

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 37199  
Docket No. MS-36861  
04-3-01-3-438

The Third Division consisted of the regular members and in addition Referee James E. Nash when award was rendered.

(Gary E. Neumann

**PARTIES TO DISPUTE:** (

(Canadian Pacific Railroad Company

**STATEMENT OF CLAIM:**

"This is to serve notice, as required by the Uniform Rules of procedure of the National Railroad Adjustment Board effective March 12, 1999 of my intention to file an Ex Parte Submission within 75 days covering an unadjusted dispute between me and the Canadian Pacific Railroad and the BMW System Office General Chairman, involving the following.

This letter of intent is hereby submitted on behalf of G. E. Neumann, employee of Soo/CP Railroad and member of Soo System BMW Union, Lodge 1488, Glenwood Minnesota. The accused violation of Forced Reduction (Exhibit # 1) Rule 12(a) according to Soo/CP Railroad and Rule 12(b) according to Evan Ostlund, General Chairman, BMW System Office, per work agreement between the CP Railroad company and BMW Union dated October 1<sup>st</sup> 1987. G. E. Neumann feels that there has been a rule 7(c) violated. (Exhibit #2 attached) This violation started when G. E. Neumann, who was bumped from his permanent position as Foreman on the Hankinson Maintenance Crew. He was told by Guy Hugo, CP Railroad, Senior Staffing Representative and Evan Ostlund, General Chairman, that there was no place to displace himself in Zone 4, so he displaced a temporary position in Zone 6. G. E. Neumann wants to state that according to the letter (Exhibit #3) file: Roster.97, that G. E. Neumann was doing what Rule 12(b) stated and that is protecting his seniority in the Zone that he was employed in which was Zoned 6 at the time. (Exhibit #4) first paragraph, states that the

temporary Roster was protested and upheld, there was no registered protest according to Rule 7. (c) (Exhibit #2) General Chairman Ostlund states that this was a clerical error. We dispute this because of no protest proof. File G-165.00 (exhibit #5) from E. E. Howard Manager of Track Maintenance for CP Rail states this issue should be handled between the Union and Brother Neumann. Brother Neumann asked that a hearing be held so that he could sit down face to face and talk the situation over, but was denied according to the letter dated August 9, 1999 from Guy Hugo, Senior Staffing Representative for CP Rail (Exhibit #6) attached. Brother Neumann called BMW System office and Guy Hugo to see where and if he could displace himself according to Rule 12, Forced Reduction (Exhibit #1 Attached) He could not so he took the next course and took a temporary position according to Rule 12(b). (Exhibit #1) Brother Neumann was told to read Rule 12(b) and act accordingly, as he did. He bid on Temporary positions in Zone 6 where he was employed at the time the permanent position of Assistant Foreman, Glenwood, Minnesota was made available. (Exhibit #7 Attached) Brother Neumann was still working a Temporary Position up to November 23, 1998, when he bid on System bulletin #223, Permanent (sic) Foreman Position at Paynesville, Minnesota. At the time of Bulletin #223 was received G. E. Neumann was still working Temporary and free to Bid or displace any position he desired within a temporary position, according to Rule 4 (j). (Exhibit #8)

We have been at a standstill since October 27, 1998 and still there is no satisfactory conclusion. There are many members out here,(sic) who would like to know if Rule 7 pertains to some people and not to others."

**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.

Records show that the Claimant established seniority as a Temporary Section Foreman on September 17, 1992. He was awarded the position of Permanent Section Foreman at Hankinson on March 15, 1996. He was, subsequently, displaced from that position in January 1997. Upon displacement, the Claimant bid on a series of temporary positions.

After completion of temporary assignments, the Claimant bid on the permanent position of Assistant Foreman at Glenwood rather than displace a junior Foreman at Carrington; Carrington was designated as the Claimant's home zone.

Because the Claimant bid on a permanent position at Glenwood rather than placing himself in his home zone, the Carrier advised that him that he had voluntarily forfeited seniority date of September 17, 1992, in his home zone at Carrington. The Carrier relied on Rule 12(a) for support. Rule 12(a) reads in pertinent part:

"(a) Seniority rights shall govern in cases of force reduction, abolishment, or displacement and the senior employees in the respective ranks and groups will be retained.

Employees affected by force reduction, abolishment or displacement, will have the right to displace junior employees. In order to retain seniority in their highest ranks, such employees will be required to exercise their seniority on permanent positions in the same rank in seniority group, sub-department, and designated zone as defined in Rule 6(b) in which employed, before displacing employees with less seniority in the next succeeding lower ranks in that group."

The Claimant took the position that he had the right to place himself on any position at any location his seniority would allow, so long as it was a temporary position. He maintained, also, that his original seniority date of September 17, 1992, should remain undisturbed because the Carrier could produce no evidence that it was challenged, and because the original date appeared on the seniority roster, then, reappeared after the roster was corrected and republished.

The parties were poles apart on overall rules interpretation, but agreed that the Claimant was well within his rights to bid temporary jobs as he desired; but the Carrier maintained that once the Claimant decided to place himself on a permanent job, Rule 12(a) required placement in the designated home zone. The Carrier, then, pointed out that the Claimant successfully bid on permanent position of Assistant Foreman at Glenwood – zone No. 6, rather than displace onto a Foreman's position available to him at Carrington – designated home zone No. 4.

In replying to the Claimant's insistence that his original seniority date must remain in place because the Carrier failed to produce evidence that date was challenged, the Carrier argued that failure to change the original date was nothing more than a clerical error; and, that rules provide that such an error can be corrected at any time, without protest. The Carrier relied on Rule 7 – Seniority Rosters for support. Rule 7 reads in pertinent part:

“(c) Temporary rosters will be compiled and posted as of September 1st of each year, and will be open for corrections for a period of 90 days from date of posting. Upon presentation of proof of error by an employee or his representative, such error will be corrected. If no protest is registered within 90 days, the dates will stand as official and thereafter will not be subject to protest on any future rosters, except that any clerical errors or omissions will be corrected. Permanent rosters including corrections will be issued January 1<sup>st</sup> of the following year.”

On the basis of oral arguments, and all other evidence presented to the Board, we were unable to determine whether the Claimant's original seniority date of September 17, 1992 was challenged as argued by the Carrier. And, while the record does indicate that the Claimant did, in fact, exercise his seniority in zone No. 6 – where he was employed, rather than in zone No. 4 – his home zone, there were no junior positions available to him at the time that he was required to displace.

The Carrier cannot, then, reasonably argue that the Claimant voluntarily forfeited his original seniority date when he bid on the permanent position of Assistant Foreman in Glenwood - zone No. 6.

Because of indeterminable facts – on both sides – and the peculiar circumstances of this dispute, we believe a fair resolution can be found in the middle ground between the two positions.

The Board finds that the Carrier must restore the Claimant's original seniority date of September 17, 1992. The Claimant, however, is not entitled to back wages or any other compensation of any nature related to this claim.

**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 28th day of September 2004.