

**Form 1**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 39947  
Docket No. MW-39797  
09-3-NRAB-00003-060640  
(06-3-640)**

**The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(National Railroad Passenger Corporation (Amtrak) –  
( Northeast Corridor**

**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 Welder K. Deely to the structural welder foreman track position headquartered at the Wilmington Roadway Equipment Shop per Advertisement 021-MWSI-0805 dated August 29, 2005 and instead assigned junior employee E. Delvalle (System file NEC-BMWE-SD-4548 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, the aforesaid bulletin shall now be corrected and assigned to Claimant K. Deely effective September 19, 2005, and he shall have his name placed on the welder foreman roster effective the same date, and he shall be compensated for the difference in pay between the pay rate he received and the pay rate of the welder foreman position for all straight time and overtime hours earned by Mr. Delvalle beginning September 19, 2005 and continuing until he is placed on said position.”**

**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.**

**On August 15, 2005, the Carrier advertised for bid a position of Structural Welder Foreman Track. On August 23, 2005, the Carrier cancelled the advertisement because of a clerical error. The Carrier reposted the position with the error corrected on August 29, 2005. The Claimant bid on the position but it was awarded to E. DelValle.**

**The Claimant had a seniority date of January 20, 1992, on the Bear System Shop Welder Roster as a Welder. DelValle had a seniority date of September 4, 1995 on the Southern District Structures Department Structural Welder Roster.**

**Rule 1 provides:**

**“In the assignment of employees to positions under this Agreement, qualification being sufficient, seniority shall govern.**

**The word ‘seniority’ as used in this Rule 1 means, first, seniority in the class in which the assignment is to be made, ands thereafter in the lower classes, respectively, in the same group in the order in which they appear on the seniority roster.”**

The instant dispute turns on which was the appropriate seniority roster to use. The Organization asserts that the appropriate seniority roster was the Bear System Shop Welder Seniority Roster per the Bear Transfer Agreement which governed the transfer of work from the Bear, Delaware System Shop to the Wilmington, Delaware Roadway Equipment Shop. The Carrier asserted that the Bear System Shop Welder Seniority Roster did not apply because the position was for a Structural Welder Foreman and that the Bear Seniority Roster was limited to Welders and did not include Structural Welders. Rather, the Carrier maintained, the appropriate seniority roster was the Southern District Structures Department Structural Welder Roster, on which DeValle had seniority but the Claimant did not.

As the moving party, the Organization has the burden of proof. Consequently, the Organization has the burden to prove that the Bear System Shop Welder Seniority Roster applied to structural welding positions at Wilmington under the terms of the Bear Transfer Agreement. However, the Organization failed to provide evidence that would carry its burden of proof. The Organization asserted that the parties "understood that many things are left unsaid in Labor Agreements, including the Bear Transfer Agreement," but this assertion is no substitute for proof by competent evidence. The claim must be denied for lack of proof.

**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 30th day of September 2009.