

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees)
(National Railroad Passenger Corporation (Amtrak)
Northeast Corridor)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned junior MW Repairman P. Koch instead of MW Repairman J. Pikulak to a 'contract' MW Repairman position on the Track Laying Machine (System File NEC-BMWE-SD-1672).

(2) As a consequence of the aforesaid violation:

1. We are requesting that Mr. Pikulak be awarded the contract position.

2. This is also to be considered a claim - should Mr. Pikulak be laid off and Mr. Koch continue working (due to the contract) for all straight time and overtime worked while Mr. Koch continues working due to a Rule 55 violation.

3. Claim commences as of this date for any and all overtime worked by Mr. Koch while under the contract."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

Claimant holds a Southern District seniority date of September 25, 1985, and an entered service date of June 2, 1982. P. Koch holds a Southern District seniority date of April 19, 1985, and an entered service date of January 24, 1984. Claimant and Koch were interviewed for a contract MW Repairman position on the Track Laying Machine which was advertised pursuant to Rule 89 of the parties' December 5, 1980 Memorandum of Agreement. That Rule provides, in pertinent part:

"II. All positions and vacancies below the rank of General Foreman will be advertised to employees holding seniority on Corridor Units in accordance with the Rules of the Agreement. Bulletins advertising these positions will also be posted in places accessible to other employees covered by the said Agreement in order that such employees may, if they so desire, make application for advertised positions and vacancies.

In the filling of positions advertised in accordance with the provision of the first paragraph hereof, the order of preference will be as follows:

- (1) From employees with seniority in the class in the unit in which position is advertised.
- (2) From employees with seniority in unit in which position is advertised in accordance with the Rules of the Schedule Agreement.
- (3) From employees with seniority in other Corridor Units."

Neither Claimant nor Koch possessed seniority on the Track Laying System. Further, neither Claimant nor Koch was on a Corridor Seniority Roster. In short, literal application of Rule 89 did not establish a preference as between Claimant and Koch. The Carrier determined that both possessed sufficient fitness and ability and awarded the position to Koch rather than Claimant based upon Koch's greater Southern District seniority. The Carrier further asserts that for nine years prior to this dispute positions were filled in this fashion relying upon Southern (or Northern) District seniority where applicants had no seniority on the Track Laying System or on a Corridor Seniority Roster.

At best, the language in Rule 89 governing the awarding of positions to employees who do not possess seniority on the Track Laying System or who were not on any Corridor Seniority Roster is ambiguous. Rule 89 appears silent with respect to employees such as Claimant and Koch who hold no seniority under the designated rosters in that Rule. Under traditional Rules of contract construction, ambiguities in language can be resolved through the examination of custom and past practice between the parties. Here, the Carrier has sufficiently established a past practice of reliance upon Southern (or Northern) District seniority in such situations. Given Koch's greater Southern District seniority, the selection of Koch over Claimant therefore did not violate the Agreement.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bevan - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.