

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44286  
Docket No. MW-43528  
20-3-NRAB-00003-200430**

**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: (**

**(BNSF Railway Company (Former Burlington Northern  
(Railroad Company)**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement beginning on December 4, 2014 when it failed to award and assign prior rights District 4 employe T. Elliott to a bulletined prior rights District 4 headquartered Bridge and Building Foreman/ Inspector position in Kansas City, Missouri and instead awarded and assigned District 700 employe B. Minich (System File C-15-S092-1/10-15-0089 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Elliott must now be awarded the District 4 Bridge and Building - Bridge Foreman/Inspector position with his Bridge and Building foreman seniority and must be compensated for his losses in accordance with the straight time and overtime hours worked by District 700 employe B. Minich beginning on December 4, 2014 and continuing.”**

**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.

The Claimant established and maintained seniority in the Carrier's Maintenance of Way and Structures Department. On November 27, 2014, the Carrier advertised a Bridge and Building (B&B) foreman/inspector position with the NKC Murray Yard Crew. The bulletin stated the applicable pay rate for the position, listed the tour of duty and various qualifications that were required of applicants, and clearly stated that the position was a Prior Rights District 4 position. The Claimant Elliott submitted a bid for the position. There is no dispute that the Claimant had previously been disqualified from the B&B Inspector position. On December 4, 2014, the Carrier awarded the position to employee Minich, who had also established and maintained seniority in the Carrier's Maintenance of Way and Structures Department.

The Claimant possessed Prior Rights District 4 seniority and was covered by the Burlington Northern Agreement. Employee Minich did not possess Prior Rights District 4 seniority. The Organization filed this claim which was appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

Rule 6 of the parties' Agreement establishes seniority districts. The Seniority Districts Consolidation Agreement entered into between the Burlington Northern and Santa Fe Railway Company and the Brotherhood of Maintenance of Way Employees states, in part:

**"Within the newly consolidated seniority districts, seniority exercise will be governed by the following principles [See also Appendix NN (Seniority Districts Consolidation Agreement, Section 4, 8/12/99)]:**

- a.) Each BMW-represented employee who holds seniority on the effective date of this Agreement shall retain prior rights for all exercises of seniority to all headquartered positions on his/her former seniority district until the employee resigns, retires, dies or is dismissed for cause under existing agreements.”

The Organization contends that the Carrier violated the Agreement when it failed to award the Prior Rights District 4 position to the Claimant and instead assigned it to an employee without prior rights. The Claimant’s prior rights seniority on District 4 is recognized by the Carrier.

The Organization contends that the question of awarding prior rights positions to an employee with prior rights but no foreman seniority set against an employee with foreman seniority but no prior rights was answered by Section 4 of Appendix NN to the Seniority Districts Consolidation Agreement which provides,

“Employee A has a Sectionman seniority date of March 1, 1980 on former Seniority District No. 1 (and so has prior rights on former Seniority District No. 1), but does not have seniority as a Foreman. Employee B holds a Sectionman date of March 1, 1980 and Foreman’s date of March 1, 1985 on former Seniority District No. 2. A headquartered Foreman’s position is advertised on former Seniority District No. 1. Both employees, A and B, make application for the position, who is assigned?

Answer: Employee A”

The Organization contends that this Question and Answer makes clear that the parties intended for Prior Rights seniority to prevail, even when the employee in question was not qualified for the position bid. Thus, the Organization argues, it is irrelevant that the Claimant had previously been disqualified for the bid position. He was entitled to the position by virtue of his Prior Rights. The Organization further contends that Arbitrator Suntrup’s Award and Appendix NN clearly and unambiguously provide that employees holding prior rights are entitled to superior preference for positions arising on the prior rights territory. The Organization contends that under the applicable Agreement, the Claimant was entitled to bid and fill the position. Thereafter, the Carrier would have the right to review his performance and disqualify him, if needed, under Rule 23.

The Carrier contends that the position was bulletined at the Kansas City Common Point and was therefore governed by the ATSF Agreement. According to the Carrier, under Rule 8 of that Agreement, the Carrier has the right to determine whether an employee is qualified on a specific position. Because it had previously disqualified the Claimant from the B&B Inspector position, the Carrier contends that it was not required to permit the Claimant to bid on the position he could not hold, despite any Prior Rights.

The Carrier contends that Appendix NN is not applicable to the position at issue, because that Agreement does not apply to the Kansas City Common Point or to promotion under Rule 8 of the ATSF Agreement.

This Claim was filed and handled on-property under the BNSF Northern Agreement, which states that an employee retains prior seniority rights until that employee resigns, retires, dies, or is dismissed for cause under existing agreements. There is no dispute that the Claimant retained prior seniority rights and that at the time the claim arose, the Claimant had not resigned, retired, died, or been dismissed for cause. Yet the Carrier did not assign him. The Claimant was entitled to be awarded the position and is entitled to be compensated for the Carrier's failure to assign him.

At hearing before this Board, the Carrier made additional arguments and presented evidence that might have changed the outcome of this claim, had the Board been free to consider it. But the nature of appellate jurisdiction precludes this Board from considering arguments or evidence that was not part of the on-property consideration of the claim. The interpretation of the ATSF Agreement's applicability to positions at the Kansas City Common Point is not a question properly before this Board and cannot be resolved. Therefore, let us be clear that this Board has not made any determination as to whether another Agreement might have given the Carrier the right to deny prior rights under these circumstances. We leave it to another Board to answer that question when it is properly argued on-property.

**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 23rd day of October 2020.**