also possess the requisite prior rights. . . .

Paragraph 4D.

For mobile positions on the newly consolidated seniority districts and for headquartered positions to which prior rights or grandfathered status do apply, but for which there is no bidder with such rights, the success bidder will be determined by the earliest seniority date on the rosters applicable to the position.

Paragraph 6.

The Agreement supersedes all conflicting agreements to the extent of the conflict. However, in application of this Seniority Consolidation Agreement, it is agreed to leave pre-existing prior rights arrangements . . . undisturbed with the context of expanded seniority districts.”

Because this is a Rules case, the Carrier argues that it is the Organization’s burden to prove that the Carrier violated an Agreement Rule. The Carrier asserts

that because no such evidence was provided, the Organization failed to meet its burden and its claim should be denied.

The Carrier alleges that there is no Agreement language limiting the Carrier's right to assign mobile gangs, which can report to multiple locations anywhere within the area covered by Seniority District 800. It argues that the Organization is asking the Board for a right that it has not bargained for.

The Carrier points out that this mobile position works on both the Lafayette, Louisiana, Subdivision, as well as on the Galveston, Texas, Subdivision, that is, it works in more than one prior rights zone. Its view is that Paragraph 4D of the SCA indicates that prior rights apply only to headquartered jobs (which are limited to a single seniority district) not to mobile jobs. The Carrier reasons that it would be unreasonable to support the Claimant's desire for prior rights within his portion of Seniority District 800, but to deny those same prior rights to employees in other zones.

Because the gang was a mobile gang, not a headquartered gang, and because the Claimant had no B&B Foreman seniority, the Carrier asserts that (1) prior rights do not restrict its ability to award the position (2) there was no violation of any Agreement and (3) the claim should be denied in its entirety.

The contest in this dispute revolves around the cumbersome language in Paragraph 4D that explains what happens to bidders on two different types of jobs. The 4D sentence contains a result phrase – the job goes to the person with the highest seniority. The sentence also contains two groups of bidders to whom the result phrase may apply. The Organization interprets the two groups to be “bidders for headquartered jobs where no one with prior rights bids for those jobs” and “bidders for mobile jobs where no one with prior rights bids for those jobs.” The Carrier reads the sentence differently. It interprets the two groups to be “bidders for mobile jobs” and “bidders for headquartered jobs where no one with prior rights bids for those jobs.” In other words, one party believes the “but for” phrase in SCA Paragraph 4D modifies both of the foregoing classes and the other party believes the “but for” phrase modifies only one of the foregoing classes – the one immediately preceding the “but for” phrase.

Stated another way, the parties read the 4D language in two different ways:

1. The Carrier's position. The person who gets the hearquartered job is the one with the most seniority unless a bidder has prior rights and the person who gets the mobile job is the person with the most seniority in the overall zone the job covers.
2. The Organization's position. The person who gets the hearquartered job or who gets the mobile job is the one with the most seniority unless a bidder for either job has priority rights.

To evaluate this 4D language, one can imagine a theoretical job advertisement that refers to two groups of bidders. This hypothetical advertisement says "women and men who shave their beards every day before coming to work are eligible to bid for the job." This could be read to mean that women who shave every day and men who shave every day are equally eligible. Alternatively, the sentence could mean that all women (without restriction) are eligible and only men who shave every day are eligible. The Board concludes that the parties intended the second construction when they negotiated the Agreement language. The "but for" phrase in Paragraph 4D modifies and applies to the most recent group that precedes that phrase (bidders for headquartered jobs). It does not apply to the first group (mobile jobs) - only to the second group (headquartered jobs).

The Board takes notice that all other language in the SCA that grants prior rights (Paragraphs 4A, 4B and 4C) limits those prior rights to headquartered jobs. In interpreting the intent of the negotiators, the Board concludes that it is more reasonable and logical that the concept embodied in 4A, 4B and 4C was intended to be carried forward into Paragraph 4D.

The Carrier next turns to its contention that this dispute is merely one regarding the facts at issue. It argues that where the Board is faced with a factual dispute, it must dismiss the claim. In support of this position, the Carrier cites the following language in on-property Public Law Board No. 5404, Award 18:

“Inasmuch as this Board is unable to resolve this material factual dichotomy, we have no alternative but to dismiss the instant claim due to this factual dispute without addressing the merits of the claim before us.”

For its part, the Organization’s initial assertion is that it met its burden of proving that the Carrier violated the TRIA, the SCA and the Agreement by failing to allow the Claimant his prior right to be assigned to the Foreman’s position.

The Organization acknowledges that bidding was open to all of Seniority District 800, but calls the Board’s attention to the fact that the work was to begin in Morgan City on the former Lafayette Subdivision, a seniority zone where the Claimant had prior rights and where McWilliams had none. It adds that the Claimant possesses the skills and ability to perform all B&B Structural Foreman duties. As a consequence, the Claimant should have been placed ahead of the man who was given the position and the job assignment should be reversed. For authority, the Organization cites the language above in Article 2, Sections 3A and 3B of the TRIA.

In addition, the Organization cites the language above in Paragraph 6 of the SCA to demonstrate that the TRIA language on which the Carrier relies is reversed and superceded by the provisions of the SCA.

The Organization argues that the language in the several Paragraphs of SCA indicates that if the Carrier advertised for a position in the Louisiana prior rights zone, the Claimant must get prior rights in that zone. The Carrier responds that the problem with this argument is that the Foreman position is not assigned to that zone. It performs service in more than one zone. It is assigned to all of Seniority District 800. The Board concludes that the TRIA provisions are not in conflict with the SCA’s language. Both documents support the Carrier’s action. Paragraph 6 of the SCA does not reverse the language found in the TRIA.

The Carrier acknowledges the Organization’s argument based on SCA Paragraph 4D, but disputes it. Paragraph 4D states that for mobile positions on the newly consolidated seniority districts and for headquartered positions to which

prior rights or grandfathered status apply, “but for [which] there is no bidder with those prior rights,” the successful bidder will be determined by the earliest seniority date on rosters applicable to the position. Each party contends that 4D proves it should win this dispute.

The Parties disagree about whether there was an Agreement violation and whether the Organization’s burden was met, but the Carrier did not contest the Organization’s calculation of the remedy other than to imply it should be zero because there was no violation. The debate in this case is whether the Organization met its burden. The debate is not over what is the appropriate remedy in the event that the Organization prevails.

The Organization bears the burden to prove that the Carrier violated the Agreement. The Board concludes that the Organization did not meet its burden. It failed to prove that the Carrier violated the SCA, the TRIA or any other Agreement. The evidence shows that the mobile position works on more than one prior rights zone and was advertised in the entire Seniority District 800.

The Board concludes that McWilliams had a B&B Foreman seniority date of July 8, 1996 on Consolidated District Seniority Roster 800. The gang was a mobile gang, not a headquartered gang. The Claimant had no B&B Foreman seniority. The Carrier correctly assigned the mobile Foreman job to the senior employee on the roster who bid on the position (McWilliams). The Claimant did have prior rights on the Louisiana Seniority District, however, the Foreman job was advertised for a larger area – all of Seniority District 800. Seniority District 800 included territory in two states and was not limited to the smaller Louisiana prior rights zone. It is true, as the Organization stated, that the first location to which the Claimant and McWilliams were told to report was at Morgan City within the zone in which the Claimant enjoys prior rights. This is true, but irrelevant to the dispute at hand.

The Board finds that the Foreman’s position’s first assignment did indeed begin on the Louisiana prior rights seniority zone, but notes that the advertised job provides equally for assignment on a Texas seniority zone where the Claimant has neither seniority nor prior rights. It notes that the position was advertised to those

with seniority in Seniority District 800 where the Claimant has no prior rights. Those rights continue to exist, but are not applicable in this situation.

In addition, contrary to the Organization's argument, the SCA language is not in opposition to the TRIA language and does not override the TRIA. There is no conflict to resolve between the TRIA and the SCA regarding mobile gangs, prior rights and Seniority District 800. It is important to note that even had there been a conflict, the clear language of SCA Paragraph 6 states that in applying the SCA, the parties agreed to leave previous prior rights Agreements undisturbed regarding expanded seniority districts.

There was no violation of any of the Agreements by the Carrier. The Board finds the Organization's claim to be without merit.

The Claimant clearly has prior rights, however, the language quoted above from the SCA and the TRIA clearly indicates that the previously bargained for intention of the parties was for prior rights to apply only to headquarterd positions, not to mobile jobs like this one.

Accordingly, the claim must be 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 14th day of May 2010.