

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 38201  
Docket No. MW-37456  
07-3-02-3-538

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way Employes  
(BNSF Railway Company (former Atchison,  
( Topeka and Santa Fe Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed and refused to assign Mr. L. R. Bush to Track Supervisor/Inspector Position #82055 headquartered at Lafayette, Louisiana beginning August 6, 2001 and continuing [System File JFSF-01-11/15-01-0014(MW) ATS].
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. R. Bush shall now be assigned to Track Supervisor/Inspector Position #82055 and he shall be compensated for the difference in pay between the track foreman rate of pay and the track supervisor/inspector rate of pay for eight (8) hours each day and for all overtime hours worked by the employee on the aforesaid position beginning August 6, 2001 and continuing.”

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.

At the time of the merger of the Southern Pacific and Union Pacific Railroads, the Burlington Northern Santa Fe Railway (BNSF) purchased former SP right-of-way in Southern Louisiana, between Iowa Junction and Avondale, Louisiana. As well, BNSF was provided trackage rights to operate over former SP tracks between Beaumont, Texas, and Iowa Junction, Louisiana. The UP-SP Trackage Rights Implementing Agreement between the BNSF and the BMW, signed on March 6, 1997, governed how former SP employees would be integrated into BNSF on the territory between Iowa Junction and Avondale Louisiana.

When that Agreement was signed, the Claimant was employed as a Track Inspector. Based on the terms of the Implementing Agreement, the Carrier elected for the Claimant to remain in that position and assigned him Track Supervisor seniority. Effective July 28, 2000, the Claimant bid off the position. He submitted a letter to the Carrier on that date explaining his decision:

"This letter is to inform you that as of July 28, 2000, I wish to return to my previous position as Foreman on the Surfacing Gang for the Lafayette Subdivision. Currently, I hold the position of Track Inspector. I am glad that I could help BNSF in this position, but for personal reasons, I wish to give up my rights as Track Inspector on July 28, 2000."

A little more than a year later, on August 6, 2001, the Carrier assigned an employee other than the Claimant to the position of Track Supervisor/Inspector in Lafayette, Louisiana.

The Organization filed a claim on September 3, 2001, contending that the Carrier had violated the Implementing Agreement when it assigned a non-prior rights employee to the Track Supervisor position and did not award the position to the Claimant. The Organization asserted that the Claimant had prior rights on the trackage between Avondale and Iowa Junction, Louisiana. As a basis for its position, the Organization insisted that Prior Rights Protection under the 1997 Agreement was infinite, did not apply only to former SP employees at the time of the BNSF takeover, and did not limit the Claimant to the craft in which he worked. Rather, the Organization proposed, the Agreement afforded the Claimant the opportunity to work in any craft within the Maintenance of Way Department. The claim was denied and subsequently progressed including conference on the property on December 19, 2001, after which it remained unresolved.

The Carrier contends that Article 1, Section 3 of Appendix No. 23 of the Parties' Agreement gives it total discretion with respect to the selection of incumbents for Track Supervisor positions. That provision reads, in pertinent part, as follows:

"Except as otherwise provided in Section 4 of this Article 1, Section 6-b of Article II and in Article IV of this Agreement, there shall be no restriction upon Management in the exercise of its right to select incumbents for the position of Track Supervisors. The selection or appointment of track supervisors shall be made by the General Manager."

The Carrier also notes that the Implementing Agreement, at Section 2, B (2) addresses the issue of selection of Track Inspectors.

"It is understood that the existing Track Inspectors will be selected for Track Supervisor positions established under Appendix 23. If the positions are not filled in that manner, then consideration will first be given to the former SP workforce who come into the employ of BNSF. If the positions are not filled in that manner, only then may the position be filled by a former Santa Fe employee."

The Carrier insists that it applied the Rules correctly in selecting an employee other than the Claimant to fill the position at issue. It also emphasizes that the Claimant forfeited his prior rights protection when he voluntarily resigned his position as Track Inspector on July 28, 2000. As a result, the Carrier argues, when the Claimant bid for the Track Supervisor job in 2001, he was in the same position as any other employee who did not hold Track Supervisor seniority. The Carrier contends that it was within its rights to choose a candidate who had Track Supervisor seniority, but was not working as a Track Supervisor at that time.

The Board reviewed the record and the applicable Agreement language with care. We are in essential agreement with the Carrier that the Claimant voluntarily forfeited his prior right seniority as Track Foreman when he voluntarily left his position as Track Inspector to return to his "previous position on the surfacing gang for the Lafayette Subdivision." To view this situation otherwise would subject the Carrier to maintaining prior rights for employees who might choose to leave the Carrier's employ entirely and then return years later claiming the "prior rights" they had been granted under the Implementing Agreement.

There can be no question that, at the time of the awarding of the Track Supervisor position at issue, the Claimant did not hold the position of Track Inspector – the position he voluntarily resigned in July 2000. Further, the Claimant's own letter to the Carrier is clear – his intention was to "give up [his] rights as Track Inspector." There is no indication in the record to suggest that the individual selected, who held Track Inspector seniority, was an arbitrary or discriminatory choice by the Carrier. Accordingly, the Board has no basis upon which to overturn the Carrier's action, and the claim must be denied in its entirety.

### 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 18th day of May 2007.**