

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43749
Docket No. MW-44994
19-3-NRAB-00003-180489**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned new hire employee H. Hanson to a new laborer position on the Waseca section gang, headquartered in Waseca, Minnesota beginning on December 13, 2016 and continuing and failed to bulletin and assign such position after thirty (30) days' duration as required by Rule 9 (System File B-1609D-202/USA-BMWED_DM&E-2017-00011 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Kelly shall be compensated ‘...All man/hours at the overtime rate of pay for his daily travel, as shown earlier in the claim, at his rate of pay. Claimant shall also be compensated at the appropriate IRS rate mileage for one hundred and twelve (112) miles each day for all days of the claim period’ (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.

This case stems from the Carrier's decision to assign newly hired employee Mr. H. Hanson to on-the-job training (OJT) in Waseca, MN, where he remained for over thirty (30) days. This position was not bulletined. Claimant J. Kelly, who holds seniority within the Carrier's Maintenance of Way Department, exercised his seniority to bid to a position in New Ulm, MN, further from his residence than Waseca, MN, after his position was abolished. Had he been allowed to bid on a Waseca position, the Claimant would have been able to work close to home. By letter dated February 2, 2017, the Organization filed a claim on Mr. Kelly's behalf. That claim was properly progressed on the property without resolution and was then timely progressed to this Board for final adjudication.

The Organization asserts that the Agreement was violated when the Carrier failed to bulletin a position filled by a unilateral new hire for more than thirty (30) days, thereby depriving the Claimant of the opportunity to bid on the laborer position in Waseca, MN and forcing him to travel a one hundred twelve (112) mi. round trip. The Claimant held the position of Laborer, described in Rule 4 and within Rule 1 – Scope. His unilateral assignment was made despite holding seniority from his date of hire, in accordance with Rule 3. Rule 9 required the Carrier to bulletin the position, but the Carrier “has attempted to create new terms of the agreement for hiring employees to the craft outside of negotiations.” While employees are “placed on the actual roster following the probation period,” they still accrue seniority from the first day they perform compensated service under the Agreement.

The Carrier insists that the Agreement has not been violated because it did not create a new Laborer position as the Organization alleges and did not offer the position to Mr. Hanson. He was simply assigned as part of his OJT as an “inexperienced newly hired probationary employee,” a Carrier decision not contractually prohibited. Rules 3 and 6, when read together, show a seniority date established upon successful completion of the probation period. Payment of a new employee at the Laborer rate does not establish a new job or position. The Organization has not shown that the

Claimant was improperly compensated for service performed in New Ulm or that he should be paid overtime for travel. The Carrier has not bargained away relevant management prerogatives.

It is critical to the analysis to set forth in relevant part Rules contained in the labor agreement. Rule 1 – Scope, Part 1 states that “The rules in this Agreement shall govern the hours of service, rates of pay, and working conditions of DM&E employees represented by BMWED and who work in the Engineering Department . . .” This includes the Claimant. Rule 3 – Probationary Period, Part b states that “Upon satisfactory completion of the probationary period, the employee will be placed on the appropriate seniority roster(s).” Rule 6, Part 3.a states that “Employees hired to positions after the effective date of this Agreement will establish seniority in the System Regular or Temporary Employee Roster with a date corresponding to the date he first performed compensated service in the applicable work category.” Rule 9 – New Positions, Vacancies, Assignments and Displacements, Part 1 states that “New positions and vacancies in existing positions of more than thirty (30) calendar days will be posted in places accessible to all employees covered by this Agreement for a period of seven (7) calendar days.

This Board has not been made aware of negotiated language that directly limits the Carrier’s ability to train new employees, with the caveat that the Carrier must comply with the existing Agreement. The parties agree that this dispute involves a unilateral new hire. The crux of the dispute revolves around the timing of the placement of the new hire on the seniority roster and the relationship between the new hire and the abolishment of the Claimant’s former position that was headquartered in Waseca, MN. The Organization contends that there is cause and effect between the payment of the new hire/trainee at the Laborer rate and the abolishment of the Claimant’s position in Waseca. The Board finds that payment of the new hire as a Laborer does not support the contention that a new position has been established. Rule 4 of the Agreement does not contain a “Trainee” work category, thus the new hire was classified as a Laborer, the lowest existing pay grade. Payment at an existing rate does not indicate the establishment of a new position.

A second important distinction involves the accrual of seniority and the ability to use the accrued seniority. Rule 6 clearly establishes that a Trainee accrues seniority from his/her first day of compensated service regardless of the rate of compensation. Rule 3 is equally clear that a Trainee/probationary employee is placed on the appropriate seniority roster(s) only after the successful completion of the probationary period. In other words, until successful completion of the probationary period, the

accrued seniority is of no use. The so-called vacancy was not posted because the probationary employee was doing on-the-job training (OJT) and was not filling a permanent, temporary or seasonal position. Moreover, since the Trainee was in his probationary period, he could not have used his seniority to displace a more senior employee, that being the Claimant in this case.

The Board understands that the Claimant was forced into a less desirable situation when his position was abolished, but the Organization has not established that the abolishment was related to the OJT of the new hire. The Agreement was not violated.

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 16th day of July 2019.