

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42345
Docket No. MW-41442
16-3-NRAB-00003-100304**

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

**(Brotherhood of Maintenance of Way Employees -
(Division IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad 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 Mr. D. Warren to Foreman Position 92051 on MDZ Gang SC31 beginning on January 26, 2009 and continuing and instead assigned junior employe B. Bolin (System File T-D-3480-T/11-09-0261 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Warren shall now ‘. . . be assigned in accordance with his seniority and bid application. We further request that Claimant be made whole for any and all losses, and reimbursement for loss of any and all lost work opportunity, including overtime, difference in rate of pay, difference in per diem rate, and the loss of 5% bonus of annual pay he would have earned on SC31, beginning on January 26, 2009 and continuing until Claimant is assigned thereto.”**

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 essential facts of this case are not in dispute. At the time of the incident leading to the claim, the Claimant filed a written application seeking assignment as Foreman of the 2009 MDZ Surface Crew TSCX0031 (SC31). The job bulletin was posted on November 16, 2008. Prior to submitting his application for the Foreman position, the Claimant was assigned and worked as an MDZ Machine Operator on the same gang in 2008.

By letter of March 12, 2009, the Organization filed a claim with the Carrier alleging that it violated the Parties' Agreement when it failed to assign the Claimant to his desired position in accordance with his seniority. It based its claim on Rules 1, 2, 5, 6, 20, 21, 22, 24, 25, 29, 32, 55, 80, as well as the February 15, 2005 MDZ 2000 Final Agreement. As remedy, the Organization requested that the Claimant be assigned the MDZ Foreman position on SC31 in accordance with his seniority and bid application. Further, it requested that the Claimant be made whole for any and all monetary losses and reimbursed for any lost work opportunity. The claim was subsequently denied by the Carrier under date of May 11, 2009.

The Organization further appealed the claim, which continued to be denied by the Carrier. The claim was then progressed, up to and including conference on the property on February 23, 2010, after which it remained in dispute.

It is the position of the Carrier that it did not violate the Claimant's seniority. It contends the Organization's claim is not continuing. The Carrier also disputes the Organization's assertion that it has abused a relatively new Agreement reached by the Parties. It alleges the Organization has consistently been challenging the Carrier's right of selection since the Agreement was reached in 2005. Moreover, the Carrier stresses it has exercised good faith by reaching an Agreement and allowing its employees to operate highly specialized equipment, for which the Carrier expended approximately \$21.6 million dollars.

The Carrier contends that preferential consideration was ultimately given to B. Bolin when assigned the MDZ Foreman position because he had two years of prior experience as a Foreman under the MDZ Agreement. In contrast, the Carrier points out that the Claimant only had one year as a Machine Operator.

Lastly, the Carrier points out that the Claimant bid and was awarded the Foreman position on TP11. As a result, it argues the Claimant was not deprived of any work opportunity. Accordingly, the Carrier urges the denial of the claim was justified.

At the outset, the Organization argues that the Claimant was the most senior applicant and met all qualifications under Paragraph 4 of the MDZ Agreement. It specifically points to the Claimant's Rank "A" Track Foreman's seniority date of May 28, 1981, and previous work experience on an MDZ Surface Crew compared to assigned junior employee B. Bolin's established seniority as a Foreman on February 15, 1999. Further, the Organization emphasizes and details the Claimant's experience and work performed as a Track Inspector, Section Foreman, and other Gang Foreman positions throughout his tenure.

The Organization disputes that the Claimant was not granted an interview prior to the Carrier's assignment of junior employee B. Bolin. It asserts the Carrier granted an interview two weeks after the fact and only after complaints were made by the Organization.

The Organization insists the "preferred work experience" qualification set forth in Paragraph 4 of the MDZ Agreement is based upon assignment to an MDZ gang. It argues the language does not explicitly or impliedly reference solely to an individual position on the gang. In addition, the Organization emphasizes the language "seniority shall prevail." It stresses that seniority is a fundamental and valuable property right which is recognized in countless Awards. In support of its position, it cites Third Division Award 19758.

Finally, the Organization disputes the Carrier's argument that the Claimant was not awarded the position as a result of not being available for service when he took floating vacation days. For these reasons, the Organization urges the claim be sustained.

The Board carefully reviewed all the evidence. We find the record before us has sufficiently established that the Carrier was correct when it assigned the MDZ Foreman position on SC31 to B. Bolin. Although the Claimant possessed one year of experience as an MDZ Machine Operator in 2008, Bolin's two years of work experience in the position as MDZ Foreman in 2007 and 2008 made him the qualified applicant in accordance with Paragraph 4 of the MDZ Agreement.

Notwithstanding the Board's decision above, we find that the Carrier did not act appropriately when it provided the Claimant an interview after it had already assigned the MDZ Foreman position. Moreover, while it does not impact the Claimant's outcome in the instant case, it is important to note that the Carrier did contact the General Chairmen to provide objective reasons for not assigning the Claimant on the basis of seniority. Specifically, we draw attention to language outlined in Paragraph 3 of the MDZ Agreement:

"Consistent with paragraph 4 below, if the senior applicant for any one of the MDZ positions is not selected by the company, it shall contact the General Chairmen and provide the objective reasons for not assigning on the basis of seniority."

Accordingly, the claim is 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 28th day of July 2016.