SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to the Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES DIVISION, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Organization,

and

BURLINGTON NORTHERN SANTA FE RAILWAY COMPANY,

Carrier.

Case No. 22
Award No. 22

OPINION AND AWARD

Hearing Date: April 6, 2006
Hearing Location: Sacramento, California
Date of Award: October 27, 2006

BOARD MEMBERS

Employe Members: R. B. Wehrli and Donald F. Griffin
Carrier Members: Kenneth Gradia and John Hennecke
Neutral Member: John B. LaRocco

EMPLOYEES STATEMENT OF CLAIM

The Organization respectfully requests that claimant now be compensated at his protected rate of pay for all regular assigned work days, including holidays, commencing from December 8, 2000 continuing through December 31, 2000.

CARRIER'S QUESTION AT ISSUE

Did the Carrier violate the February 7, 1965 Agreement, as amended, when it suspended the protective benefits of Claimant A. Martinez during the period following the abolishment of Claimant's Gp 3 Machine Operator position, because of his failure to exercise his seniority to displace junior employee R. A. Fenhaus from position 46538, Group 5, and instead voluntarily assumed a furloughed status?

2000. According to the Group 5 Small Machine Operator Seniority Roster, Claimant's seniority date was July 7, 1980, while Fenhaus held a seniority date of April 17, 1981.

In its April 26, 2001 appeal letter, the Organization alleged that Claimant called the Carrier's Manpower Office on December 8, 2000 and was informed that there was not any position available to him in the exercise of his seniority. The Carrier replied on June 21, 2001, that had Claimant contacted the Manpower Office, he would have been told of his ability to displace junior employee Fenhaus from the Group 5 Machine Operator position.

On September 13, 2001, the Organization declared that, while Claimant had attempted to contact the Manpower Office on December 8, he did not actually speak to a person in the office until December 12 or 13, 2000. The Organization requested that the Carrier produce the Manpower Office telephone records.

On November 13, 2000, the Organization and the Carrier had entered into an agreement, memorialized as Appendix MM, covering the recording of incoming Manpower Office calls as well as retaining and retrieving such recordings. The second paragraph of Appendix MM reads:

> On November 13,2000 at Fort Worth, we discussed that the current system has been in operation for several months and calls are efficiently retrieved when the call date, Manpower Planner name and call time is provided. However, as Manpower Planners are subject to change, and many callers do not displace on the first call, the parties agree that if the Planner's name is unknown, at least the date and time of call must be provided to enable the Carrier to make reasonable efforts to retrieve a call. Call records will be retained for six months and the Organization may review by phone or in person. Transcripts of retrieved calls will be provided to the Organization upon request The parties affirm that reasonable efforts will be made to retrieve calls.

The Carrier denied Claimant protective benefits under the February 7, 1965 Job Stabilization Agreement, as amended, from December 8 through December 24, 2000, because it treated him as occupying a position having a higher rate than his guarantee. Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement provides that if an employee fails ". . . to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, . . ." the employee ". . . shall cease to be a protected employee . . .." However, on this property, the parties amended the Job Stabilization Agreement to provide for the suspension of the protective guarantee for certain "prior rights" employees as opposed to a forfeiture of protective status. [See *Article G of the District Consolidations-Related Agreements* dated August 12, 1999.] Since Claimant did not forfeit his protected status, the Carrier, as stated above, compensated Claimant at his guarantee for the last seven days of December 2000.

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

The Carrier failed to present any evidence to contradict Claimant's plausible declaration that he tried to contact the Manpower Office on December 8, 2000, which coincided with the Carrier's abolition of his Group 3 Machine Operator position. Claimant later clarified that, despite repeated attempts to contact the Manpower Office, he was unable to speak to an office employee until December 12 or 13, 2000. The Manpower Office employee told Claimant that he could not exercise his seniority to any available position and thus, Claimant went on furloughed status. While the Carrier asserted that Claimant could have bumped junior employee Fenhaus during the two weeks following December 8, the Carrier never came forward with any reliable evidence demonstrating that this displacement information was communicated to Claimant.

The Carrier had an affirmative obligation to notify Claimant of his capacity to displace any junior employees regardless of whether Claimant contacted the Manpower Office. Rule 8(D) of the schedule agreement requires the Carrier to post a list of employees retained in service or if a list is not posted, to inform displaced employees of their displacement rights. The parties did not intend for Appendix MM to supersede Rule 8(D). The Carrier violated Rule 8(D) by failing to fulfill its affirmative obligation to permit Claimant to exercise any and all of his seniority rights. *NRAB Third Division Award No. 37467* (Goldstein).

In conclusion, the Carrier must pay Claimant his Job Stabilization Agreement guarantee for the period from December 8 through December 24, 2000.

B. The Carrier's Position

The Organization did not proffer any evidence to substantiate Claimant's assertion that he attempted to contact the Manpower Office on December 8, 2000 and that he was told, on December 12 or 13, that he could not displace any junior employee. Appendix MM mandates that the Carrier maintain telephone records for six months. The Organization failed to ask for the records covering the period December 8 through December 13, until September 13, 2001, which was past the six-month record keeping requirement. In addition to the untimely request, Claimant did not provide precise times when he tried to call or the identity of the person in the Manpower Office with whom he spoke. Therefore, the Carrier could not possibly produce the requested telephone records. Since Claimant and the Organization failed to make a timely request for the telephone records, the Organization cannot satisfy its burden of proving that Claimant actually attempted to contact or made contact with personnel in the Manpower Office.

More importantly, had Claimant called the Manpower Office, the office personnel would have advised him of his capacity to displace junior employee Fenhaus from the Group 5 Machine Operator position which Claimant would have held until December 24, 2000.

In sum, the Carrier properly suspended Claimant's protective benefits under the February 7, 1965 Job Stabilization Agreement, as amended, because he failed to exercise his seniority to displace a junior employee following the abolition of his Creston position.

III. DISCUSSION

R. A. Fenhaus was junior to Claimant on the Group 5 Machine Operator Seniority Roster. Thus, when the Carrier abolished Claimant's Group 3 Machine Operator position on December 8, 2000, Claimant had the capacity to displace Fenhaus. The record also reflects that Claimant held greater seniority than a junior employee on a Group 3/4 Machine Operator position on a Mobile gang. However, Claimant could have worked the position occupied by Fenhaus from December 8 to December 24, 2000. The issue is whether Claimant or the Carrier is responsible for Claimant going to furlough status instead of displacing Fenhaus.

Claimant alleges that not only did he lack any knowledge of his ability to displace Fenhaus, but also that the Carrier misled him by telling him that there was not any position available to Claimant to which he could exercise his seniority.

If Claimant contacted the Carrier's Manpower Office, as he alleges, the Carrier was under an affirmative duty to accurately inform Claimant of the positions to which he could exercise his seniority to maintain active employment status. However, a careful perusal of the record reveals a dearth of evidence to support Claimant's allegations.

At the onset, the evidence strongly indicates that Claimant, himself, was unsure about when he contacted the Manpower Office. Initially, Claimant emphatically asserted that he was informed, on December 8, 2000, that he could not displace to any other position. Later, Claimant changed his rendition. He subsequently declared that he actually contacted the office on December 12 or 13 but, even then, Claimant neither gave an approximate time when he called the office or the name of the person who purportedly gave him misleading information about his displacement rights. Claimant's equivocation casts doubt on his assertion that he spoke to a representative in the Manpower Office.

Nevertheless, Appendix MM is designed to resolve previously irreconcilable disputes where the employee alleges that he called the Manpower Office and the Carrier contends that no call was received. Under Appendix MM, the Carrier must retrieve the call records only if Claimant first provides a date and time of the call. As discussed in the previous paragraph, Claimant could never precisely recall the date of his alleged call much less the approximate time of his call. Moreover, the request for production of the telephone records was not made until after the expiration of the six-month limitation period expressly set forth in Appendix MM. Thus, the Carrier was not under any affirmative obligation to disprove Claimant's allegations as the date the railroad (September 13, 2001) received the telephone record production request.

The Organization's reliance on *NRAB Third Division Award No. 37467 (Goldstein)* is misplaced inasmuch as it was undisputed in that case that the displaced employee contacted the Manpower Office and expressed a desire to exercise seniority. The record in this case is void of any such evidence and therefore, the Carrier did not violate Schedule Rule 8(D) insofar as the manner in which the Carrier handled Claimant's application for protective benefits.

Under the August 12, 1999 amendments to the Job Stabilization Agreement, the Carrier properly treated Claimant as occupying a position higher-rated than his guarantee from December 8 through December 24, 2000. Stated differently, the Carrier properly suspended Claimant's protective benefits during that period.

AWARD AND ORDER

1. The Organization's claim is denied; and,

2. The Answer to the Carrier's Question at Issue is No.

Dated: October 27, 2006

Rick Wehrli
Union Member

Ken Gradia
Carrier Member

Dissenting

Donald F. Griffin
Union Member

John Hennecke
Carrier Member

John B. LaRocco
Neutral Member

DISSENTING OPINION OF EMPLOYE MEMBERS TO AWARD NO. 22 OF SPECIAL BOARD OF ADJUSTMENT NO. 1087

The Employe Members respectfully dissent from the majority's decision in this case.

The facts of this case, which were not in dispute, indicated the Claimant's position was abolished effective close of shift December 8, 2000. In this connection, Rule 8 (D) of the parties' Agreement states:

> *"At the time as notice of reduction is given, under Section A of this rule, the officer making the reduction will see that a list showing names, classification and location of employes retained in the service in the various crews in the seniority district, is posted in tool houses and outfits, so that seniority may be exercised without unnecessary loss of time."*

Both parties spent a tremendous amount of time arguing over whether or not the Claimant contacted the Manpower Planners Office to gain information regarding "*a list* [of] *names, classification and location of employes retained in the service in the various crews in the seniority district.*" However, there is nothing in the record that indicates the Carrier complied with Rule 8 (D). Had the Carrier complied with Rule 8 (D), this dispute would not have been before this Board because the information the Carrier would have provided the Claimant pursuant to Rule 8 (D) would have settled the issue of whether or not the Claimant had accurate information to exercise seniority.

This award indicates in the last paragraph of Page 6, "*The record in this case is void of any such evidence*" (that the Claimant contacted the Manpower Planners Office to express a desire to exercise seniority) therefore, "*...the Carrier did not violate Schedule Rule 8 (D) insofar as the manner in which the Carrier handled Claimant's application for protective benefits.*" This suggests that the Claimant violated the terms of some agreement by not contacting the Manpower Planners Office to express a desire to exercise seniority.

The Claimant was under no obligation, under the current collective bargaining agreement, to contact the Manpower Planners Office to gain the information because, under Rule 8 (D) of that agreement, it is the Carrier's obligation to provide such information regardless of whether or not the employee requests it, wants it or "*desires to exercise seniority.*"

In accordance with the Disputes Resolution Procedures Agreement of October 25, 1996, this Board does not have the authority "***...to add contractual terms or to change existing agreements governing rates of pay, rules and working conditions.***" In light of this fact, it must be emphasized and recognized that this decision does not serve to nullify or diminish the Carrier's obligations under Rule 8 (D) of the parties' collective bargaining agreement. Nor does this decision serve to impose any new contractual obligations on the employes covered by this agreement. Such changes may only occur pursuant to the applicable provisions of the Railway Labor Act as specifically stated under Rule 80 of the parties' collective bargaining agreement. Because this decision may imply otherwise, BMWED dissents.

Respectfully submitted,

R. B. Wehrli - Employe Member SBA 1087

D. F. Griffin - Employe Member SBA 1087

Dated: