

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42383
Docket No. MW-41654
16-3-NRAB-00003-100301

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

(Brotherhood of Maintenance of Way Employes –
(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 Assistant Foreman P. Anderson to Assistant Foreman Position 02302 on RP-21 on Bulletin R0805-05 dated February 1, 2008 and a report date of February 11, 2008 and instead assigned junior employe P. Montanez (System File T-D-3311-W/11-08-0295 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Anderson shall now ‘. . . be placed on the Assistant Foreman position, as a part of Steel Gang RP21, and that he be made whole for the Company’s violation, beginning February 11, 2008 and continuing until such time as Claimant is placed upon the position or May 12, 2008. We request that Claimant received the correct rates of pay, for all hours the junior employe remains on the position. We request that Claimant receive pay equal to any and all overtime received by any employe allowed to work the position. We request that Claimant, received all benefits accruing to his assignment on Assistant Foreman on RP-21, including per diem meal allowances \$25.00, beginning February 11, 2008 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.

The essential facts of this case are not in dispute. At the time of the incident leading to the claim, the Claimant placed a bid on position 03402 Bulletin R0801 and was awarded and assigned Assistant Foreman position to Regional System Gang (RSG) TTPX0011 (TP11) on December 15, 2007. On February 1, 2008, the Claimant applied to Bulletin R0805-05 to fill vacant position 02302, as Assistant Foreman on RSG Steel Gang RP21 with report date of February 11, 2008. The Claimant's application was denied and the position was assigned to junior employe P. J. Montanez.

By letter of April 2, 2008, the Organization notified the Carrier of its claim that the Claimant's seniority was violated in accordance with Rule 2 and Rule 22 of the parties' collective Agreement. As a remedy, the Organization's claim requested all overtime damages, additional benefits and allowances accruing to him, and requested that the Claimant be placed on the RP21 Assistant Foreman position. The claim was subsequently denied by the Carrier by letter of May 29, 2008.

The Organization further appealed the Claimant's seniority claim which continued to be denied by the Carrier. The claim was then appealed, up to and including conference on the property, on December 7, 2009, after which it remained in dispute. Accordingly, the matter is appropriate for reference to this Board for adjudication.

It is the position of the Carrier that it did not violate the Claimant's seniority in this particular case. First, the Carrier asserts the Organization misstated the report dates for the Assistant Foreman position on RSG TP11. It disputes the Organization's stated report day of May 12, 2008 and points out that the position had an earlier report day of April 21, 2008.

Notwithstanding the Claimant's reporting date, the Carrier draws attention to Rule 7, Section II, I. In particular, the Carrier asserts its practice since the inception of the rule in 1996 has been not to allow employees to exercise their seniority until they have been assigned to a gang for thirty (30) days. It maintains the plain language states that the day an employee reports to the gang is the first day of assignment. The Carrier also argues the Manpower Planning office does not allow employees to bid from one RSG to another RSG before either gang has started up for the work season.

Lastly, the Carrier notes the Claimant was fully employed during the claim period and therefore contends he did not suffer loss of earnings. Accordingly, the Carrier urges the denial of the claim was justified.

At the outset, the Organization argues that the Claimant was the senior Assistant Foreman and therefore should have been assigned to the position on Rail Relay Gang RGS RP21. It specifically points to the 2007 seniority roster for District 300 with Claimant's seniority date listed as November 8, 1995 and contrasts it with the 2007 seniority roster for District 200 which lists P. J. Montanez's seniority date as May 18, 1998. The Organization emphasizes that the Claimant was clearly the most senior and the Carrier undoubtedly violated his seniority under Rule 2 A, Rule 21, and Rule 22. It stresses that seniority is a fundamental and valuable property right which is recognized in a countless number of awards. In support of its position it cites Third Division Award 19758.

The Organization contends that Rule 7, Section II, I does not apply in this case. It argues the rule applies only to employees after they are working a position on a RSG gang and not before. In this case, it points out the Claimant had not reported to any RSG gang. The Organization details the history and intent of the Rule and disputes the Carrier's alleged past practice.

Finally, the Organization protests the Carrier's argument that the Claimant was not awarded the position as a result not being available for service when he took floating vacation days and bereavement leave. Moreover, it contends the Carrier's

assertion that the Claimant was “fully employed” during the claimed period. For these reasons, the Organization urges the claim be sustained.

The Board has reviewed all the evidence in this case. We find the Carrier was justified when it did not assign the Claimant to Assistant Foreman position on RSG RP21 in accordance with Rule 7, Section II, I.

The record established that while the Claimant was senior to junior employee awarded the Assistant Foreman position on RSG RP21, the Claimant was already assigned as Assistant Foreman to RSG TP11 on December 15, 2007 with a report date of April 21, 2008. In this case, the Claimant would have been eligible to exercise his seniority thirty (30) calendar days after reporting to RSG TP11 on April 21, 2008. Specifically, we draw attention to language outlined in the Agreement:

**Rule 7. District, Regional, and Systemwide Gangs
Section II. Regional and System-wide Gangs**

- I. Employees assigned to regional or systemwide production gangs, including recalled furloughed employees and new hires, may exercise seniority to bulletined positions outside their gang after they have been assigned to the gang for thirty (30) calendar days* (the day that the employee reported to the gang is the first day of assignment). 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. [11/15/96 Agreement, Article IX; 9/26/96 National Agreement, Article XVI, Section 3 (b)]

*Note - Bids will be also accepted from employees working on the current year's Regional/System Gangs for work on the following years' Regional/System Gangs. [11/17/95 Agreement, Appendix K, Paragraph CC]

In similar fashion, the Board is in agreement with Referee Marx's reasoning set forth in Third Division Award 36277.

Accordingly, the claim is denied in its entirety.

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 August 2016.