Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39519
Docket No. MW-37689
09-3-NRAB-00003-030046
(03-3-46)

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(BNSF Railway Company (former St. Louis – San
(Francisco Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1) The Agreement was violated when the Carrier called and assigned junior employees E. Stenzil, J. Tune and J. Stewart, III to work the Fresno California blitz beginning on January 17 through February 7, 2000, instead of Messrs. K. McGoon, B. Burks and J. Rasch [System File B-2565-2/12-00-0067 (MW) SLF].

2) As a consequence of the violation referred to in Part (1) above, Claimants K. McGoon, B. Burks and J. Rasch shall now each be compensated for one hundred twenty (120) hours' pay at their respective straight time rates of pay and fifty-seven (57) hours' pay at their respective time and one-half rates of pay."

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 Organization filed the instant claim on behalf of the Claimants, alleging that the Carrier violated the parties' Agreement by failing to call the Claimants to work the Fresno, California, blitz track maintenance project and instead calling junior employees to perform this work.

The Organization initially contends that Rule 79 clearly and unambiguously requires that in the recall of furloughed employees, the senior employees who have complied with Rule 78 will be notified to report for duty. The Organization asserts that there is no dispute that the Claimants were senior to the three named employees recalled by the Carrier and assigned to the Fresno blitz track maintenance project. The Organization argues that because it also was undisputed that the Claimants had complied with Rule 78, there can be no valid question that the Claimants were entitled to preference for recall to the subject track work. The Carrier's decision to bypass the Claimants violated the Agreement.

Addressing the Carrier's "volunteer" defense, the Organization maintains that the Carrier is in serious error. Pointing to a number of Awards, the Organization emphasizes that it is well established that there is no need for the Claimants to volunteer or to request that the Carrier respect their seniority. The Organization argues that there is no merit to the Carrier's "volunteer" theory, which is contrary to the essence of the Agreement.

The Organization maintains that, in any event, the Claimants periodically checked with the Carrier during their furloughs to inquire about positions that they might be able to work. Moreover, two of the Claimants submitted bids for the positions advertised in connection with the Fresno blitz. The Organization contends that the Carrier took no issue with the evidence showing that the Claimants had demonstrated an unmistakable interest in working generally and on the Fresno blitz in particular. The Organization insists that whether the Claimants "volunteered" for the positions in question is of no moment and cannot validly be used to defeat the instant claim.

As for the Carrier's defense that the Claimants held no seniority on the district where the work was performed, the Organization argues that this does not serve to invalidate the undisputed fact that the Claimants were senior to the three named employees assigned by the Carrier in this instance. The Organization emphasizes the Carrier's admission that it had chosen from employees on other divisions who had not worked on the district in question, but who had "volunteered" for the assignments. The Organization points to a number of Awards holding that when, as here, a carrier makes assignments from employees outside the district involved, the carrier must observe the principle of seniority.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Claimants have not proven any contractual entitlement to the positions at issue. The Carrier asserts that the California district gang positions referenced in the claim actually are on Santa Fe Territory, Districts 51 and 62, and not on the Regional-System Gang (RSG). The Carrier argues that the positions on which the Claimants claimed to have bid were on the RSG. The Carrier asserts that the California district gang positions were not bulletined, but instead were assigned to volunteers who learned of the jobs by word-of-mouth; the record demonstrates that this is the custom for blitz projects.

The Carrier emphasizes that even if the California district positions had been bulletined, the Claimants would not have been entitled to bid on them because they lacked any right to be assigned to these positions. The Claimants could not bid on the district positions because the Claimants lacked seniority rights in California. The Carrier further points out that if the Organization now is attempting to alter the basis of the claim, by changing the subject matter to an entirely different group of jobs, that would be improper because it is far too late to amend the instant claim under Rule 90 of the Frisco Agreement.

The Carrier then asserts that with 1998 seniority dates, the Claimants are junior to all employees who were awarded the RSG jobs, so the Claimants may have referred to their bids on the RSG jobs merely as evidence of their willingness to travel to jobs distant from the Claimants' homes in Missouri. The Carrier insists that even if the Claimants had specifically volunteered for the Riverbank, California, jobs, which they did not do, the Carrier was under no contractual obligation to assign the Claimants to

these Santa Fe territory positions, which are outside of the Claimants' seniority districts. The Carrier emphasizes that the work in question clearly was outside the scope of the Frisco Agreement.

The Carrier then contends that even if the Organization accurately represented the facts of this case, the instant claim still must fail because there is no contractual basis for it. The Carrier insists that there simply are no Agreement provisions stating that furloughed Frisco employees must be assigned to work on foreign seniority districts outside of their own territorial jurisdiction. The Carrier points out that such assignments are outside the Frisco contractual scheme. The Carrier asserts that because it generally is unable to assign employees to work on foreign seniority districts, the Carrier basically uses volunteers from the ranks of unemployed workers, as occurred here. The Carrier emphasizes that employees otherwise consider seniority district lines to be virtually impenetrable walls to assignment of foreign-district employees.

The Carrier goes on to argue that although the Organization is attempting to frame this dispute as a superior-seniority issue, the Carrier could have hired new employees to fill the extra Santa Fe jobs in the California blitz, rather than assigning furloughed employees from foreign districts, like the Claimants. The Carrier insists that there is no dispute that new employees hired into those Santa Fe jobs would have contractual seniority preference to those jobs over anyone from the Frisco territory, including the Claimants, without regard for their length of tenure.

The Carrier further asserts that Frisco employees obtain seniority preference rights through their own Seniority Districts, pursuant to Rule 3 of the Frisco Agreement. None of the Frisco Seniority Districts are even on the same side of the continent as California, which is Santa Fe territory. The Carrier emphasizes that Frisco employees cannot claim assignment rights on Santa Fe territory, where they have no pre-existing seniority.

The Carrier goes on to contend that another fundamental defect in the Organization's case is the failure to explain the contractual basis for the instant claim. The Carrier points out that the Organization did not cite or argue any particular contract provision. Instead, the Organization simply referred to its familiar boilerplate of nine major Rules, which it tends to stuff into virtually all of its claims, regardless of the subject matter of the particular claim. The Carrier asserts that in the absence of

any explanation from the Organization of a contractual basis for its claim, the Rules cited by the Organization's boilerplate cannot support the claim. The cited Rules apply only to employees and positions covered by the Frisco Agreement, and none of them are applicable to the subject matter of this dispute. The Carrier insists that there is no Frisco contract provision applicable to the subject matter of this dispute. Moreover, even if the claim had been for the RSG positions, which it was not, the Claimants were too junior to obtain any bulletined RSG assignments.

The Carrier argues that it is free to use its discretion to select among volunteers for any extra jobs accruing to blitz projects. The Carrier asserts that this volunteer policy was founded, at least in part, to provide employment opportunities that would be otherwise unavailable to furloughed employees whose seniority was outside of blitz project boundaries. The Carrier insists that throughout the decades in which the parties' Agreement has been in existence, the Carrier has followed the same practice to which the Organization now belatedly objects.

The Carrier contends that within its policy, it historically has exercised its discretion in choosing among furloughed employees from the former railroads of its system. The Carrier asserts that it is free to continue the historical exercise of its own sound management discretion in accepting volunteers for positions on foreign seniority districts. There is no contractual restriction prohibiting such a practice, so the Carrier argues that it is free to exercise its inherent and reserved rights of management of its workforce.

The Carrier emphasizes that the Claimants have no seniority rights to California jobs, and there is no contractual support for the instant claim. The Claimants cannot claim a right that is outside the scope of their Frisco Agreement. The Carrier points out that the Frisco Agreement is the creature of one merger property, while the Santa Fe Agreement is from an entirely separate merger with a different railroad. These two mergers involved discrete groups of employees covered by different labor agreements. The Carrier asserts that a number of Awards have recognized the contractual distinction of merger territories.

The Carrier argues that in the instant case, the Organization is mixing apples and oranges. The Carrier asserts that the California blitz jobs are not "work for the property within the jurisdiction of the Agreement covering the Claimants." The Carrier insists that there is no contractual support or authority for granting extra-

territorial assignment rights to the Claimants. Accordingly, the Carrier was entitled to exercise its managerial discretion in how it assigned foreign employees to the blitz jobs. The Carrier asserts that prior Awards have dismissed claims where the Organization failed to show that any particular contract provision or past practice required the job assignment demanded by the claimant. In the instant case, the Organization failed to prove that any contract provision or past practice supports its position, and the Carrier insists that the Organization cannot prove that the Claimants had a preferential right to this position.

The Carrier goes on to point out that the Board may not imply seniority rights that are not specifically provided by the Agreement. In addition, job assignment rights may not be implied or broadly construed. The Carrier suggests that the Organization is seeking to re-write the Agreement and ignore historical practice, without having to engage in the collective bargaining process.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it assigned junior employees to work the Fresno, California, blitz between January 17 and February 7, 2000. Therefore, the claim must be denied.

The record reveals that the Organization failed to prove any contractual entitlement to the positions in dispute. There was no contractual basis for the Organization's position that the Frisco territory's seniority would be applicable to the voluntary assignments to temporary positions on the Santa Fe territory. As the Board stated in Third Division Award 37945:

> "Before the Carrier can be required to present evidence in support of any defenses to the Organization's claim, the Organization bears the burden of proving that its claim is colorable. The Board finds that the Organization failed to meet that burden of proof."

In this case, the Organization failed to prove that its claim was "colorable" because of the difference in the two territories and there was no showing that the

Claimants had any rights on the territory at issue. Because the Organization failed to meet its burden of proof in this case, this claim must be denied.

AWARD

Claim denied.

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 2nd day of February 2009.