

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44116
Docket No. MW-44936
20-3-NRAB-00003-180365**

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

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

PARTIES TO DISPUTE: (

**(Kansas City Southern Railway Company
(Former Gateway Western Railway 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 properly allow Mr. O. Hall to displace junior employee D. Brossett from a Jordan Spreader machine on Gang 766 on October 4, 2016 and continuing [System File C 16 10 03 (073)/K0416-6995 KCS].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant O. Hall shall now ‘... be compensated the difference in pay from a Machine Operator rate of pay and a Trackman’s rate of pay (\$2.49 per hour), and \$72.00 per diem per day from October 3, 2016 until this matter is resolved including any overtime earned. This totals \$756.96 in wages, and \$2376 in per diem on November 23, 2016 continuing forward at \$19.92 wages, and \$72.00 per diem per day plus any overtime worked plus late payment penalties based on a daily period rate of .0271% (Annual Percentage Rate of 9.9%) calculated by multiplying the balance of the claim by the daily periodic rate and then by corresponding the number of days over sixty (60) that this claim remains unpaid.”**

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 O. Hall established and holds seniority in the Carrier's Maintenance of Way and Structures Department, with an established seniority date of February 19, 2015 as a System Production Gang (SPG) Machine Operator. Employee D. Brossett also established and holds seniority in the Carrier's Maintenance of Way and Structures Department with an established seniority date of March 8, 2015 as an SPG Machine Operator.

The undisputed facts are that effective September 27, 2016 the Carrier abolished thirteen (13) Machine Operator jobs, thereby initiating a bump/roll that resulted in the displacement of the Claimant from his Machine Operator job as a HazMat Fuel Truck Operator by a qualified employee senior to the Claimant. The Claimant then expressed a desire to use his seniority to bump into the Jordan Spreader job occupied by Mr. Brossett. The Carrier would not allow the bump, viewing the Claimant as not qualified. The resulting claim, set forth above, was timely filed and properly handled on the property. When the claims conference did not result in resolution of the claim, it was progressed to this Board for final adjudication.

The Organization relies on the February 7, 2012 System Production Agreement between the parties, particularly Paragraph 1(b), asserting that the Claimant's relative seniority standing should have governed within SPG gangs, with the System Production Board and Displacement List (List) to be used for assignments. The Carrier's contention that the Claimant had not satisfied an additional precondition necessary to qualify for assignment to the Jordan Spreader "simply does not align with the language of Paragraph 1(b) of the SPG Agreement. Moreover, the Claimant was

not given the opportunity to show that he was qualified on the Jordan Spreader, thereby preventing him “from assuming the position at all.”

The Carrier points to the Organization’s alleged failure to bear the burden of making a *prima facie* case because it failed to show that the Claimant had the requisite fitness and ability to operate this specialty piece of equipment and thus to bump Mr. Brossett. The Carrier has the right to determine fitness and ability. Seniority is not a sufficient qualification in this case. The Carrier contends that the July 1, 1979 Agreement between the parties controls. In the on-property correspondence, the Carrier also points to Paragraph 1(b)(3) of the SPG Agreement.

The following portions of the SPG Agreement are particularly relevant:

- “1. The maintenance of way gangs identified in this agreement shall be governed by the collective bargaining agreement between the Kansas City Southern Railway Company (“KCS”) and the Union reviewed July 1, 1979, as subsequently amended, which is currently in effect on the KCS, except as otherwise provided below:
- (a) The rates of pay for assignment shall be the highest rate of pay for the classification applicable under the agreement between the BMWE/KCS L&A CBA or the agreement between the BMWE/Mid South, SouthRail, Tex-Mex or Gateway Western as found in Attachment “A”.
 - (b) Seniority for purposes of assignment to positions and other exercise of seniority within the gangs shall be determined on the basis of each employee’s relative standing on the “System Production Bid and Displacement List” (hereafter the “List”). The List shall be created as follows:

* * *

- (3) Except as otherwise provided, an employee may exercise seniority to a position for which he is qualified in a gang established under this Agreement based upon his or her relative ranking on the List.”

The Organization must bear the burden of proof in this contract case. The parties agree that had the Claimant been promoted into the Jordan Spreader job, he

would have had a period of time in which to show that he was qualified to operate the machinery. However, this is not a “failure to promote” case; rather it is a “use of seniority to bump” case. An employee wishing to bump into a position does not get a period of time to prove his or her qualifications. Instead, in accordance with Section 1(b)(3) of the System Production agreement, which the Carrier has relied on, the individual desirous of using seniority to bump into a position may do so only if he or she is qualified at the time seniority is exercised.

The Carrier has the right to determine qualifications as long as that right is exercised in a fair and objective manner. There is nothing in the record to suggest that the determination that Mr. Hall was not qualified was either unfair or the product of bias. The Organization has provided no evidence whatsoever showing that the Claimant was a qualified Jordan Spreader operator at the time he attempted to bump into the position. In short, the Organization has failed to meet its burden of proof.

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 11th day of August 2020.