

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39355
Docket No. MW-37933
08-3-NRAB-00003-030291
(03-3-291)

The Third Division consisted of the regular members and in addition Referee Susan R. Brown when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when, under letter dated May 21, 2001, it rescinded the assignment of Mr. D. C. Hanson to the fuel truck driver's position on Montana Seniority District 200 Tie Gang TP-03 and appointed junior employe D. P. Donovan to said truck driver position (System File B-M-877-H/11-01-0285 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. C. Hanson shall now ‘... be made whole for any and all losses incurred including pay for any pay differentials for all work he performed beginning May 15, 2001, between that of truck driver and whatever position Claimant may hold. We further request pay for all lost time, including pay equal to any and all overtime worked by the junior employe D. P. Donovan beginning May 15, 2001, and continuing until Claimant is placed upon his desired position. We request that Claimant receive reimbursement for all mileage incurred between his residence and his work locations, in excess of mileage Claimant would have incurred between his residence and work locations for TP-03, paid at the rate of \$.325. We request that Claimant receive payment for all travel time for travel incurred between his residence and his work locations, in excess of travel Claimant**

would have incurred between his residence and work locations for TP-03, paid at the time and one-half rate. We further request that Claimant receive the 5% gang bonus for all compensation paid to junior employee D. P. Donovan beginning May 15, 2001, until such time that the fuel truck driver's position on TP-03 is abolished.'"

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.

An unusual and complex chain of events led to this claim. On April 16, 2001, J. V. Hegel exercised his seniority and displaced D. P. Donovan on a Fuel Truck Driver's position on Montana Seniority District 200 Tie Gang TP-03. As a result, Donovan displaced junior Truck Driver B. A. Albro, and a long series of subsequent bumps occurred. On April 20, Hegel was disqualified for the TP-03 position, a fact he did not contest. The position was advertised in a Bulletin dated May 1 and on May 15, P. J. Kenny was awarded the bid. The next day, the award was rescinded as an error, and Claimant Hanson, a more senior employee who then held the position of Surface Crew Foreman, was assigned. Also on May 16, the Carrier advertised the Surface Crew Foreman position vacated by the Claimant. On May 21, the Carrier determined that Hegel had improperly been permitted to displace Donovan and, therefore, the vacancy should never have been posted. It thereupon rescinded the Claimant's assignment to the TP-03 Fuel Truck Driver position. There is no evidence in the record as to whether the Claimant was returned to his prior position or used his seniority to bid another vacancy.

The Organization contends that the TP-03 Truck Driver position was properly bulletined under Rule 20, which requires the Carrier to post any vacancy of more than 30 days' duration. Applying that Rule results in the Claimant's right of seniority to the position and all the income and prerogatives of same. It points to the Carrier's initial posting of the position as an indication that it agreed with the Organization's interpretation; it cannot now claim an "error." Moreover, it asserts that Hegel's **disqualification was improper**. Finally, the Organization contends that in the long series of bumps that occurred, only Donovan was returned to his prior position, in violation of the Claimant's seniority rights.

The Carrier argues that because Hegel did not have the proper certification for the Fuel Truck Driver position, his initial displacement of Donovan was permitted in error. Upon discovering its mistake, the Carrier only did what the Organization is always asking for; it sent everyone back to status quo ante. There was no violation of Rule 20 because the original displacement was in error so no vacancy of any length ever occurred.

After careful study of the record, the Board concludes that several issues raised by the Organization are not before us, including the propriety of Hegel's disqualification, which was never challenged and cannot now be considered. The Organization also alluded to other employees who were bumped in the chain started by Donovan's initial displacement and stated that none of them were returned to their prior positions, presumably to support its claim that Donovan's return was improper. This assertion regarding the treatment of the other employees, however, is merely that, with no record evidence of what actually happened to them. As stated many times by many prior Boards, assertions without evidence cannot be considered and we decline to do so here.

The skeleton of the story is this: a displacing employee was disqualified, leaving a vacancy. After the vacancy was posted and awarded, the Carrier concluded (1) it had made an error in allowing Hegel to bump (2) a vacancy had never occurred (3) the position had been erroneously advertised and (4) Donovan should still hold the Fuel Truck Driver position. The parties' discussions about settling this issue are immaterial to the contractual questions before the Board. First, it is sound labor policy for arbitrators not to consider statements made during settlement discussions so as not to chill such discussions in the future. Second, there are many reasons why

parties settle claims; what they are willing to undertake in order to do so under particular circumstances is not dispositive of a contract interpretation.

The nub of this dispute revolves around whether the displacement by Hegel of Donovan was an “error” that the Carrier was contractually permitted to correct by returning everyone to status quo ante, as the Carrier contends, or whether it was a routine displacement by a senior employee who was eventually disqualified, resulting in a vacancy of more than 30 days, as the Organization argues.

A similar issue has been addressed in the past albeit in a somewhat different context. In Special Board of Adjustment No. 1109, Referee Richard R. Kasher found that an employee is presumptively qualified when assigned to a position. He stated:

“While the Carrier has argued that there is no ‘such thing’ as a presumption of qualification, in fact, in this Board’s opinion, when the Carrier awarded Ms. Thompson a position of foreman, she was presumptively qualified. Otherwise, how could the Carrier ‘disqualify’ Ms. Thompson if she had not established some right to the job.”

Referee Kasher noted limited exceptions to this rule, citing as an example of such an error when a specific license is needed to hold a position, the Carrier mistakenly believes that the employee holds such a license, and makes the assignment. Absent such a specific, limited mistake, Referee Kasher found that the Carrier made a bona fide assignment, noting that such an assignment does not preclude the Carrier from disqualifying the employee within the first 30 days if s/he is not able to perform the duties of the position.

In the case before us, the Carrier argues that it was exactly such a lack of license (hazmat) that resulted in the erroneous assignment of the sort referred to by Referee Kasher. The record, however, indicates otherwise. The written reason for disqualification given by the supervisor, as required by contract, states:

“The disqualification is due to inability to perform the extensive duties of this position and at the request of the employee.”

The Carrier's later assertion that Hegel was disqualified solely because it was discovered that he did not to have a hazmat license is nowhere backed by evidence. It is well established by precedent that parties must prove their assertions with evidence presented on the property and that mere assertion is insufficient to establish a case. Moreover, as the Organization points out, Hegel was permitted to operate the fuel truck for a period of five days and surely the Carrier would not have done so in the absence of a federally-required license.

Based on this evidence, we conclude that Hegel's displacement of Donovan was proper and when Hegel was subsequently disqualified for his "inability to perform the extensive duties of this position," a vacancy was created that had to be advertised. As the record reveals, the Claimant was the proper employee to be assigned to the vacancy. There were no grounds for the Carrier to rescind his assignment because it arose from a bona fide disqualification, not from an error.

Being deprived of a position to which he had a contractual right caused the Claimant harm in need of a remedy. We reject the Carrier's argument that his loss is measured solely by the actual rate of pay; the opportunity for overtime earnings are often far more important than the base rate to an employee, as evidenced by the fact that the Claimant used his seniority to bid on the Truck Driver position with a lower pay rate than the Foreman position he was then holding. Although it is clear that Donovan worked far more overtime in a given period (671 hours) than did the Claimant (73.5 hours) it is only speculative how many of those hours the Claimant would have worked had he had the opportunity. Compensating him for all of Donovan's work, therefore, has no basis in fact. It is clear, however, that the Claimant's lost opportunities must be remedied in some measure, so we shall use an average figure to calculate his losses. Moreover, we find that additional travel time and mileage for the Claimant is not warranted. These payments are not compensation for work, but are sums paid for actual travel incurred. Presumably the Claimant was appropriately recompensed for the travel time and mileage he incurred in whatever positions he held and those are the only payments to which he is entitled.

The Board concludes that an award favorable to the Claimant is warranted with the following provisions:

- The Claimant shall be paid any difference in the rate of pay between the TP-03 Fuel Truck Driver position and any position he held from May 21, 2001 until

such time as he is assigned the TP-03 Fuel Truck Driver position or that position is abolished, whichever comes first;

- The Claimant shall be paid, at the time and one-half rate of the TP-03 Fuel Truck Driver position, the difference between the overtime he worked in the position(s) he held and one-half the overtime worked by D. P. Donovan on the Fuel Truck Driver position from May 21, 2001 until such time as the Claimant is assigned the TP-03 Fuel Truck Driver position or that position is abolished, whichever comes first;
- The Claimant shall be paid the 5% gang bonus for all compensation paid to D. P. Donovan beginning May 15, 2001, until such time as he is assigned the TP-03 Fuel Truck Driver position or that position is abolished, whichever comes first;
- The Claimant shall not be paid any additional travel time or mileage.

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 21st day of October 2008.