

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44530
Docket No. MW-43866
22-3-NRAB-00003-210217**

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

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

PARTIES TO DISPUTE: (
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier abolished Claimant J. Davis' bulletined position at the close of shift March 13, 2015 and began assigning the duties of the abolished position to other employees beginning March 14, 2015 and continuing (System File T-D-4682-M/11-15-0403 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Davis must be compensated for all losses, including but not limited to loss of pay differential and any overtime worked by the other employees piloting the TWCS rail detector.”**

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.

Factual Background:

The Claimant J. Davis has established and holds seniority as a foreman in the Track Sub-department. Immediately prior to the dates giving rise to this dispute, he was regularly assigned as the foreman of Gang TMGX1649, Position 32076. In connection with this position, he was assigned as the pilot of the mobile rail detector working over the Twin Cities South Subdivisions. At the close of shift on March 13, 2015, the Claimant's foreman position was abolished by the Carrier for reasons that were never articulated. Beginning the following day, March, 14, 2015 and continuing thereafter, the Carrier then assigned employees in other positions, whose regular duties did not encompass those encompassed by the Claimant's now-abolished foreman position, to perform the work of piloting of the mobile rail detector working over the Twin Cities South Subdivisions.

Pertinent provisions of the parties' Agreement state as follows:

RULE 2. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

- A. Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided.**
- B. B. Seniority rights of all employees are confined to the sub-department in which employed, except as otherwise provided in this Agreement. * * ***

RULE 5. SENIORITY ROSTERS

- A. Seniority rosters of employees of each sub-department by seniority districts and rank will be compiled. Two (2) copies will be furnished foremen and employees' representatives, and foremen will post a copy in tool house and outfit cars, or at convenient places for inspection of employees affected. Copies will also be made available to employees not working under the supervision of a foreman.**
- B. Seniority rosters will show names, employee numbers, seniority dates, occupations and locations of employees. [Letter of Agreement 4/13/98]**

- C. Seniority rosters will be revised and posted in March of each year and will be open for correction for a period of sixty (60) calendar days from date of posting. Employees on leave of absence or on furlough at the time roster is posted will be granted sixty (60) calendar days after their return to active service in which to make protest as to seniority dates. Protests on seniority dates for correction will be confined to names added since posting of previous annual roster. Erroneous omission of names from the seniority rosters, or typographical errors on such rosters, may be corrected at any time.
- D. On each seniority district as indicated in Rule 6 A, four (4) separate seniority rosters shall be maintained for Track Sub-department employees as indicated below, with separate seniority dates only for each rank contained on the roster: [8/12/99 District Consolidation-Related Agreement, Article E, Attachment 1]

TRACK SUB-DEPARTMENT

Track Inspector, Foreman-General Section Foreman, Maintenance Crew Foreman, Section Foreman, Grouting Crew Foreman, Cropping Crew Foreman, Extra Gang Foreman

RULE 20. POSITIONS TO BE BULLETINED

All vacancies and new positions of more than thirty (30) calendar days' duration shall be bulletined in the seniority district for the sub-departments involved. [11/14/02 Letter of Agreement] [Appendix K Paragraph 4 GG]

RULE 21. BULLETIN PROCEDURE

- A. Except as otherwise provided in this Agreement, new positions or vacancies subject to bulletin, as provided in Rule 20, will be bulletined for a period of ten (10) calendar days at the headquarters or outfits of gangs in the sub-department of employees entitled to consideration in filling of the position. Such bulletins will be numbered consecutively by the issuing officer commencing on January 1st of each year. Beginning September 1, 1999, bulletins will be issued on the first (1st) and sixteenth (16th) of each month, along with assignments from previous bulletins. * * *

- B. Each bulletin will show its consecutive number, date of posting and date of expiration; and for each position thereon will specify location and rate of pay, assigned hours, work days, [machine No., in Roadway Equipment Department (For exceptions see Appendices BB and SS)] and nature of work.**
- C. When position is filled, notice of assignment will be given in similarly numbered bulletin form showing name and seniority date of successful applicant for each position filled. Bulletin of positions or vacancies, and notice of assignment on vacancies previously bulletined may appear on the same numbered bulletin notice when occurring simultaneously. * * ***
- E. Employees assigned to positions on bulletin, unless being used for special service, must take position assigned to within thirty (30) calendar days, unless prevented from doing so by illness or other authorized leave.**

Under this paragraph, an employee assigned to a position by bulletin assignment should be released from his former assignment and will report to his new assignment as soon as practicable after date of assignment unless being held for special service by the Carrier or prevented from doing so because of illness or other authorized leave. (If a move to another location is involved release should be at close of shift on last day of work week to enable reporting at start of shift on first day of work week following.) * * *

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. * * ***

RULE 29. OVERTIME

- A. Except as otherwise provided in this Agreement, time worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be computed on actual minute basis and paid for at time and one-half rate, with double time computed on actual minute basis after sixteen (16) continuous hours of work in any twenty-four (24) hour period computed from starting time of employee's regular shift.**
- B. Employees required to work continuously from one regular work period into another regular work period shall be paid for the second or succeeding period at rate of time and one-half for the first sixteen (16) hours of work commencing with the starting time of the regular work period and thereafter at double-time rate until the beginning of the next regular work period, except that when a majority of employees affected desire to continue to work the remaining hours of their regular work period instead of being released for rest, such remaining regular work period hours will be paid for at straight time rate.**
- C. An employee notified or called to perform work after the expiration of his regular work week and prior to the commencement of his next work week, or after his assigned quitting time on one day and prior to his assigned starting time on his next week day with a holiday intervening, and required to work continuously into the next regularly assigned work period, will be paid therefor on the actual minute basis at time and one-half rate with double time after sixteen (16) continuous hours of work in each twenty-four (24) hour period, or portion thereof, computed from the time the employee is required to report for work, or from the time called, as the case may be, to the commencement of the regularly assigned work period. Except as otherwise provided for in Section D of this rule, such an employee will be paid at straight time rate for work performed during the regularly assigned work period. * * ***

RULE 55. CLASSIFICATION OF WORK * * *

B. Foreman.

An employee assigned to direct the work of men and reporting to officials of the railroad shall be classified as a foreman.

Position of Organization:

The Organization argues the Claimant worked in his foreman position for five years before it was abolished. It argues that after the job was abolished, the Claimant's duties were given to other employees. It argues that the position obviously was needed because the work was assigned to other employees. In its view, this constituted a violation of the Agreement, and the Claimant lost pay from this decision.

Position of Carrier:

The Carrier argues that the Rail Detector is not assigned to any particular district. An employee performing rail detector duties can begin one day in one district and end in another. The Carrier decided that it was unnecessary to have a full time Rail Detector. It maintains that inherent within its managerial rights is the option to abolish positions. The Claimant was given his required advance notice and was able to exercise his seniority in obtaining a new position. It concludes there was no violation of the agreement.

Analysis

A rail detector travels 3 to 8 mph detecting flaws in the rail which would not otherwise be identified by Track Inspectors or other conventional means. The mechanism is accompanied by a pilot to obtain track authority.

The Carrier asserts it has the managerial right to abolish positions and establish the configuration of the workforce. The Organization does not directly contest the Carrier's managerial right to abolish positions, but sees management's substitution of less senior employees to perform the work as a violation of the Claimant's seniority. In support of this contention, the Organization offers the memorandum of Michael N. Armstrong, who after 20 years in supervisory positions in railroad maintenance and engineering, opines that supporting rail detector operations with section crew is inefficient. He proposes that instead, a dedicated crew of six or more be instituted as a rail repair crew.

The problem with the Organization's contention is that it has not supplied the Board with evidence to persuasively substantiate the allegation that less senior employees are doing the work the Claimant had done or that the job required full time performance. Allegations, standing alone, are insufficient. Further, there is no showing that the employees now doing the Claimant's duties are cumulatively working a 40-hour week, which would undermine the Carrier's assertion that it was not a full-time job. Given Mr. Armstrong's assessment, having section crews perform this work is apparently commonplace.

The Carrier has defended with its conclusion that the job was not full time and therefore the decision to abolish was a proper exercise of managerial prerogative. The Claimant made a written statement, but it says nothing about the assignment of his job duties after the allegedly improper job abolishment or about whether his duties required full time performance. No statement from or regarding employees who worked with him either prior to or following the abolishment was provided, nor has the seniority of the employees involved been documented. Given this record, the Organization cannot be said to have met 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 8th day of October 2021.