

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42587
Docket No. MW-42628
17-3-NRAB-00003-140345**

The Third Division consisted of the regular members and in addition Referee Robert A. Grey when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Springfield Terminal Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier refused to allow Claimant R. Hawkins to displace junior employee R. Gilliland from the tamper operator position on Construction Crew 2720 following his release from medical leave on April 12, 2013 (Carrier’s File MW-13-14).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Hawkins shall now be compensated for the difference in the rates of pay between the tamper operator position and the position that the Claimant worked for a total of \$69.20.”**

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 parties agree the underlying facts of this case are peculiar and unique, and that neither party acted with lack of good faith. It is undisputed that the Claimant is senior to R. Gilliland, and that both are qualified as Tamper Operators.

On March 13 (all dates referred to herein took place in 2013), while Claimant was on a medical leave of absence, the Carrier advertised a Tamper Operator position, to be covered as of March 25. The bid close date was March 19. On March 20, the position was awarded to R. Gilliland, effective March 22, with the assignment to be covered on March 25.

Also on March 20, the Carrier issued a letter stating: "The following positions to be covered on Monday, March 25, 2013 have been Postponed and will be covered by the awarded personnel, per AWARDS-JM, on Monday, April 1, 2013: . . ." The letter applied to nine positions, including R. Gilliland's awarded Tamper Operator position.

On March 27, the Carrier issued another letter stating: "The following positions to be covered on Monday, April 1, 2013 have been Postponed and will be covered by the awarded personnel, per AWARDS-JM, on Monday, April 8, 2013: . . ." This second postponement letter applied to the same nine positions, including R. Gilliland's awarded Tamper Operator position.

On April 2, the Claimant was medically cleared to return to work. Also on April 2, the Claimant sought to displace junior employee R. Gilliland from his awarded Tamper Operator position. The Carrier denied the Claimant's displacement request, stating that due to the postponements the position was not available for displacement within the Claimant's five day return-to-work displacement period. The Claimant exercised his seniority to displace a different position, but it was a lower paying position than Mr. Gilliland's Tamper Operator position. The Claimant seeks the pay differential between the position he actually displaced, and Mr. Gilliland's Tamper Operator position which the Claimant sought to displace but was denied by the Carrier.

The parties agree this claim hinges on the Board's interpretation of Agreement Article 20.2, which states in pertinent part: "An employee whose regular position is abolished or who is displaced from his regular position while on leave of absence, sick leave, vacation, or suspension may, within five (5) calendar days after his return, displace to any position for which he is qualified held by a junior employee."

The Carrier argues that because of the postponements, the position in question was not available for displacement until April 8. Therefore, argues the Carrier, the Claimant had no contractual right to displace the position, because it was not available to be displaced within five days after the Claimant's April 2 return to work. The Carrier posits that allowing the Claimant to displace Mr. Gilliland under these circumstances would have violated Mr. Gilliland's contractual rights by allowing the Claimant to make an improper displacement. The Carrier also notes that had it allowed the Claimant to displace this position when he was cleared to return to work, Claimant would not have had an actual job to work until April 8.

The Organization argues that the Carrier cannot postpone the coverage date of an advertised and awarded position. Rather, argues the Organization, the Carrier has the right under Article 21 to cancel or abolish the position before its coverage date, and then re-advertise the position when the Carrier is ready for the position to be covered. This, argues the Organization, is what the Carrier should have done, rather than postpone the Tamper Operator coverage date twice, or even once. The Organization argues that the Tamper Operator position existed on paper within the five days of the Claimant's return to work, and therefore there is no reason why the Claimant should not have been allowed to displace the junior employee holding it. The Organization points out that were the Carrier so inclined, it could "sharp-shoot seniority by correlating abolishment notices, displacements and postpone awards in an effort to restrict employees from exercising their seniority." The Organization stresses that it is not alleging any such motive on the part of the Carrier.

The Board need not, and does not, decide whether the Carrier has the right to postpone the coverage date of an advertised and awarded position. The question the Board must decide in this case is: when does a position become "held by an employee" for purposes of displacement under Article 20.2? Is it the date the position is awarded, or is it the date the position must be covered? For the following reasons, the Board finds it is the date the position is awarded.

Mr. Gilliland was awarded the position on March 20, effective March 22. When the Carrier postponed the coverage date, the position did not go back up for bid. Rather, the position remained awarded to Mr. Gilliland. Neither Mr. Gilliland nor anyone else could bid or re-bid for the position because it was, and remained, awarded to Mr. Gilliland, despite the coverage date postponements. In other words, the Carrier's postponements of the coverage date did not nullify the fact that Mr. Gilliland had been awarded the position.

Because the awarding of the position was not nullified by the coverage date postponements, Mr. Gilliland “held,” and continued to hold, the position as of March 22 for purposes of Article 20.2. Because the Claimant is senior to Mr. Gilliland, and the Claimant sought to displace him within five days of his return, the Carrier should have implemented the Claimant’s request to displace Mr. Gilliland.

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 19th day of April 2017.