

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 37467  
Docket No. MW-36506  
05-3-01-3-2

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

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(BNSF 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 failed and refused to assign Mr. L. D. Darcy to a sectionman vacancy on Section #1 at Aberdeen, South Dakota on April 20 through May 8, 1998 (System File T-D-1550-H/MWB 98-08-13AF BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. D. Darcy shall now ‘. . . receive pay for eight (8) hours straight time pay for each of April 20, 21, 22, 23, 24, 27, 28, 29, 30, May 1, 4, 5, 6, 7, and 8, a total of 120 hours, at the sectionman’s rate of pay, a total of \$1771.20. We also request that Claimant receive pay equal to any and all overtime service rendered by Mr. Richards during claimed period. We further request that Claimant receive accreditation for any and all fringe benefits he would have accrued had he been allowed to exercise his seniority.’”

**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 March 1, 1998 Twin Cities Seniority District No. 11 roster for Sectionmen showed both the Claimant and P. S. Richards in furlough status. According to that roster, the Claimant's seniority date was shown as June 29, 1992, and Richards's seniority date was August 23, 1994. Thus, given that roster information, the Claimant was clearly senior to Richards as a Sectionman, a fact not disputed by the parties.

On April 16, the Claimant was recalled, pending bulletin assignment on April 20, 1998, to a Sectionman's vacancy located on Aberdeen Section No. 2, within Seniority District No. 11. However, before being awarded and actually working said position, senior Sectionman J. Piechowski, who had until this time held a Section No. 1 Sectionman's position, bumped the Claimant on the following day, April 17, 1998, and the Claimant was returned to furlough ("call-back") status.

On that same April 17 date, the Claimant contacted the Carrier's Manpower Office and applied for Piechowski's now vacant Section No. 1 position. The parties do not dispute that the Claimant's displacement request was denied and that, instead, junior Sectionman Richards was allowed to displace it pending bulletin assignment of April 20, 1998. The Carrier based its denial of the Claimant's request on Rule 9, Note 2, which states:

"Employees who are returned to service as per Rule 9 pending outcome of a bulletin must express their desire for the position by making application therefor, or a junior employe may be assigned thereto. In the event no applications are received, the employe recalled will be assigned. If an employe other than the employe recalled is assigned, the employe recalled to service must displace any junior employe in his seniority district (home sub-district for a sectionman) called back to service on or after the date he was

recalled, if there are no junior employes he can displace he may return to a furlough status by complying with the provisions of Rule 9. (Emphasis added)

The Claimant was then returned to furlough and, according to the record, did not return to service until May 11, 1998, when he was notified that he would be assigned to the Aberdeen Section No. 1 Sectionman's position.

The Organization contends that the Carrier should have assigned the Claimant to the Section No. 1 vacancy given his greater seniority over Richards as of April 17, 1998, pursuant to Rule 2(A), as follows:

“Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided.”

The Organization emphasizes that the Claimant expressed his desire to occupy the Section No. 1 vacancy on April 17, 1998, two days before Richards would have even reported to it. Given the Claimant's seniority over Richards, the Claimant's displacement request should have been allowed. Thus, the Carrier's assignment of junior employee Richards to the Section No. 1 position, instead of the Claimant, violated the Agreement and entitled the Claimant to the earnings of that assignment from April 20 to May 8, 1998. See on-property Third Division Award 19758.

The Organization furthermore argues that Rule 8(D) and (E) also supported the Claimant's assignment to the Section No. 1 position because: (1) under Rule 8(D) when individual reductions in force are made, employees cut off will be advised of the junior employees whom they may displace on a seniority basis; and (2) pursuant to Rule 8(E) the Claimant did attempt to exercise his seniority over junior Sectionman Richards. With regard to Rule 8(D) the Organization emphasizes that the Carrier did not inform the Claimant that a junior employee (Richards) was being retained in service on April 17, 1998, when the Claimant sought the displacement. Nor did the Carrier assist the Claimant after he had been cut off, in order to minimize any loss of time, the Organization stresses. See Third Division Award 25983.

According to the Organization, the Carrier's affirmative defense is that Note 2 to Rule 9, above justified the Carrier's decision to assign Richards instead of the Claimant because the Claimant was in call-back status, while Richards supposedly had been assigned to a permanent position. That argument simply is not supported by any probative evidence, the Organization says. According to the roster, both the Claimant and Richards were furloughed as of March 1, 1998, it stresses. On April 16, 1998, the Claimant had been recalled to the Aberdeen Section No. 2 position later assigned to Piechowski. Thus, given the lack of any proof that Richards actually owned a position at the same time the Claimant made the displacement request, the claim must be sustained, the Organization concludes. See Third Division Award 17051.

In addition, the Board must grant the monetary remedy requested herein, including the payment of straight time and overtime pay lost, for the claim dates specified above, the Organization averred. See Third Division Awards 25968, 28724 and Award 52 of Public Law Board No. 2206. The better line of precedent demands a monetary remedy in the instant case, the Organization avers.

In response, the Carrier asserted that because the Claimant had been recalled pending bulletin assignment, pursuant to Rule 9, Note 2, his displacement right did not include bumping Richards from the Section No. 1 vacancy. According to the Carrier, the Claimant's displacement right was confined to "displacing any junior employee in his seniority district (home sub-district for Sectionmen) called back to service on or after date he was recalled." In the Carrier's view, given the "plain language" of Rule 9, Note 2, the Claimant could not displace Richards because Richards's recall date was earlier than that of the Claimant. Thus, the Claimant's only option was to return to furlough, the Carrier argued.

The Board carefully studied the entire record in this case, including the cited Rules, the parties' arguments and the precedent Awards cited herein. The Carrier's first level claim denial, issued by the Manager Maintenance Support, informed the Vice General Chairman that "Mr. Richards owned a permanent position effective April 20, 1998 and could not be displaced by an employee in call back status," we note. However, from our close review of the record, we find no evidence to support that affirmative defense by the Carrier. Indeed, the record does not directly indicate how, under the circumstances, the junior Sectionman acquired a superior displacement right over the Claimant, nor does the record specify the position to which Richards purportedly had been recalled. There is a clear failure of proof on

these critical issues on the Carrier's part, we are persuaded. That is critical to our conclusion that this claim must be sustained, we emphasize.

Thus, in light of the entire record before us, and the unusual facts and circumstances underlying the instant claim, we conclude that the Claimant's displacement should have been allowed. See Third Division Award 17051. From our careful study of this complicated record, we therefore fail to find that Rule 9, Note 2 supported junior Sectionman Richards's assignment to the Aberdeen Section No. 1 Sectionman vacancy over the more senior Claimant. The instant claim shall be sustained as presented, we hold, including the full monetary remedy requested.

**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 19th day of April 2005.**