

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42588
Docket No. MW-42629
17-3-NRAB-00003-140352

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 assigned junior employe C. Tulley to the position of I&R Trackman in Rigby Yard, Portland, Maine on April 15, 2013 through April 30, 2013 instead of recalling and assigning senior employe F. Nelson thereto (Carrier’s File MW-13-17).
- (2) As a consequence of the above-stated violation, Claimant F. Nelson shall be allowed ‘Ninety-six (96.0) hours Straight Time as well as any overtime accrued by employee Connor Tulley during the Carrier’s wrongful assignment of him to this position.’ (Emphasis in original).”

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.

Article 8 of the parties' Agreement is entitled "Filling Vacant Positions." It is the protocol by which the Carrier provides notice of vacant positions, and employees bid for same. The record contains no evidence that the Carrier failed to give Article 8 notice of the vacant position in question. The Organization points to no language anywhere in the Agreement that requires the Carrier to individually canvass employees for their interest in vacant positions.

The Organization is correct that Article 8.1 states: "In the assignment of employees to positions under this Agreement, qualification being sufficient seniority shall govern." However, Article 8.3(d) states: "Vacant positions will be awarded to the senior qualified employee bidding for same"

The record contains no evidence, nor allegation, that the Claimant bid for the vacant position. Therefore, the Board finds that the Organization has failed to present a prima facie case that the Claimant's seniority was bypassed in the filling of this vacant position.

Third Division Award 30979 cited by the Organization is distinguishable on the facts. In that case, the successful bidder elected to accept a different position than the position he had bid for, requiring the Carrier to re-bid the position. In the interim, the Carrier allowed a junior employee to work the position without a bid, before it was permanently filled. By doing so, that Carrier denied the Claimant the opportunity to exercise his seniority over the junior employee for said position.

In the claim at hand, the Carrier did not deny the Claimant the opportunity to exercise his seniority over junior employees. Rather, junior employee Tulley bid for the vacant position; senior employee Claimant did not bid. The Claimant's failure to bid for the vacant position constitutes the Claimant's failure to exercise his seniority, not a violation of the Claimant's seniority by the Carrier.

AWARD

Claim denied.

**Form 1
Page 3**

**Award No. 42588
Docket No. MW-42629
17-3-NRAB-00003-140352**

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 19th day of April 2017.

LABOR MEMBER'S DISSENT
TO
AWARD 42588, DOCKET MW-42629,
AWARD 42589, DOCKET MW-42630
(Referee Robert A. Grey)

In these cases, the Majority erred in its decisions. The Majority held that the Carrier did not violate the Claimants' seniority when it allowed the junior employee to work as a result of their "bid" on vacant positions. The Majority further held, the Claimants failed to "bid" on the positions which was a failure to exercise their seniority. This holding misses the focal point of these cases.

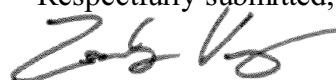
First, it should be noted that the Agreement specifies that in filling any position "seniority shall govern". In these cases, the Carrier admittedly assigned a junior employee to fill the positions. However, the Carrier alleged an affirmative defense that the junior employee was the only one that expressed interest in the positions. It should be noted that the Carrier did not cite a single rule which required the Claimants to express interest in a position to protect their seniority rights when filling a temporary vacancy. Moreover, this Board has repeatedly held that the Carrier has the burden of proof to establish its affirmative defenses. However, in these cases, the Carrier has not presented a single piece of evidence to support its affirmative defense. There is no evidence that the positions were bulletined or advertised in any way that would have allowed the Claimants to request to cover the positions. The Claimants could not be expected to express interest in positions that they were never informed existed. Accordingly, the Carrier did not establish its affirmative defense.

Moreover, the principle is well established that employees need not request to have their seniority respected for work, even if the work is only overtime service or for temporary work. Among the many awards holding to this effect are Third Division Awards 16022, 20120, 25926 and 30979. Typical thereof is Award 30979 which, in pertinent part, held:

"*** The Carrier did not question Claimant's availability, qualifications, or willingness to fill the vacancy at issue. The fact that Mr. Flower's 'requested' to fill the temporary vacancy did not entitle him to fill the vacancy in preference to Claimant, nor does Mr. Flower's proximity to the work location mitigate Carrier's failure to recall the Claimant in seniority order. Based on the foregoing, this claim must be sustained."

For the above-mentioned reasons, it is clear that the Majority erred in rendering its decisions. Therefore, I respectfully dissent.

Respectfully submitted,



Zachary C. Voegel
Labor Member