

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 34204
Docket No. CL-35204
00-3-99-3-53

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

PARTIES TO DISPUTE: (Transportation Communications International Union
(Springfield Terminal Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Organization (GL-12247) that:

- (a) I am filing claim on behalf of Ms. Diane Cuino, Spare TSR/Crew Dispatcher, North Billerica, Massachusetts. Claim is for eight (8) hours at the rate of time and one half at Crew Dispatcher's rate (TSR) Commencing January 14, 1998 and is for each and every day position CD-2 works. This claim is continuous until this situation is corrected.
- (b) Carrier violated the Agreement when it would not allow Ms. Cunio to displace Mr. D. Bock off position CD-2 when she was allowed a displacement, thus Mr. Bock is junior to Ms. Cunio. Position CD-2 is and should be a bump and bid position, the Carrier continues to violate the Agreement when it allows Mr. Bock to remain on said position.
- (c) Rules violated are 13.1, 13.2, 13.3, 13.4, 13.5, 14.1, 14.2, 14.3, 14.4, 14.5, 14.6, 14.7, 14.8 and all other rules of this Agreement.”

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.

Position CD-1 at North Billerica was posted for bid as a result of the incumbent C. Sauvageau's retirement. CD-1 is a Rule 2 Partially Excepted Position ("PEP") with hours of 4:00 A.M. to 2:00 P.M., Saturday - Monday off. Rule 2 states that PEP's "... are positions which are not subject to the Rules of this Agreement governing bidding, displacement, assignment, or promotion." Effective September 21, 1997, D. Bock was assigned to CD-1.

Position CD-2 was also a PEP. According to the Carrier, CD-2 was occupied by R. Silk. However, CD-2 was designated by the parties for PEP purposes as an "incumbents only ... revert to full scope." Stated differently, once CD-2 was no longer occupied by the incumbent Silk, that position reverted to a bid and bump position.

The claim asserts that the Claimant was improperly denied the ability "... to displace Mr. D. Bock off position CD-2 when she was allowed a displacement" [emphasis added]. According to the Organization, after Bock (who was the most junior employee in the terminal), was awarded CD-1, the Carrier "switched position CD-1 with CD-2," i.e., the Carrier "switched the hours of CD-1 and CD-2." Therefore, according to the Organization, because of the "switch," CD-2 was no longer occupied by the incumbent Silk, CD-2 reverted to a bid and bump position under the Agreement, and the Claimant should have been allowed to exercise her seniority into CD-2 as a full bid and bump position.

The Organization sees the Carrier's actions as a circumvention of Rule 2. The Carrier maintains that both CD-1 and CD-2 are PEP's under Rule 2 which make those positions exempt from the Rules of displacement.

In Third Division Award 33507, the Board faced a similar dispute on the property. There, the Organization argued that the Carrier violated the Agreement

when it awarded CD-1 to Bock and allowed Silk in CD-2 to assume the hours of CD-1 which should have caused CD-2 to revert back to full Scope because Silk no longer worked that position, but was working CD-1. The Board denied the claim:

“While someone might take the position the Carrier is sharpshooting the Agreement to keep its excepted position, it did not violate the Agreement. The Carrier has the right to change starting times, a position not disputed by the Organization. Rule 14[.5 which requires declaring a job vacant and posting it for bid if there are changes in starting/quitting times greater than one hour; change of rest days or change of location of the position] is the only rule that requires jobs to be vacated, if starting times are changed, and the Organization does not argue that the positions in dispute are not excepted from this Rule.”

This is, for all purposes, the same dispute that was decided by the Board in Award 33507. We cannot say that Award 33507 is palpably in error. As such, and for purposes of stability, we cannot decide this case de novo, but we are required to defer to that prior Award. To do otherwise would be an invitation to chaos and would result in encouraging parties after receiving an adverse decision to attempt to place a similar future dispute before another referee in the hope of obtaining a different result.

The Organization’s assertion in this case that it has better evidence than in Award 33507 that, in fact, the positions had been “switched” cannot change the result. In the prior Award it was found that for PEP positions, “[t]he Carrier has the right to change starting times.” Coupled with the fact that the positions are designated PEP and thus not covered by bid and bump requirements, for us to use the Organization’s alleged better evidence in this case would amount to an indirect way of reviewing this dispute de novo. At best, as found in Award 33507, “the Carrier is sharpshooting the Agreement to keep its excepted positions.” But that was allowed in Award 33507 and, because that decision was not palpably erroneous, in this same dispute we are required to defer to Award 33507. The bottom line in the prior Award is that under the same basic facts, the Carrier “did not violate the Agreement.” For purposes of stability, the decision must be the same in this matter.

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 23rd day of August, 2000.