

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40773
Docket No. MW-40171
10-3-NRAB-00003-070409
(07-3-409)**

The Third Division consisted of the regular members and in addition Referee Patrick Halter 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. E. Himel to Bulletin No. 81505 to the bridge tender position on the Berwick Bridge at Morgan City, Louisiana and instead assigned said position to Mr. O. St. Marie on May 31, 2006 [System File JFSF-06-10/15-06-0010 (MW) ATS].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. Himel shall now ‘. . . be assigned to the position of Bridge Tender bulletin # 81505, located at the Berwick Railroad Bridge, Morgan City, Louisiana, M. P. 80.5 and any and all overtime at the respective Bridge tender rate of pay. Beginning May 31, 2006, through and including on a continuous basis until this matter is settled. . . .”**

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.

In 1995 the Burlington Northern Railroad (BN) acquired the Atchison Topeka and Santa Fe Railway (ATSF) to form the Burlington Northern Santa Fe (BNSF). After the formation of BNSF, the Union Pacific Railroad (UP) acquired the Southern Pacific Railroad (SP) and its tracks in the southern and southwestern United States.

Alongside the UP-SP merger, the BNSF and BMWF entered into the UP-SP Trackage Rights Implementing Agreement 1 (March 1997) which reads, in relevant part, as follows:

- “1. The purpose of this agreement is to provide for expedited changes in services, facilities, operations, seniority districts and existing collective bargaining agreements to effectuate the transfers of track ownership as approved[.] The purpose is also to enable the company to provide effective competition to the combined UP-SP combined corridors, and to allow for integration of these operations with other BNSF operations. The purpose is also 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. Other Implementing Agreements may amend this Agreement or address operations in other corridors.”

The Implementing Agreement (IA) created “[a] new Louisiana prior rights seniority zone of the Southern Region Seniority District No. 2” and the Santa Fe-BMWF Schedule Rules were applicable on this newly-acquired territory (Article 1,

§ 2). Under Article 2, Selection of Forces, the plan for the Iowa Junction-Avondale segment involved the transfer of some BMW-represented employees from SP to BNSF. Around this time, the Carrier established Bridge Tender positions when it bought the SP right-of-way in Southern Louisiana.

Article 2, § 3A, in the IA states that “[f]ormer SP employees who take positions in the newly established Louisiana prior rights seniority 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.”

The Claimant, a former SP employee and Foreman at the time of the UP-SP merger, elected to continue employment with BNSF as a Foreman. After the Claimant transferred to BNSF in 1997, he bid on Bridge Tender position, Bulletin No. 80515 (May 2006).

Although the Claimant did not have seniority as a Bridge Tender, the Organization states that is not relevant because Article 2, § 3A provides preferential rights to all positions within the zone for former SP employees such as the Claimant. Public Law Board No. 6537, Award 2 interpreted § 3A: “The second sentence clearly states that the rights ‘include’ the right to promotion. The word ‘include’ clearly and necessarily implies that the right extends beyond promotions.” Beginning May 31, 2006, and continuing, the Organization states that the Carrier violated Article 2, § 3A when it did not assign the Claimant to the Bridge Tender position in the prior rights seniority zone.

The Organization notes that the BNSF employee selected for the bulletined position holds prior rights to assignments on Santa Fe Southern Region District No. 2 as it was configured prior to the IA (Article 2, § 3A). Thus the Carrier also violated Article 4, § 1.A: “[t]his [IA] supersedes all previous and existing agreements understanding or interpretations which are in conflict with this Agreement covering the employees represented by the Organization.” The Claimant is entitled to be assigned to the Bridge Tender position in preference to all other non-prior rights individuals; his prior rights supersede the seniority of the selected BNSF employee already established within that class of service.

The Carrier's failure to respect the Claimant's prior rights caused him to remain in a less desirable position (Foreman). The Claimant was denied placement on the appropriate Bridge Tender roster and precluded from accumulating seniority on the seniority district in that class. He suffered a \$6,960.00 loss (and continuing) based on the e-mail attached to the Carrier's letter (October 10, 2006) denying the appeal to the claim.

The Carrier states that the Organization relies on only a portion of the IA and ignores the Bulletin and Assignment Rules of the ATSF Agreement; it seeks to change the IA and ATSF Agreement which preserve the Carrier's right to select. The Organization's position is, essentially, that the Carrier cannot assign an employee with proper qualifications and seniority to a position. The selectee was a qualified employee with seniority as a Bridge Tender so, pursuant to the ATSF Agreement, he was subject to assignment as a Bridge Tender.

The Claimant elected to bid in 1997 for his Foreman position and was assigned to it with BNSF under the terms of the IA. The Claimant could not be considered for promotion under the bulletin because he works a higher-rated position than the one bulletined and he has no Bridge Tender seniority, whereas the selectee did have such seniority. By placing a bid on the bulletined position, the Claimant was indicating he was seeking a promotion. Article 2, § 3A renders the Claimant ineligible to be considered for promotion to a lower rated class position. Third Division Award 38201 addresses the issue in this claim; that precedent should be followed.

Article 4, § 1A of the IA cannot be interpreted or applied to cancel another provision in the IA. BMW ignores the Seniority Consolidation Agreement of 1999 (years after the IA (1997)) that placed this Claimant and others under the ATSF Agreement. Article 4 supersedes existing Agreements and not the Seniority Consolidation Agreement.

Because the Carrier selected a BNSF employee with Bridge Tender seniority, it did not promote an employee into that bulletined position and the Claimant was working a higher-rated position, any claim of damages is without basis. A monetary remedy ceased when the selectee was bumped off the Bridge Tender position on June 13, 2006.

Having reviewed the record, the Board will interpret and apply Article 2, § 3 in accordance with arbitral precedent established by Public Law Board No. 6537, Award 2 (2003) issued post-Seniority Consolidation Agreement (1999).

Specifically, the second sentence in § 3 -

“...clearly states that the rights ‘include’ the right to promotion. The word ‘include’ clearly and necessarily implies that the right extends beyond promotions. Thus, the Carrier improperly interpreted the Prior Rights Agreement as limited to cases involving promotion as the Prior Rights Agreement expressly affords former SP employees preference to assignments and positions regardless of whether the appointment . . . is a promotion. The [Claimant] was a former SP employee in the Louisiana seniority zone. That fact is sufficient to give him prior rights to the . . . assignment. The UP-SP Trackage Rights Implementing Agreement was consistently interpreted and applied in this manner in the past.”

The Board, moreover, determines that the Carrier’s reliance on Third Division Award 38201 is not dispositive of this matter because, in that claim, the employee provided written notice to the Carrier wherein he voluntarily and effectively relinquished or renounced his prior-rights seniority. In the instant claim the Claimant did not issue the same or similar statement. Also, the ATSF Agreement is not in evidence, so the Board cannot ascertain its meaning and application to this claim.

The Carrier’s position was that the Claimant did not have seniority for the Bridge Tender position; however, aside from seniority there is no contention that the Claimant was not fit and able to perform in that position as bulletined. The Claimant “had a prior right to the assignment by application of the explicit terms of the prior rights agreement, which the Board must enforce as intended by the parties.”

Based on the relevant arbitral precedent, this claim will be sustained for the period of May 31 through June 13, 2006, which is the date the selectee was bumped from the Bridge Tender position. Authorizing compensation after June 13 would be

speculative by the Board because it has no information about the employee placed in that position compared to the Claimant.

As for the Organization's remedy seeking \$6,960.00, the e-mail relied upon refers to another employee and not the Claimant. Monetary loss is limited to May 31 - June 13, 2006. The Claimant will be appropriately compensated and reported for seniority purposes covering that period of time.

AWARD

Claim sustained in accordance with the Findings.

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 15th day of December 2010.