

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36561
Docket No. MW-34251
03-3-97-3-831**

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 Employes
(Burlington Northern Santa Fe 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 assigned Foreman W. M. Bernard who holds seniority in Seniority District 19 to perform service on Seniority District 20 rather than calling and assigning any one of the Claimants to perform such service beginning May 10, 1995 and continuing. (System File B-M-402-F/MWB 951005AZ BNR)**
- 2. As a consequence of the violation referred to in Part (1) above, “. . . each Claimant listed on Seniority Roster District 20, Track Sub Department Roster 1 Rank A dated March 1, 1995 receive an equal share of all straight time hours and all overtime hours performed by Mr. Bernard. All time to be divided equally between all Claimants starting on claimed date and continue until Mr. Bernard returns to his seniority district.”**

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 claim alleges that commencing May 10, 1995, W. M. Bernard, who held seniority as a Foreman in District 19, was improperly assigned to work on Gang UC-04 in District 20 where he held no seniority.

According to the Carrier's letter of August 7, 1995, the Carrier's records showed that ". . . Bernard was transferred from Seniority District 19 to Seniority District 20 under provisions of Rule 11A of the current BMWWE Agreement" and that "... Bernard is working with the Undercutter which is highly mechanized and dangerous ... [and h]is experience with this equipment necessitates the need to move him from his seniority district as a transferred employee." In its letter of December 1, 1995, the Carrier states that ". . . Bernard was working as an Assistant Foreman ..." on gang UC04 to which he was assigned in District 20 and again relies upon Rule 11A ("... therefore Rule 11A would apply here in support of the Carrier's transferring Mr. Bernard temporarily to another seniority district.").

In further handling on the property, the Organization produced statements from Foremen in District 20 who stated they have previously worked with or around undercutting crews and would have bid on the Foreman's position filled by Bernard had that position been posted for bid.

Rule 11A provides:

"RULE 11. TRANSFERS

- A. An employe may be temporarily transferred by the direction of the Company for a period not to exceed six (6) months from one seniority district or division to another, and he shall retain his seniority on the district or division from which transferred. Such employe shall have the right to work temporarily in his respective rank on the district or division to which transferred, if there are no qualified available employes on the district or division. The six (6) month period may be extended by agreement between the Company

and the General Chairman. When released from such service the employe shall return to his former position.”

There does not appear to be a dispute over the general rule that, in the absence of provided exceptions in the Rules, employees cannot be freely transferred to seniority districts where they do not hold seniority. See generally, Third Division Award 20891 (“Carrier violated the Agreement when it assigned an employee from seniority district No. 23 . . . [to] . . . seniority district No. 24 . . . and by assigning him work outside his seniority district Carrier violated the right of an employee holding seniority in that district to perform the work.”). This case deals with an exception to that general rule.

In this case, the Carrier specifically relied upon Rule 11A to permit its actions. The critical language in Rule 11A provides that the Carrier can make a temporary transfer across seniority district boundaries, but when making a temporary transfer of an employee to another seniority district “[s]uch employe shall have the right to work temporarily in his respective rank on the district or division to which transferred, if there are no qualified available employes on the district or division.”

The Carrier’s reliance upon Rule 11A is an affirmative defense. The Carrier must therefore show that at the time Bernard was transferred from District 19 to District 20 where he held no seniority “. . . there [we]re no qualified available employes on the district or division.” Aside from a general assertion concerning Bernard’s abilities on the Undercutter, the Carrier has not made that required showing in support of its affirmative defense. Instead, the Organization has sufficiently shown that there were some District 20 Foremen who had Undercutter experience and would have bid on the District 20 Foreman’s position had the position been posted rather than filled by Bernard. The claim therefore has merit.

In its Submission to the Board, the Carrier made the argument that Bernard was transferred to District 20 as an Acting Roadmaster - an exempt position - and therefore asserts that its actions could not be challenged under the Agreement. However, while the Organization early on in its letter of June 22, 1995 referred to Bernard as being transferred “. . . in the capacity of a foreman or Roadmaster to run Gang UCO4” in District 20, the Carrier affirmatively stated in its letter of December 1, 1995 that “. . . Bernard was working as an Assistant Foreman . . .” on the gang to which he was assigned in District 20 and further in that letter as well as its letter of August 7, 1995, specifically relied upon Rule 11A as a defense for its assignment of Bernard. For

purposes of this case, the Carrier must be held to the factual assertion that Bernard was "an Assistant Foreman" and that its defense was based upon the exception provided in Rule 11A.

As a remedy, the Organization seeks shared relief on behalf of Foremen on the District 20 seniority roster for all hours worked by Bernard in District 20. The class of District 20 Foremen on the roster for that district at the time of the transfer lost work opportunities as a result of the improper transfer of Bernard into District 20. Further, a qualified Foreman for the Undercutter position in District 20 may have bid on that position improperly filled by Bernard and other District 20 Foremen would have then had the opportunity to backfill positions left vacant as a result of another's successful bid into that position. The Organization's requested relief is reasonable and shall be required for the length of time that Bernard held the position in dispute in District 20.

AWARD

Claim sustained.

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 16th day of June 2003.