

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44690  
Docket No. MW-46156  
22-3-NRAB-00003-200194**

**The Third Division consisted of the regular members and in addition Referee  
Pilar Vaile when award was rendered.**

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

**PARTIES TO DISPUTE: (**  
**(Keolis Commuter Services, LLC**

**STATEMENT OF CLAIM:**

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

- (1) The Agreement was violated when the Carrier failed to award and assign Mr. W. Rowe to foreman position(s) on Gangs V-062 and V-340 effective November 19, 2018 and December 11, 2018 (Carrier's File BM WE 15/2019 KLS).**
- (2) As a consequence of the violation referred to in Part (1) above, the Organization ‘... requests that the Claimant be placed on the Foreman Seniority Roster on the November 15, 2018 date, he be compensated all lost wages for the difference in hourly rate between the Assistant Foreman to Foreman positions, as well as any missed overtime or double time for that Foreman position. Please advise when the Claimant will be placed on the Seniority Rosters and in which pay period he will be compensated for all missed wages.”**

**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 W. Rowe has established and maintains seniority in the Carrier's Maintenance of Way Department. On the dates giving rise to the dispute, he was assigned as an Assistant Foreman Flagman.**

**On November 13, 2018, the Claimant bid on multiple positions, with his highest priority position being that of 1686-KCS-1118 Foreman on Gang V-062 in Rosemont. On November 15, 2018, the Carrier released the award for that position indicating "No Bids Rec'd". On November 27, 2018, the Claimant then placed a bid for Position 1712-KCS-1118 Foreman on Gang V-340 in Readville. On December 3, 2018, the Carrier released a list of awards showing the Claimant had been awarded this position. Later that day, the Carrier released a correction to the awards, removing the Claimant from Position 1712-KCS-1118 Foreman on Gang V-340 in Readville, with the position now reading "No Bids Rec'd".**

**At the time in question, the Claimant was filling a "Force Account Flagmen" position that had originally been created by agreement of the Parties in a Side Letter dated July 18, 2018, also known as "Side Letter #2". Under this document and its companion Side Letter #1 (covering certain I&R Crews), the employees assuming the new positions were "locked in" to those positions for twelve (12) months from the date the position was occupied, in consideration of certain pay and/or benefit differentials negotiated under the Side Letters.**

**However, by letter dated October 3, 2018 the Union exercised its right to unilaterally cancel the Side Letters with 30 days' notice, upon the failure of the Parties to resolve a dispute involving meal allowances for the Side Letter employees.**

**Both Side Letters have identical cancellation provisions, which provide as follows:**

**this agreement may be automatically cancelled at any time by either party by written notification thirty (30) days in advance of any abolishment of the position.**

(Carrier Ex. 2, emphasis added.) (The Side Letters were discussed at length in Case NRAB 3-200195, which was heard contemporaneous to this and the other related matter (NRAB 3-200195), and that decision is hereby adopted and incorporated by reference herein.) Thus, at the time the Claimant applied for the Foreman positions described above, 30 days had lapsed since the Organization gave unilateral notice of cancellation.

Nonetheless, when the Claimant applied for the foregoing Foreman positions, the jobs created under the Side Letter(s) had not yet been abolished. The Carrier would not commence any abolishment of Side Letter positions until December 4, 2018. Moreover, when it did, it did so in batches or rounds and the entire process took approximately four months, concluding in or around March 2019. During this time, the affected employees continued to receive the pay and benefit premiums owed under the Side Letters.

The Organization timely filed a claim under the Railway Labor Act, 45 USC §§ 151, *et seq.*, which was denied on the property and timely referred with or without an agreed upon extension to the National Railroad Adjustment Board for final adjudication.

The Organization argues that under the terms of the Side Letter it had expired and was therefore immediately void and of no effect as of November 2, 2018. It further argues that the Carrier violated the Scope, Seniority and Assignment Rules, by not permitting the Claimant to bid to the foregoing jobs for which he was qualified, after he was no longer locked-in under the cancelled Side Letter # 2. In this way, the Carrier denied the Claimant the opportunity to establish foreman roster seniority to which he was contractually entitled, in violation of the Claimant's valuable seniority rights.

The Carrier, in contrast, argues that the Claimant was not eligible for the positions he bid upon. It argues that, instead, he was still subject to the twelve (12) month "lock in" provision of to the Side Letter, since the Carrier had not yet abolished his position upon notice of the Organization's intent to cancel the Side Letters. It observes that the Side Letter is silent on how and when jobs must be abolished following the 30-day notice period; and that abolishing all the flagging positions at the same time would have left it unable to protect the needs of the service. For instance, it pointed out that BMW employees have the ability to choose to not make a bid or bump for seven (7) days from the date of the abolishment, and that as a result a number of flagmen positions could remain

unfilled. Accordingly, the Carrier asserts, it took a “measured” and “methodical” approach to abolish the locked-in positions.

Upon consideration of the whole record, the Board finds and concludes as follows. First, it is accurate to say both Side Letters expired on November 2, 2018, 30 days after the Organization gave notice of cancellation. Second, it is true that the Carrier initially breached the Side Letters by failing to initiate “any” abolishment proceedings under the Side Letter by November 2. Nonetheless, as explained next, the Organization did not establish by substantial evidence that the Side Letters therefore “automatically” ceased to bind the Parties at all, as of November 2, 2018.

The Board begins by observing that the language of the cancellation period is awkwardly written. This is probably because it aims in a single line to reflect both the Parties’ equal rights to cancel the Side Letters with 30 days’ notice, and also the Carrier’s co-equal and co-extensive obligation to give thirty days’ notice of any abolishment of the Side Letter positions.

Notwithstanding any awkwardness, however, the plain terms of the Side Letters still clearly conjoin cancellation and abolishment. Specifically, it is evident from the language of the provision that the Parties’ contemplated that abolishment, in addition to notice of cancellation, would be a required pre-condition for the terms of the Side Letters to cease operation in their entirety. This is hardly surprising, given the logistics of staffing a complicated business.<sup>1</sup>

By contrast, an interpretation that turned solely on the reference to “automatic cancellation” would lead to absurd results. Under such an interpretation, the Side Letters would become instantly void and of no effect at all as the Organization urges. However, the Letters were silent as to what would become of the employees holding the positions created therein. There was no provision for automatic reversion to prior positions, which were abolished as the Organization conceded at oral arguments; nor were there any other means provided for summary or automatic reassignment. It is simply not plausible that that is what the Parties’ intended, particularly given the clear pre-condition of abolishment. It is clear, reading the entire provision in context, that “automatic cancellation” unartfully refers to the Parties’ unilateral power rather than to any immediacy of effect.

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<sup>1</sup> It is also consistent with general labor law principles, under which an expired contract is usually deemed expressly or by implication to continue in effect until renegotiation or other dispositive trigger.

Accordingly, the Board determines that each of the Side Letter positions remained in existence and “lock in” until abolishment of the particular position was completed, notwithstanding the Carrier’s failure to initiate abolishment within 30 days as required under the Side Letters. As such, the Claimant was still governed by the lock-in requirements of Side Letter # 2 when he bid on the Foreman positions described above.

The Board notes that a different conclusion might have been reached had the Union presented substantial evidence of bad faith delay in initiating or completing the required abolishment process. However, the Organization did not present any evidence that the entire four-month process took so long as to reflect bad faith. Additionally, the Carrier asserts without rebuttal that the delay in initiation was due to the Organization presenting two fronts to the Carrier.

While the General Chairman wanted to cancel the Side Letters when an agreement on meal allowances could not be reached, the local members and/or Local Representative(s) advised the Carrier that they wanted to continue the benefits and premiums paid under the Side Letters. The Carrier asserts it acted in good faith throughout, and that its good faith is proven by the fact that it commenced abolishment once the Carrier received the General Chairman’s subsequent letter of November 8, 2018 letter and it was “finally clear” to the Carrier that no agreement to continue the Side Letters could be completed.

Based on these undisputed claims, which were within the Organization’s power to research and refute if untrue, the Board cannot find bad faith solely based upon the Carrier’s initial 32-day delay in initiating the abolishment process. *See e.g., Third Div. Award No. 40788, BMWD – IBT Rail Conference and BNSF Railway Co. (former Burlington Northern Railroad Co. (Knapp 2010) (allegations regarding improper outsourcing were sufficient to enable the Carrier to research the records to see if they disputed the factual allegations); and Third Div. Award No. 27628, BMWE and Union Pacific Railroad (Zusman 1988) (allegations regarding qualifications stand as fact where unrefuted).*

**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 28<sup>th</sup> day of January 2022.**