

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40428
Docket No. MW-39858
10-3-NRAB-00003-070001
(07-3-1)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway 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 Machine Operator P. Hust to Bulletin F0404A-07 Position 30459, Group 3 Machine Operator Production Tamper with Group 2 rate of pay, on Surface Crew 382, per Award Bulletins dated April 15, 2004 and instead assigned junior employee K. Dallman (System File T-D-2761-W/11-04-0213 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Hust shall now ‘ . . . be immediately placed on the Group 3/4 position, as a part of Surface Crew 382, and that he be made whole for the Company’s violation, beginning April 26, 2004 and continuing until such time as Claimant is placed upon the position. We request that Claimant receive the correct rates of pay, for all hours the junior employee remains on the position. We request that Claimant receive pay equal to any and all overtime received by any employee allowed to work the position. We request that Claimant, receive all benefits accruing to his assignment on Surface Crew 382, including per diem meal allowances \$23.00, beginning April 26, 2004 and**

continuing, and reimbursement of any away from home lodging during claimed period of time. We also request that Claimant receive week-end travel allowances under Article XIV, of the September 26, 1996 Mediation Agreement, we further request that all Claimants receive accreditation toward the bonus incentive allowance.”

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 March 9, 1994, the Carrier wrote to the Organization regarding the parties' agreement, in part, regarding “. . . implementation of the Terms and Conditions applicable to Regional Gangs . . . [related] to . . . the exercise of seniority from the Regional Gangs by bidding . . .” (“1994 Letter”) The question and answer format in the 1994 Letter read:

- “Q. Will a Region Gang employee be allowed to bid on positions that are posted and closed within the ninety (90) day restriction on exercise of seniority, but will be awarded after the Region Gang employee's ninety (90) day restriction on exercise of seniority ends?
- A. Yes. As clarification, all employees except those recalled from furlough off of their home seniority district, who are assigned

to Region Gangs either by bulletin, by recall from furlough on the district or newly hired are subject to a restriction on bidding outside their Region Gang for ninety (90) calendar days computed from the day the employee reports to the Gang. Bids will be accepted, however, if the bulletin advertising positions for bid is posted and closed during an employee's ninety (90) day restriction, but will not be awarded until after the employee's ninety (90) day restriction ends."

Subsequently, the 1996 National Agreement changed 90 days to 30 days and added language now in Rule 7, Section II (I), that says:

"ARTICLE XVI – PRODUCTION GANGS - Section 3

* * *

(b) An individual who bids and is subsequently assigned to work on a regional and system-wide production gang established by a covered carrier may be held to that gang for a period of no more than 30 days. After such time, the employee will be entitled to bid for other jobs with the carrier, subject to the limitation that no more than ten percent of a gang may bid off during a one week period."

Appendix K to the 1996 National Agreement listed some 34 Letters of Agreement that continued in effect. It does not mention the 1994 Letter.

The Claimant was assigned to Regional/System Gang RP-06 on March 15, 2004. On April 1, 2004, the Carrier posted a number of jobs for bid, including Job 34059, a Group 3 Machine Operator on a production tamper with Surfacing Crew 382. Bids closed on April 10 and the position was to become effective on April 15.

On April 8, after 25 days on Gang RP-06, the Claimant bid Job 34059. The Carrier denied his bid, because he had not served 30 days on RP-06 as required by Rule 7 Section II(1). A junior employee was awarded Job 34059.

The Organization filed a claim, citing Rules 2 and 22. It argues: (1) because the Claimant was senior to the successful bidder, his Rule 2 and 22 seniority rights have been violated; (2) his 30-day restriction ended April 13, two days before the bid job was awarded; and (3) the history of Rule 7 Section II(1)'s language, read together with the 1994 Letter, states the proper application of bid restrictions and establishes the Organization's interpretation. Asserting that the Carrier's violation was deliberate and continuing, it requests the broad remedy quoted above in its Statement of Claim.

The Carrier responds: (1) the unambiguous language in Rule 7 Section II(1) restricted the Claimant's ability to bid off of his Regional/System gang for 30 days after being assigned to the gang; therefore, his seniority never became a factor; and, moreover, there is no mention of effective bid days in relation to computing the 30-day restriction; (2) the 1994 Letter is inapplicable because it was modified thereafter, originally only applied when the restricted period was 90 days and is no longer part of the Agreement because it is not listed in Agreement Appendix K; (3) the Organization's reading defeats the stability the Rule was designed to protect; (4) the Organization failed to meet its burden of proof; and (5) claimed damages are excessive and unproven because there is no proof of financial loss and, at most, there is an issue of disputed fact outside the Board's authority.

At its core, this dispute is whether Rule 7 prevents a gang employee from bidding outside the gang during his first 30 days on a gang for a position that begins after expiration of his first 30 days. If so, the Claimant's bid was fatally premature. If not, he is entitled to his bid job as the senior bidder.

On its face, Rule 7 Section II(I)'s language seems conclusive. With certain other provisions not now relevant, it first creates a 30 day maximum restriction when a gang employee may be held to the gang he is assigned. Crucially, it then states, "after such time, the employee will be entitled to bid for other jobs. . . ." Given the apparent simplicity and clarity of the phrase, strong persuasive evidence or circumstances are needed before accepting the Organization's contention that an employee is entitled to bid before expiration of the 30-day holding period. No incompatible language is found in the 1996 National Agreement. Nor is there

evidence of any contrary binding practice or arbitral precedent supporting the Organization's reading.

Instead, the Organization points to a letter written some two years before the 1996 National Agreement. Nothing indicates that it was meant to merge into or survive the unreconcilable, straight forward language in the new Agreement. To the contrary, Appendix K's failure to incorporate the document reflects a mutual understanding that the 1994 Letter lost whatever previous authority it possessed.

Accordingly, 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 14th day of May 2010.