

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44691
Docket No. MW-46157
22-3-NRAB-00003-200195**

**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. A. Fernandes to a Truck Driver B position on Gang V-404 effective October 15, 2018 and instead awarded and assigned Mr. S. Fernandes thereto (Carrier's File BMW E 10/2019 KLS).**
- (2) As a consequence of the violation referred to in Part (1) above, the Organization requests that A. Fernandes Seniority be properly placed on the Truck Driver B position 1559KCS0918 and placed on the Truck Driver Roster one (1) position above S. Fernandes. Please advise when the Claimants (sic) Seniority date will be corrected.”**

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 A. Fernandes 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.

Prior to the instant dispute, the Claimant placed a bid for a truck driver position on Gang V-404. On October 9, 2018, the Carrier awarded the position to junior employee S. Fernandes. Claimant A. Fernandes has a trackman seniority date of December 17, 2015 whereas junior employee S. Fernandes has a trackman seniority date of January 11, 2016. Prior to the instant dispute, neither employee possessed truck driver rights.

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. Specifically, both Letters provided, among other things, for a \$2.00/hour differentials, although Side Letter #2 for Flagmen such as the Claimant included a \$48.00 per diem in lieu of travel time and mileage.

Both Side Letters also provided for a twelve (12) month lock-in. However, Side Letter # 2 for Flagmen such as the Claimant applies to all "employees bidding on these positions". In contrast, Side Letter #1 for the I&R Crew has separate lock-in provisions for "employees assigned by bulletin to an I&R Crew", and for employees who exercised seniority to bump or displace a junior employee. (*Id.*, emphasis added.)¹

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.

¹ Both Side Letters also had identical cancellation provisions, which the Organization exercised shortly after the instant matter arose.

The Organization argues that the twelve (12) month “lock in” provision in Side Letter #2 for Flagmen does not apply to the Claimant because he did not bid into it but instead “he *exercised seniority after a displacement and bumped into the position.*” (Org. Subm. at 10, emphasis in original.) As such, the Organization asserts that he was not restricted from bidding the truck driver position in the instant dispute. It observes that while the twelve (12) month “lock in” provision in Side Letter # 1 expressly applies to both employees who bid into the positions and those who “exercise seniority” under Rule 8 “to displace a junior employees”, Side Letter #2 expressly applies only to employees who bid into the positions and makes no reference at all to employees who obtain the position through bumping and/or displacement.

The Organization further argues that bidding a position and exercising seniority to bump into a position after a displacement are entirely different from one another, and that the Carrier was well aware of this when it drafted the language of Force Account Flagmen Positions Side Letter #2. Had the Carrier intended to restrict the employees under Force Account Flagmen Positions Side Letter #2 after a displacement, they would have included the proper language to do so, as they did in Side Letter #1, concerning I&R Crew Lock. The Organization further argues that by failing to award and assign the Claimant to the truck driver position, and instead awarding it to a junior employee, the Carrier violated the Scope, Seniority and Assignment Rules and has violated of the Claimant’s valuable seniority rights.

The Carrier argues that the Claimant was ineligible for the positions he bid upon because he was still subject to the twelve (12) month “lock in” provision of the Side Letter. It argues that by bumping into the “Locked In” Assistant Foreman position, the Claimant “essentially” bid into it. Further, it argues that by displacing another employee to acquire the position, the Claimant acquired all of the responsibilities associated with this position, including the twelve (12) month “Lock-in rate” that the position was “created with...”

Upon consideration of the whole record, the Board finds and concludes as follows, beginning with general principles. As often noted by and before the NRAB, it is a guiding principle that “[w]hatever the parties’ different intents may have been the arbitrator ‘...is constrained to give effect to the thought expressed by the words used’”, and Arbitrators “in this industry...must ‘...give common or normal meaning to the language used in (an) agreement’”, “ ‘however onerous the terms of an agreement may be, ... if such is the meaning of the language used...’”. *See BMW*

and *Burlington Northern Santa Fe* (Suntrup 1999) (unnumbered); *see also* Third Div. Awards 18423, 24306, 40229 and Fourth Division Award 3442.

Here, for whatever reasons, the Parties chose to use different language in the two Side Letters. There is an understandable impulse to read tremendous significance into the omission in Side Letter # 2 of a reference to displacing/bumping employees. However, at the same time, Side Letter # 2's basic lock-in provision is much broader than that of Side Letter # 1: Side Letter # 2 applies to all "employees bidding on these positions", while Side Letter # 1's basic lock-in provision is limited to "employees assigned by bulletin." Under Rule 8, "bulletined" positions are "[n]ew positions or vacancies" and are treated separately from situations of displacement. As such, it was necessary for Side Letter # 1 to separately address situations of displacement, given its initial reference to "assign[ment] by bulletin."

Accordingly, this difference in language alone does not signal that the basic lock-in provision in Side Letter # 2 is inapplicable to situations of bumping and displacement. To the contrary, Side Letter # 2 broadly governs "employees bidding on these positions" that were "created with a 'Lock-in Rate'". It is therefore evident that the condition of "Lock-in" follows the position under Side Letter # 2, including for those employees who essentially bid into it thereafter. *See, e.g.,* Fourth Div. Award 3442, *Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express & Station Employees (Allied Services Div.) and Boston and Maine Corp.* (McBrearty 1977) ("[t]he contracting parties must be presumed to have known what they were doing when they chose the language which they did to express their bargained intent").

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 28th day of January 2022.