

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42471
Docket No. MW-42035
16-3-NRAB-00003-120409

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(Union Pacific Railroad Company (former Missouri
(Pacific 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. K. Amos to the B&B Assistant Foreman position on Gang 9314 by Bulletin SBS 50183 effective April 29, 2011 (System File UP247WF11/1557004 MPR).
- (2) The Agreement was violated when the Carrier failed and refused to assign Mr. K. Amos to the B&B Assistant Foreman position on Gang 3550 by Bulletin PAL 51257 effective April 29, 2011 (System File UP248WF11/1557005).
- (3) The Agreement was violated when the Carrier failed and refused to assign Mr. K. Amos to the B&B Carpenter position on Gang 3550 by Bulletin PAL 51271 effective April 29, 2011 (System File UP249WF11/1557006).
- (4) As a consequence of the violation referred to in Part (1) above, Claimant K. Amos shall now ‘. . . be awarded the Bulletin 50183, and seniority, on April 29, 2011 and the difference in pay from his current position of trackman and System Asst Foreman, and continuing ***’
- (5) As a consequence of the violation referred to in Part (2) above, Claimant K. Amos shall now ‘. . . be awarded the Palestine

Bulletin 51257, and seniority, on April 29, 2011 and the difference in pay from his current position of trackman and Palestine Division Asst Foreman, and continuing”

- (6) As a consequence of the violation referred to in Part (3) above, Claimant K. Amos shall now ‘. . . be awarded the Palestine Bulletin 51271, and seniority, on April 29, 2011 and the difference in pay from his current position of Truck Operator and Palestine Division B&B Carpenter, and continuing ***’”

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.

In April 2011, the Carrier advertised vacancies which included the following three positions: B&B System Bridge Assistant Foreman, B& B Division Assistant Foreman, and B& Carpenter. The Claimant bid on all three positions. Rule 20 includes language which states, “When more than one vacancy or position exists and are advertised at the same time, employees will have the right to bid on all such positions, stating their preference.” All three bids were re-bulletined on the basis that there were “NO QUALIFIED BIDDERS.” The Organization submitted three separate claim letters in behalf of the Claimant claiming that he should have been awarded each of the positions for which he bid because “He was the senior non-qualified bidder on this bulletin from the respective division.” The remedy requested for each of the three claims was that the Claimant be awarded the bulletined position, seniority in that position, and the difference in pay from his current position of Truck Operator and that of the position for which he bid.

The Carrier denied each of the claims, first, on the basis that the claims were duplicative. It was the Organization's responsibility, the Carrier asserted, to determine which of the claims it wished to pursue since an employee is never assigned three entirely different bulletins for which the employee bid on in the same bid cycle. The Carrier also cited Rule 2(j) which states, "New employees will not be permitted to exercise seniority outside of the service in which they commenced service (district, zone or system) until they have completed twelve (12) months of service. . . ." The Carrier noted that the Claimant commenced his employment with the Union Pacific Railroad on March 14, 2011, within the Track Subdepartment as a Trackman, at which time he established seniority in the Palestine Division. Therefore, the Carrier contended, the Claimant "shall not be permitted to exercise seniority outside of this division or department until March 14, 2012."

On October 4, 2011, the Organization appealed the denial of the claims. It maintained that the claims were not duplicate claims, citing Rule 2(b), which permits employees to establish seniority in all subdepartments and bid any classification within any subdepartment. It argued that Rule 2(j) did not apply because the Claimant bid on a Division position and 2(j) applies to District, Zone, or System positions. The Organization further noted that the positions being bid for were also in the Palestine Division and asserted that "Claimant has the right to bid inside his own Division."

In answer to the appeal the Carrier, by letter dated November 4, 2011, reiterated its position that the claims were duplicative because "[t]hrough the Claimant has the right to bid on as many positions as he chooses in a bid cycle, he is only permitted to hold one assignment at a time." By contending that the Claimant should have been assigned to three separate positions in the same bid cycle, the Carrier asserted, the Organization was pyramiding the claims, which was "inconsistent with the intent of the Railway Labor Act as stated in Section 2." In addition, the Carrier stated, at the time of the Claimant's bids, Rule 44, Note 2 provided that an employee "needed to bid to a Helper position in order to establish rights in the B&B Subdepartment." Only after establishing such rights, the Carrier asserted, would the employee be eligible to bid to a position of a higher classification within the subdepartment.

The parties held a conference on the three claims on February 14, or 15, 2012 (there is a conflict in the record regarding the correct date), without resolving any of them. The Carrier's notes of the conference, signed by its representative at the meeting, contain the same "CARRIER COMMENTS" for each of the three claims:

“Bid on three jobs. Org filed three claims. Cannot get three jobs in one cycle, duplicate claims. Had to enter B&B as Helper per rule 44.”

For each of the three claims the Organization wrote a separate letter to the Carrier on May 24, 2012, stating that it was in response to the Carrier’s letter dated November 4, 2011.

Each of the May 24 letters further stated, “This will serve and confirm the conference held on February 15, 2012 . . . in which you submitted additional information allegedly supporting your position.” In each of the letters the Organization proceeded to reiterate arguments previously made in support of the particular claim. None of the May 24, 2012, letters specifically referred to the argument made in the Carrier’s November 4, 2011, letter regarding Rule 44.

The Board agrees that it was improper for the Organization to pursue all three claims at the same time. To do so was inconsistent with the provision in Rule 20 which states, “When more than one vacancy or position exists and are advertised at the same time, employees will have the right to bid on all such positions, stating their preference.” The requirement that the employees state their preference when they bid on more than one vacancy or position manifests the agreement of the parties that an employee cannot be awarded more than one position that was advertised in the same bid cycle. Since the employee was not eligible to be awarded more than one position from among those advertised at the same time, it follows that he or she cannot seek a remedy based on a denial of more than one awarded position.

To approach the matter in another way, let us assume that the Claimant had been awarded one of the three positions for which he bid. It follows that he would necessarily have been denied assignment to the other two positions. Under those circumstances he would not have a claim regarding either of those positions since he was only entitled to be assigned to one of the three. In the present case, the Claimant was not awarded any of the three positions. Even if we assume that it was a contractual violation not to award him any of the three positions, the remedy cannot be any greater than would have been the case had there been no violation. The purpose of a remedy for a contract violation is to put the grievant in the same situation he or she would have been in absent the violation, but not in a better position.

Here the Claimant seeks a remedy that would put him in a much better position than had he been awarded one of his bids. He seeks seniority and back pay for three different advertised bulletins even though had he been awarded a bid he could not have obtained seniority or higher pay with respect to more than one bulletin. That cannot be allowed. In the present case, it was up to the Claimant to decide which of the three claims was his strongest and most advantageous and to go with that claim.

The Carrier requests the Board to dismiss all three claims because of the Claimant's failure to select any of them. The Board is unwilling to do so because the Claimant was entitled to pursue one of them. These are not duplicate claims. Each is for a different position. However, because Claimant cannot hold more than one position at the same time, he must choose one of them. In addition, it is clear which of the three claims is Claimant's strongest and most advantageous, namely, his bid for the B&B Assistant Foreman position on Gang 3550 under Bulletin PAL 51257 effective April 29, 2011. The B&B Division Assistant Foreman position pays 25 cents per hour more than the B&B Division Carpenter position. The B&B System Assistant Foreman position would place the Claimant on a separate seniority roster on a district basis pursuant to Rule 5(b) and, in light of Rule 2(j), would raise a serious question about the Claimant's eligibility for the position. Rather than remand this case, which is already more than five years old, back to the parties for the Organization to choose which of the three claims to pursue before this Board, the Board will dismiss the Organization's claims as they pertain to the Division Carpenter and System Assistant Foreman positions and decide the case on the basis of the Organization's strongest claim, namely, the one concerning the Division Assistant Foreman position advertised in Bulletin 51257.

The Carrier contends that the claim pertaining to the Division Assistant Foreman position should be denied on the basis of Note 2 of Rule 44. That rule provides as follows:

“RATIO OF MECHANICS

Rule 44. Bridge and Building Department gangs will be properly balanced as between mechanics and helpers, maintaining a ratio of one (1) helper to three (3) mechanics when practicable.

Note 1: This rule applies only to division bridge gangs.

Note 2: If a position is initially advertised as a mechanic's position and goes no bid, it will be advertised as a helper position to allow employees from other sub-departments to bid to and establish seniority in the Bridge and Building Sub-department."

In its November 4, 2011, letter denying the Organization's appeal, the Carrier asserted that "employees were required to enter the Bridge and Building (B&B) Subdepartment as a Helper per Rule 44, Note 2." That is not what Note 2 says. By its terms it pertains only to a mechanic's position. There is no evidence in the record that a Division Assistant Foreman is considered a mechanic's position. In addition, there is no evidence that the bulletin which advertised the Division Assistant Foreman position here in issue was a position that previously had gone no bid. So far as the record shows, this was the first time the Division Assistant Foreman's position was advertised. For these reasons the Carrier's argument based on Note 2 of Rule 44 must be rejected.

The Carrier contends, however, that its argument based on Note 2 of Rule 44 must be accepted because the Organization did not deny the applicability of Note 2 when it replied to the Carrier's letter of November 4, 2011, in which the argument based on Note 2 was made. There is much Board authority that uncontested factual evidence must be accepted as established when not challenged by the opposite party. It is not clear to this Board, however, that the interpretation of a Rule by one party must be accepted by the Board when not contested by the other party even if the interpretation appears erroneous to the Board. No authority has been cited to the Board on that question, and the Board will not pass upon it here since it is not necessary to do so for a decision in this matter. Here, the record is clear that the argument based on Rule 44, Note 2 was made by the Carrier to the Organization at their conference on this claim. The fact that the claim was not resolved in the conference is evidence that the Organization rejected the Carrier's argument.

In addition, the Organization's letter of May 24, 2012, in answer to the Carrier's November 4, 2012, letter noted that at the conference the Carrier "submitted additional information allegedly supporting [its] position." The only additional information submitted at the conference so far as the record shows, was the Carrier's reliance on Rule 44, Note 2. The Organization's May 24, 2012, letter made clear that the Organization was persisting in its position that its claim was valid and that the Carrier had not correctly applied the Agreement.

The Organization has taken the position on the property that the failure to award the Claimant the Division Assistant Foreman position for which he bid was a violation, among other provisions, of Rule 19 of the Agreement. See claim letter dated June 20, 2011. The only language of Rule 19 that would appear to be applicable here is subsection (c)(2), which states as follows:

“(c) If the position is not filled by an employee from the home division (or district, as appropriate) and there are no qualified division (or district, as appropriate) employees furloughed (or working in a lower classification for specialized jobs), the following will apply:

- (1) Employees with the earliest established M of W seniority date in the class, then lower classes in that sub-department.
- (2) Employees with the earliest established M of W seniority date in another sub-department.”

Consistent with its position on the property, the Organization argues in its submission that “because the Claimant was the senior employe to properly and timely submit his bid for this position he was entitled to said assignment pursuant to the provisions of Rule 19(c)(2).”

The Organization’s interpretation of Rule 19(c)(2) is plausible, even though it is not the only reasonable interpretation of that provision. At no time, either on the property or in its submission, has the Carrier put forward its interpretation of Rule 19(c)(2). In the absence of any interpretation offered by the Carrier and because the Organization’s interpretation is plausible, the Board will accept that interpretation for purposes of this case. The Board notes, however, that no authority has been cited that supports the Organization’s interpretation. The Organization has cited three on-property awards that purportedly support its contention that “because the Claimant was the senior employee to properly and timely submit his bid for this position he was entitled to said assignment pursuant to the provisions of Rule 19(c)(2).” A reading of the awards (Awards 29022, 29851 and 30006), however, shows that they do not support the contention that an unqualified applicant is entitled to be awarded an advertised bid.

For example, in Award 29022, the Board stated, “Nothing was shown on the record to indicate that the Claimant, as an experienced Welder Helper, had insufficient ability and merit to bar him from the position.” In Award 29851 the advertised vacancy was for a Carpenter. The Claimant had seniority as a B&B Carpenter for more than a year predating the announced vacancy. In Award 30006 the vacancy in issue was for a Welder Helper, and the Board noted that “the Claimant had been utilized as a Welder Helper and had other welding experience.” The Board further stated, “The record makes it clear that the Claimant was not passed over for being unqualified but rather because the Carrier found the junior employee more qualified.” Clearly none of the awards cited by the Organization supports its position that an unqualified senior bidder is entitled to be awarded a vacancy when no qualified employee applies for the position. Nor does the record contain any evidence of a past practice of awarding the senior unqualified bidder the bulletined vacancy when there is no qualified bidder.

In addition, the Carrier cited an award in support of its position that duplicate claims will not be allowed, but which award also holds that the Carrier was entitled to include a requirement in an advertised bulletin that applicants “be qualified on the Maintenance of Way Book of Rules and the operation of the bridge.” In that case, Third Division Award 32189, Rule 16 stated, “An employee who acquires a position through bidding . . . will be allowed not less than five (5) nor more than thirty (30) working days in which to qualify” In rejecting the organization’s claim that Rule 16 required the Carrier to promote employees even if they had no knowledge of bridge operation, the Board stated:

“The Board finds no merit to this claim. We reviewed prior Bulletins and find no persuasive proof of practice indicating that prior Bulletins permitted employees to be promoted who possessed no knowledge of bridge operation. Rule 16 does not state that the Carrier must promote employees without any knowledge of bridge operation and thereafter, provide at least five days in which to demonstrate proficiency in the operation, rules, regulations and reporting procedures of the position. The Agreement contains no language suggesting full cooperation of Supervisors or in the classification of positions that the Carrier must promote an employee who lacks basic fitness and ability solely on the basis of seniority and thereafter train those who lack minimum fitness and ability.”

The lack of cited authority or evidence of a past practice in support of the Organization's interpretation of Rule 19(c)(2) and the award quoted above supporting a contrary interpretation prevent this Board from accepting the Organization's interpretation beyond the confines of the present case. Because, however, the Organization's interpretation is a reasonable reading of the contractual language (although by no means the only reasonable interpretation) and in the absence of any challenge by the Carrier to the Organization's reading of Rule 19(c)(2), the Board will accept that interpretation for purposes of the present case. See, however, Third Division Award 42474, heard in oral argument by the Board on the same date as the present case, where the Carrier denied the Organization's claim that an unqualified senior bidder was entitled to be placed in the bulletined position for which he bid, and this Board upheld the Carrier's position.

As a remedy for the violation found, the Carrier will be required to pay the Claimant the difference in pay between what he would have received as a Division Assistant Foreman in the Bridge & Building Subdepartment if he had been selected and the pay he actually received. This shall apply until he was (or is) assigned to a position with equal or greater pay. The Claimant is not awarded Assistant Foreman or Bridge & Building seniority, however, since it is not known whether or not the Claimant, if selected, would have qualified for the Division Assistant Foreman position after selection. Third Division Awards 29022 and 30006.

AWARD

Claim sustained in accordance with the Findings.

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 28th day of November 2016.