

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 41737
Docket No. MW-41532
13-3-NRAB-00003-110146

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to assign Mr. R. Dalbey to the assistant foreman position on the section crew headquartered at Noyes, Minnesota per System Bulletin 81A dated April 2, 2007 and instead assigned junior employee R. Degelder (System File C-07-040-018/8-00219-145).
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier shall now correct System Bulletin 81A to show Claimant R. Dalbey as being so assigned and Claimant R. Dalbey shall be compensated at the applicable assistant foreman rate of pay for all straight time and overtime hours worked by junior employee R. Degelder on the assistant foreman position at Noyes, Minnesota beginning with the first day he worked said position following the aforesaid April 2, 2007 bulletin and continuing until this correction has been made.”

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 village of Noyes, Minnesota, is located in the northwest corner of the state at the Canadian / U.S. border and is the northern terminus of U.S. Route 75 and the site where the BNSF Railway Company and the Soo Line Railroad enter Canada. Noyes, Minnesota, is the headquarters point for the Noyes Section crew that has, as its primary and regular responsibilities, repairing and maintaining track for more than 80 miles of section territory running from the northern point of Noyes to Karstad, Minnesota, at the southern end. In addition to its regular responsibilities, the crew performs the function of “barman” and, in that capacity, assists U.S. Customs Department personnel with the handling of railcars scheduled to cross into the U.S. over the border from Canada. Under the direction of the U.S. Customs Department, the “barman” is required to open and close the doors on freight cars so Customs Department personnel can inspect the various cargos entering the U.S. Although the overwhelming majority of train traffic into the U.S. from Canada is scheduled and pre-planned, the requirement for the presence of a “barman” to provide assistance to U.S. Customs Department personnel can occur at any time either during regularly assigned work hours or during overtime hours – which entails being present as needed after regular work hours, weekends, holidays, etc.

Prior to October 2006, the Noyes Section crew was composed of a Foreman, Assistant Foreman and a Laborer. Any one of the three crew members was able to perform the function of the “barman.” In October 2006, following installation of continuous welded rail, the Carrier abolished the Laborer’s position, leaving the Noyes section crew composed of the remaining two positions: Foreman and Assistant Foreman. D. Dalbey, the Claimant’s brother, began working on the Noyes section crew in 1989, assumed the position of Foreman in 1992 and left the crew in 2007 for medical reasons. In describing the function of the “barman,” D. Dalbey stated the following, in pertinent part, in an undated letter:

“At the end of the work day, whoever is on call as the barman, has to call the Border Services Group in Winnipeg to let them know who is on call after hours and on weekends and whether that person will be on call for just the day, the weekend, the week or even the whole month; the number where they can be reached and the amount of notice time that they will need to report. The Border Service Group then gives the barman a call giving him as much notice as possible, usually an hour, about when the

train is to arrive, and to let him know that Customs has been called for a particular time. The barman then goes over to the depot and gets the switch on [the] other side and makes sure it is clear; depending upon the weather, he may also have to shovel or even plow a path out to the crossing so the customs official can get to the cars.”

Dalbey noted in the letter that the Foreman of the section crew had first choice in taking overtime calls for customs inspections (the barman function) the Assistant Foreman had second choice, and the senior Laborer when there were two section Laborers had the next choice. D. Dalbey served on the Noyes section crew for a total of 18 years and for all those years, he resided in Noyes, Minnesota. For at least the last 15 of those 18 years as Foreman of the section crew, D. Dalbey worked almost all of the overtime barman calls. Because he resided in Noyes where the section crew headquarters is located, there was never a time when he was not on time to meet Customs personnel at the time the trains arrived at the border for inspection.

In January 2007, when D. Dalbey vacated the section crew’s Foreman position for medical reasons, the Carrier bulletined the position as a permanent position. The section crew’s Assistant Foreman, R. Gibson, bid for and was awarded the Foreman’s position. As a result, the Assistant Foreman position was left vacant and the Carrier, by System Bulletin No. 81 dated March 14, 2007, bulletined the vacancy as a permanent Assistant Foreman position. In accordance with such postings going back decades, all Noyes section crew positions were bulletined and assigned to a Monday through Friday workweek with Saturday and Sunday designated as rest days. Bulletin No. 81 also indicated that the assigned work hours for the Assistant Foreman position would be 7:00 A.M. to 3:30 P.M. In addition, the Bulletin specified the following information:

“Applications will be received in this office until 3:00 pm Thursday, March 29, 2007 This Position Is Headquartered In Noyes, MN. Successful Applicant Must Be Available To Respond Within 30 Minutes To Pre-Rail Cars For Customs Inspections [the Barman Function]. Must Have A Valid Medical Card. Must Be GCOR/OTS. Must Have A Valid Driver’s License.”

Claimant R. Dalbey, with a Group 2, Rank B Assistant Section Foreman’s seniority date of May 23, 1991, bid on the Noyes Assistant Section Foreman’s position and so did R. Degelder with a seniority date of May 12, 2003. Although Dalbey was senior to Degelder by 12 years, by Bulletin No. 81A dated April 2, 2007, the Carrier awarded the position to Degelder. The reason proffered by the Carrier for awarding the position to an

employee junior in seniority to the Claimant was that given the fact that the Claimant resided in Emerald, North Dakota (a distance of approximately 96 miles from Noyes, Minnesota) he was not qualified for the bulletined position based on grounds he could not meet the 30-minute response requirement to pre-rail cars for Customs Inspections, whereas R. Degelder resided in Pembina, North Dakota (a distance of approximately six miles from Noyes) and, therefore, did meet the 30-minute response requirement.

The Organization notes that never, throughout the history of the Noyes section crew, had any of the crew positions been bulletined setting forth the requirement that the “successful applicant must be available to respond within 30 minutes to pre-rail cars for Customs Inspection.” In support of its assertion, the Organization proffered 75 pages of past bulletins for Noyes section crew positions beginning in March of 1989 and ending in March of 2006 - a 17-year period. In fact, the Organization points out, the previous incumbent of the Assistant Foreman position was R. Gibson, who held the job for eight years, and resided in Thief River Falls, Minnesota (a distance of approximately 80 miles from Noyes, Minnesota). As a result of the Carrier’s explanation as to why the Claimant was not awarded the position, on April 22, 2007, the Organization filed the subject continuing claim asserting that the Carrier was in violation of applicable seniority provisions, among other provisions, of the Controlling Agreement by having awarded the position to the junior employee solely on the basis he resided within 30 minutes of the Noyes Section Headquarters.

The Board concurs with the Carrier’s position that it has the right to promulgate “reasonable” Rules and is not obligated to confer with the Organization prior to implementing such Rules. However, the operative word here as it pertains to the unilateral promulgation of Rules by the Carrier is “reasonable.” It is understandable that in bulletining Noyes section crew positions over the 18-year period D. Dolbey resided in Noyes, the Carrier had no concern regarding response time for performing the duty of pre-railing cars. The record before us informs that in almost all instances, the duty of barman was performed by D. Dalbey during those years and, in the relatively few instances when D. Dalbey did not perform this duty during times when he was furloughed or working other assignments, the duty was performed by one or the other section crew members. However, we do not find it understandable that after the section crew was reduced to only two positions of Foreman and Assistant Foreman and the need arose to fill the Foreman’s position due to D. Dolbey vacating the position for medical reasons, that the bulletin the Carrier issued to fill that position did not specify the requirement for the incumbent to be available to respond within 30 minutes to pre-rail cars for Customs Inspections. Had such requirement been specified for the Foreman position, the Carrier would have been precluded from awarding the position to R. Gibson for the very same

reason it did not award the Assistant Foreman position to the Claimant, that is, Gibson's residence in Thief River Falls, Minnesota, is located approximately 80 miles from Noyes, Minnesota, and, therefore, given such a distance, Gibson would not qualify to satisfy the 30-minute response time for pre-railing cars.

We find, based on grounds of disparate treatment, that the Carrier's 30-minute response time was not a "reasonable" requirement for the Carrier to preclude awarding the Assistant Foreman position to the Claimant given the fact that he possessed greater seniority standing than R. Degelder. We find other reasons as well to conclude that the 30-minute response time as a requirement for either the Foreman or the Assistant Foreman position was unreasonable, to wit: the Claimant's willingness to make the necessary accommodations to perform the duty of barman in a timely fashion whenever he is designated to perform said duty; the fact that Foreman Gibson is first in line to accept barman duty so that in fulfilling this function, it is incumbent upon him to make the necessary accommodations akin to those the Claimant would have to make in order to meet a 30-minute response time, which involves physically being much closer in proximity to Noyes during the time on call; the fact that the trains subject to Customs Inspections are, for the most part, run on a set schedule so that barring delays which do occur, the times for arrival at the point of inspection can generally be accurately determined in advance, thereby rendering unnecessary a required 30-minute response time; and the fact that advances in technology associated with communications such as cell phones and electronic mail as compared to the state of communications that existed in years past insures better, faster, easier and efficient contact among the barman, Custom officials and the Canadian Border Service Group in Winnipeg, which, in turn, insures achieving the objective of timely inspection of the rail cars, thus rendering unnecessary a 30-minute response time requirement.

Additionally, we find the Carrier's attempt to impose a nexus between a required response time and the place of an employee's residence to be unreasonable in light of the fact that accommodations can be made, no matter how far the residence is in distance away from Noyes, by the employee, here the Claimant, to make himself available to perform the barman function in a timely manner whenever he is designated to be on call to pre-rail cars for Customs Inspections. Moreover, while one can read a residence requirement into the 30-minute response time requirement, the Carrier nevertheless failed to explicitly state on the bulletin in question that the successful applicant for the Assistant Foreman position would have to live within a certain specified distance from Noyes. Absent such a specified requirement, we find the Carrier's rejection of the Claimant as the successful bidder to be in violation of the Claimant's contractual seniority rights.

All other argument presented by the Carrier is hereby dismissed as irrelevant to the central finding that the Claimant's seniority rights were violated.

In accordance with the afore-stated findings, we will sustain the claim as presented including the remedy requested. With regard to the amount of compensation due the Claimant, we remand to the Parties the task of calculating the proper payment commensurate with the loss of wages suffered by the Claimant as a result of not being awarded the position of Assistant Foreman on the Noyes section crew. It is understood that if the Parties fail to agree as to the amount of compensation due the Claimant, either Party may request the Board for an Interpretation to settle the matter with finality.

AWARD

Claim sustained.

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 30th day of September 2013.