

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42975
Docket No. MW-42808
18-3-NRAB-00003-140490**

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan 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. T. Elliot to an assistant foreman position on Kansas City Common Point B&B gang (NKC Murry Strut Crew) and instead assigned junior employe B. Minnich thereto (System File C-13-P018-34/10-13-0512 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Elliot shall ‘... be paid for all of the straight time hours and overtime hours worked by Mr. B. L. Minnich on the claimed Assistant Foreman position beginning on May 6th, 2013, and continuing until the violation ceases, as settlement of this claim.”**

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.

This claim concerns whether a bulletined position for an Assistant B and B Foreman position was properly awarded. The Claimant established and maintained seniority in the Carrier's Maintenance of Way and Structures Department, and at the time of this dispute, he was assigned as a Head Welder.

In April of 2013, the Carrier advertised an Assistant B and B Foreman position within the Kansas City Common Point, which was a Prior Rights District 4 position, with a closing date of April 29, 2013, and an award date of May 2, 2013. The Claimant possessed prior rights District 4 seniority, but he did not have seniority as an Assistant B and B Foreman. The Claimant bid on the Assistant B and B Foreman position on April 26, 2013, but the Carrier awarded the position to B. L. Minich, an employee who at the time the position was advertised did not hold seniority in that position and had less seniority than the Claimant.

The Organization claims that the failure to award the Claimant the Assistant B and B Foreman position violated the Agreement. Specifically, the Organization alleges that the Carrier violated Rule 1 Scope, Rule 2 Seniority Rights and Sub-Department Limits, Rule 5 Seniority Rosters, Rule 20 Positions to be Bulletined, Rule 21 Bulletin Procedure, Rule 22 Assignment Procedure, Rule 29 Overtime, and Appendices NN and OO. As a remedy, the Organization seeks that the Claimant be paid for all of the straight time hours and overtime hours worked by Mr. B. L. Minich on the claimed Assistant Foreman position beginning on May 6, 2013, and continuing until the violation ceases.

Rule 22 of the Agreement, which addresses assignment and promotion, requires that in the absence of a bid from an employee with seniority in the position, the most senior qualified employee in the next lower rank will be awarded the position. Rule 22 reads in relevant part:

“RULE 22. ASSIGNMENT PROCEDURE

A. Each new position or vacancy bulletined as provided in Rule 21 will be assigned to the senior qualified applicant who holds seniority on the seniority roster from which the position in question is filled and in the rank of that position. In the absence of such applicants, the senior qualified applicant in the next lower rank and in succeeding lower ranks, if necessary, on the same roster will be assigned. Except as otherwise provided in this Agreement, in the absence of qualified applicants from the seniority roster of the position in question, the Senior qualified applicant from other seniority rosters in the same sub-department will be assigned.”

The Carrier essentially concedes that the application of Rule 22 in this case would have resulted in the Claimant being awarded the Assistant B and B Foreman position, subject to possible disqualification for lack of ability under Rule 23. However, the Carrier argues that the position in question was in the Kansas City Common Point, and as such is governed by the promotion process in Rule 8 of the ATSF/BMWED Agreement (“ATSF Agreement”). Pursuant to that Rule, before employees can be awarded a position in a higher class, they must first signify their desire to work in that class and be able to demonstrate their fitness and ability to perform the duties of that position.

In this case, the Claimant did not successfully complete the promotional process described in Rule 8 of the ATSF Agreement for the Assistant B and B Foreman position, whereas B. L. Minich did successfully compete that process. After his successful competition of the promotional process, B. L. Minich was awarded a seniority date for the Assistant B and B Foreman position of April 29, 2013, and he was awarded the bulletined position.

The Carrier’s contention that the ATSF Agreement controls this dispute is supported by BNSF Merger Implementing Agreement 6, which establishes the Kansas City Work Zone and provides that “all headquartered employees in the common work zone with prior rights will continue to work under the collective bargaining agreement that applied on their prior rights territory.” In the on-property handling of this case, the Organization conceded that the position was to be bulletined under the ATSF Agreement, but it did not concede that the ATSF Agreement covered the assignment process.

The Organization has the burden of proof in this case. It did not meet its burden to prove that the selection of B. L. Minich violated Rule 8 of the ATSF Agreement, and it did not meet its burden to establish that Rule 22 of the Agreement applied to this case. Because the Organization has not met its burden, its claim must fail.

AWARD

Claim dismissed.

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 14th day of February 2018.