

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44046
Docket No. MW-44107
20-3-NRAB-00003-170202**

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

**(Brotherhood of Maintenance of Way Employees Division
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier improperly allowed Mr. T. Rittenhouse to displace senior bidder Mr. C. Simpkins from the position of track foreman on force 5RG3 beginning on May 11, 2015 and continuing (System File G31810415/2015-190006 CSX).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Simpkins “*** shall now receive the same straight time and overtime hours expended by employee Rittenhouse whenever he is assigned to work with the C&O Rail Grinder beginning on May 11, 2015 and continuing until this violation stops.”**

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.

Claimant Simpkins holds seniority within the Carrier's Maintenance of Way Department. On December 29, 2014, the Claimant was awarded the position of track foreman on Force 5RG3 in question, as he was the senior bidder for the position. The position was to begin on May 11, 2015.

On January 8, 2015, the Claimant received a text message from Employee Rittenhouse, stating, "I will be displacing you from the grinder being it was bid out and awarded while I was on vacation." On May 11, 2015, Rittenhouse was assigned to the position instead of the Claimant.

On June 22, 2015, the Organization filed a claim on behalf of the Claimant, asserting that the Carrier had violated the Agreement because after he was the senior bidder and was awarded the position, he was not assigned the duties when it began on May 11, 2015, but the Carrier assigned the duties to Rittenhouse. On August 21, 2015, the Carrier denied the claim, contending that Rittenhouse exercised his contractual right to displace the Claimant from the position. The parties were unable to resolve the dispute on-property and the claim is now properly before this Board for final adjudication.

The Organization contends that the Claimant was the senior bidder while the bulletining was open and was properly awarded the job. Thus, the Carrier violated the Agreement when another employee was improperly permitted to displace him and was assigned the duties. The Organization contends that Rittenhouse forfeited his contractual right to displace the Claimant, belatedly waiting more than five days after returning from vacation to exercise his displacement rights.

The Organization contends that the Carrier is in possession of the payroll records that would show that Rittenhouse returned from his vacation fewer than five days prior to displacing the Claimant, and that it has failed to produce those records at its peril.

The Organization contends that the Carrier waived its argument that the claim was untimely filed, by raising it for the first time in its submission to this Board. Further, the Organization contends that the claim was timely, as it was triggered on the day that Rittenhouse began in the assignment that rightly belonged to the Claimant.

The Carrier contends that this claim is untimely and should be dismissed, as the Claimant was awarded the position on December 29, 2014, and Rittenhouse exercised his contractual right to displace the Claimant upon return from his vacation. The Carrier contends that on-property correspondence shows that the Organization and the Claimant were aware of the displacement of the Claimant no later than January 2015, but the instant claim was filed on June 22, 2015. The Carrier denies that it waived its right to challenge the timeliness of the claim.

The Carrier contends that it has not violated any Rules or Agreements in the matter at issue. The Carrier contends that after returning from vacation, Rittenhouse notified management of his intention to displace the Claimant pursuant to his contractual right under Rule 5 of the Agreement. Further, the Carrier contends that it reasonably relied, to its detriment, on the Organization's stated position that Rittenhouse was entitled to the assignment. The Carrier contends that the Organization has failed to present any probative evidence that Rittenhouse returned from vacation on any date that would cause him to forfeit his seniority displacement.

The Carrier has raised the threshold issue of the timeliness of the claim. The parties' Agreement provides, at Rule 24 (a):

“(a) A claim or grievance must be presented, in writing, by an employee or on his behalf by his union representative to the Designated Officer, or other designated official within sixty (60) days from the date of the occurrence on which the claim is based.”

This claim was filed on June 22, 2015, and the Carrier presented evidence that on January 9, 2015, both the Claimant and the Organization were aware that Rittenhouse had displaced the Claimant.

However, the Organization's point is well-taken that at no time during the on-property correspondence did the Carrier challenge the timeliness of the claim. Issues may not be raised for the first time before this Board. The challenge to the timeliness of the claim is denied.

With respect to the merits, the Organization takes the position that the Claimant was properly awarded the position and should have been assigned to it, pursuant to Rule 3, § 1:

“RULE 3 - SELECTION OF POSITIONS

Section 1. Assignment to position

In the assignment of employees to positions under this Agreement, seniority shall govern. The word “seniority” as used in this Rule means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classes, respectively, in the same group in the order in which they appear on the seniority district roster.”

There is no dispute that the Claimant was the senior bidder. The Carrier responds that because Rittenhouse was on vacation when the bid was advertised, he had the contractual right to displace the Claimant pursuant to Rule 5:

“RULE 5 - RETURN TO DUTY AFTER LEAVE OF ABSENCE, SICKNESS, ETC. - EXERCISE OF SENIORITY

- (a) With the exception of Rule 4 Section 4, and Rule 8 of this Agreement, an employee returning to duty after leave of absence, vacation, sickness, jury duty, disability, or suspension shall return to his former position and may, within five (5) days after his return to his former position, exercise displacement to any position in any classification advertised during his absence or may displace any junior employee promoted during his absence, subject to Rule 3, Section 1. However, if the position no longer exists or is filled by a senior employee before he is able to exercise the displacement, within thirty (30) days of his return, he shall make a written request to the Designated Officer requesting the same seniority date (one rank ahead) of the junior employee promoted subject to Section 1 of Rule 3.**

*** * ***

- (d) An employee, failing to exercise seniority within the five (5) days specified in paragraph (a) of this Rule, will forfeit the right to exercise seniority.”**

In the parties’ initial correspondence regarding the displacement, the Vice Chairman stated his understanding that Rittenhouse returned to work when his vacation ended on January 5, 2015. However, the Organization contends that it later learned that Rittenhouse’s vacation ended on December 30, 2014. The Carrier argues

that it relied “to its detriment” on the Organization’s stated position. But it never refuted the Organization’s position that Rittenhouse’s vacation ended on December 30, 2014. The Carrier was in the best position to produce records that would clear up this dispute of material fact, but it did not do so.

There is no dispute that the Claimant was the senior bidder who was awarded the position and that he did not get the assignment. The Carrier’s defense to this was to point to Rittenhouse’s right under Rule 5 to displace the Claimant. The Carrier, not the Organization, had access to payroll records that would have definitively shown the date on which Rittenhouse ended his vacation, but inexplicably failed to produce them at any time. It cannot rely on an initial mistaken assumption by the Organization to justify its failure to produce the facts. Once the Organization filed a claim and asserted that Rittenhouse had displaced the Claimant more than five days after ending his vacation, the Carrier had the obligation to place facts into the record to support its denial. As a result, the facts as presented by the Organization are accepted and the claim must be sustained.

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 18th day of June 2020.