

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41739
Docket No. MW-41555
13-3-NRAB-00003-110157**

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

**(Brotherhood of Maintenance of Way Employes 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 improperly issued the September 18, 2007 System Bulletin No. 375 for the position of a permanent Group 2 Rank A Section Foreman position headquartered at Noyes, Minnesota with the restriction / statement that‘***SUCCESSFUL APPLICANT MUST BE AVAILABLE TO RESPOND WITHIN 30 MINUTES TO PRE-RAIL CARS FOR CUSTOMS INSPECTIONS. * * *’ (System File G-07-040-035/8-00430-026).**
- (2) The Carrier violated the Agreement when it failed to assign Mr. R. Dalbey to the foreman position on the section crew headquartered at Noyes, Minnesota, by System Bulletin 375A, dated October 3, 2007 and instead assigned junior employe R. Degelder (System File C-08-040-002/8-00219-148).**
- (3) The claim referenced in Part (2) above as presented by General Chairman G. A. Bell on January 24, 2008 to Manager M. S. Hanson shall be allowed as presented because said claim was not disallowed by Manager M. S. Hanson in accordance with Rule 21-1(a).**

- (4) As a consequence of the violation referred to in Part (1) above, the
‘ . . . Organization requests that Bulletin 375 be cancelled and that
this position be re-bulletined absent the restriction.’
- (5) As a consequence of the violations referred to in Parts (2) and/or
(3) above, Claimant R. Dalbey shall now be compensated for:
1. The loss of all straight time and overtime pay to which he
was entitled but disallowed at the Group 2, Rank A
Foreman’s rate of pay by virtue of his superior seniority to
that of employee’s Degelder;
 2. Restoration of all vacation, fringe benefits, and other rights
as a result of the Carrier’s violation of the Agreement;
 3. The loss of all work opportunities and benefits to which he
would have been entitled from the time that claimant could
have been assigned to Bulletin Assignment #375A by virtue
of his superior seniority.”

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 Board notes that this claim is identical in substance to the claim adjudicated in Third Division Award 41737 with the difference being that Award involved the Carrier’s award of the Assistant Foreman position on the Noyes section crew to the less senior employee, R. Degelder, whereas the instant claim involves the

Carrier's subsequent award of the Foreman's position to Degelder over the Claimant's bid to that position. In Award 41737 the Assistant Foreman's position became available because the incumbent of that position (R. Gibson) vacated the position to bid on the Foreman's position, which he was awarded. It was not apparent from the record in that case whether the Carrier bulletined the Foreman's position as temporary rather than permanent, but it was apparent that the position did not specify a requirement that the successful applicant had to be available within 30 minutes to pre-rail cars for Customs Inspections. We noted in that Award that had such a requirement been part of the bulletin that advertised the Foreman's position, Gibson presumably would not have been selected as the successful bidder because his residence was located in Thief River Falls, Minnesota, a distance of 80 miles from Noyes, Minnesota, which would have, according to the Carrier, precluded him from being available within 30 minutes to pre-rail cars; that is, to perform the "barman function" of the position for Customs Inspections. We further noted in that case, that such a barrier to being awarded the Foreman position had such a 30-minute response time requirement been specified on the subject bulletin, was based on the Carrier's presumption that whenever called to perform the duty of pre-railing cars, Gibson would be present at his residence 80 miles away and, therefore, would be unable to comply with a 30-minute response time to meet the train at the time of its arrival, as well as meet the Customs official who would inspect the cars.

At the same time it awarded Gibson the Foreman's position, it bulletined the position of Assistant Foreman specifying the 30-minute response time requirement. As indicated in Award 41737 the Claimant's bid was rejected for that position because he resided in Emerald, North Dakota, a distance of approximately 96 miles from Noyes, Minnesota, and was deemed by the Carrier as being unable as a result, to satisfy the 30-minute response time to re-rail cars, whereas R. Degelder, who was junior in seniority to the Claimant, was awarded the position based solely on the fact his residence was located in Pembina, North Dakota, which is approximately six miles away from Noyes, Minnesota. Thus, the Carrier reasoned, Degelder was able to satisfy the 30-minute response time requirement if called to pre-rail cars given the short distance he would have to travel from his residence to meet the train at the time of its arrival, as well as coordinate the time he would meet the Customs official who would inspect the cars. The Organization argued in support of its claim in Award 41737 the core of which was that the Carrier's added requirement for the position of a 30-minute response time to pre-rail cars was improper, because in the history of bulletining any of the positions on the Noyes section crew, such a requirement never before existed and there was never a problem in timely performing the barman

function and, that adding such a requirement, which precluded the Claimant from being awarded the position given the Carrier's selection of the junior employee, constituted a violation of the Claimant's contractual seniority rights, here, in the instant case, reasserts the identical arguments in support of its position that the Carrier wrongfully denied the Claimant's contractual seniority rights by failing to award him the Foreman's position. Additionally, not only did the Carrier violate the Claimant's contractual seniority rights by awarding the position to the less senior employee, the Carrier also ignored the fact that the Claimant was much more qualified than Degelder on the basis of relative qualifications and experience for the Foreman's position.

In ruling to sustain the claim in Award 41737 we reassert our findings in that case to apply identically to the instant case. The crux of our ruling in the prior case was that Carrier has the right to promulgate "reasonable" Rules without the requirement to seek input from the Organization. However, we further noted that in promulgating Rules, the operative word was "reasonable" and, that given all the prevailing circumstances, the 30-minute response time requirement added to the bulletin qualifications for the position of Assistant Foreman was "not reasonable." For the very same reasons delineated in Award 41737 with the exception of our finding on grounds of disparate treatment, which does not now apply in the instant case, we find that adding the 30-minute response time requirement to the bulletin qualifications for the position of Foreman was "not reasonable" under all the prevailing circumstances. Primarily, the matter of the location of one's residence does not preclude a Noyes section crew member from adequately performing the barman function, currently the positions of Assistant Foreman and Foreman, given the existence of several factors, the two most important being the willingness of the incumbent of either position to make themselves available whenever designated to be on call as the barman to timely perform the duty of pre-railing cars for Customs Inspections and, too, advances in communication technology such as cell phones and email that did not exist in past years as an efficient and effective means to ensure the presence of the designated barman to timely meet the trains' arrival and, to also timely meet the Customs Official to inspect the cars. We further hold that based on just these findings, the 30-minute response time requirement must be deemed to be superfluous.

As in Award 41737, we hold that all other argument presented by the Carrier is hereby dismissed as irrelevant to the central finding that in not awarding the Claimant

the position of Foreman over the Carrier having awarded the position to the less senior employee, the Carrier violated the Claimant's contractual seniority rights.

In accordance with the afore-stated findings, we rule to sustain the claim as presented in Parts (1) and (2). With regard to the remedy requested in Part (5) we remand to the Parties the task of calculating the proper payment commensurate with the loss of wages and other benefits so delineated by the Organization as a result of not being awarded the position of 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.