

SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to the Dispute:	)	Case No. 19
	)	Award No. 19
BROTHERHOOD OF MAINTENANCE OF	)	
WAY EMPLOYES,	)	
	)	
Organization,	)	
	)	
and	)	
	)	
NORFOLK SOUTHERN RAILWAY	)	OPINION AND AWARD
COMPANY,	)	
	)	
Carrier.	)	
	)	

Hearing Date: September 9, 2005  
Hearing Location: Chicago, Illinois  
Date of Award: December 13, 2005

BOARD MEMBERS

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

CARRIER'S QUESTION AT ISSUE

Does Claimant R. C. Allen meet the requirements of Article II, Section 1 of the February 7, 1965 Mediation Agreement, as amended, to qualify for protective benefits?

BOARD'S STATEMENT OF THE CLAIM

Claim of R. C. Allen for protective status.

## OPINION OF THE BOARD

This Board, after hearing upon the who record and all evidence, finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act as amended; that this Board has jurisdiction over the parties and the subject matter of the dispute herein; that this Board is duly constituted according to the 1996 Mediation (National) Agreement and as specified in a National Mediation Board appointment letter dated August 18, 2004; and that all parties were given due notice of the hearing held on this matter.

### I. BACKGROUND AND SUMMARY OF THE FACTS

Claimant, a Track Laborer, holds a May 19, 1980 seniority date on the NKP seniority district.

On or about February 8, 2000, the Carrier abolished Claimant's position. He lacked sufficient seniority to displace to another position. As a result, starting in February 2000, the Carrier paid Claimant protective benefits under the February 7, 1965 Job Stabilization Agreement, as amended.

Beginning in January 2001, the Carrier issued a series of bulletins advertising several positions on maintenance of way gangs. More specifically, on February 2, 2001, the Carrier issued Bulletin No. DPG-103 advertising track laborer positions comprising Designated Program Gang (DPG) No. TS-24, a Timber and Surfacing Gang. The bulletin announced that DPG TS-24 would commence work on April 2, 2001 at Green Springs, Ohio on the NKP seniority district and was programmed to work over the following zones: NKP, NW, CR, and WAB.<sup>1</sup>

The Organization alleged that the Carrier failed to post Bulletin DPG-103 at Claimant's home location and the bulletin was not otherwise accessible to Claimant. According to the Carrier, Bulletin DPG-103, as well as other bulletins advertising laborer positions, were posted locally and readily available to active and furloughed maintenance of way employees. The Carrier submitted

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<sup>1</sup> Under Section II-D of the June 12, 1992 Arbitrated DPG Agreement, positions on DPGs are awarded in preferential order in each classification with employees holding seniority in a designated work zone having top preferences.

a statement from the New Castle, Indiana Track Supervisor attesting that bulletins were placed on the Section Foreman's desk, in plain view, and maintenance of way employees could review all bids.

The Carrier also declared that it sent Bulletin DPG-103, as well as other bulletins, to Claimant's residence. The Carrier incorporated into the record letters that it sent to Claimant dated January 12, January 31; February 9, February 22; and, March 7 and, 20, 2001. The letters indicate that recent job bulletins were enclosed. The Carrier submits that it sent Bulletin DPG-103 to Claimant with the February 9, 2001 letter.

Claimant did not bid for any of the laborer positions on Gang TS-24. On February 26, 2001, the Carrier released Bulletin No. DPG-108 announcing that all seven Gang TS-24 laborer positions had been filled. Three of the successful bidders had greater seniority than Claimant while four of the successful bidders were junior to Claimant.

On May 14, 2001, the Carrier notified Claimant that he ceased to be a protected employee under the February 7, 1965 Job Stabilization Agreement, as amended, inasmuch as employees junior to Claimant were awarded track laborer positions on DPG Gang TS-24. On June 15, 2001, the Organization appealed the Carrier's decision and thereafter, the Organization properly progressed the appeal to this Board for adjudication.

## II. THE POSITIONS OF THE PARTIES

### A. The Organization's Position

The Carrier did not come forward with sufficient proof showing that it posted Bulletin DPG-103 at locations reasonably accessible to Claimant. The Carrier was obligated to conspicuously post bulletins at maintenance of way headquarters. Therefore, Claimant was unaware of the availability

of laborer positions on DPG Gang TS-24. In addition, the record does not contain any evidence showing that Claimant possessed constructive knowledge of Bulletin DPG-103 because Claimant did not know when to inquire about available positions because Claimant did not have any hint that a bulletin had been issued.

Next, the Carrier failed to prove that it offered Claimant a position and that Claimant refused to fill the position. Thus, Claimant remained a protected employee.

B. The Carrier's Position

Track laborer positions on Gang TS-24 were available to Claimant. The Carrier sent Bulletin DPG-103 to Claimant and so, he was fully aware of the available positions. He had sufficient seniority to bid for and be awarded a position on the gang. Pursuant to Article II, Section 1(a) of the February 7, 1965 Job Stabilization Agreement, as amended, Claimant failed to exercise his seniority to obtain an available position and thus, he ceased being a protected employee.

The Carrier has the right to utilize the service of protected employees and, in exchange, protected employees must fully exercise their seniority. The Job Stabilization Agreement does not grant employees gratuitous guarantees.

III. DISCUSSION

The record reflects that the Carrier sent Bulletin DPG-103 to Claimant on February 9, 2001. Therefore, regardless of whether the bulletin was properly posted at Claimant's headquarters, Claimant received actual notice of the availability of track laborer positions on Gang TS-24.

The introductory clause and subsection 1 of Section II-D of the June 12, 1992 Arbitrated Designated Program Gang Agreement, provides:

D. Positions on DPG's will be awarded to applicants in the following order:

1. To the senior employee ranked on the DPG seniority list in the classification bulletined, who has a zone designation corresponding to one of the zones over which the DPG is programmed to work.

Claimant clearly fell within subsection 1, quoted above, since Gang TS-24 was programmed to perform service in the NKP zone, Claimant's designated zone. Applying the preferences, Claimant's seniority was greater than four successful bidders to laborer positions established on DPG TS-24. Had Claimant bid, he would have been awarded a track laborer position on DPG TS-24.

Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, reads:

An employee shall cease to be a protected employee in case of his resignation, death, retirement, dismissal for cause in accordance with existing agreements, or failure to retain or obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements, or failure to accept employment as provided in this Article. A protected furloughed employee who fails to respond to extra work when called shall cease to be a protected employee. If an employee dismissed for cause is reinstated to service, he will be restored to the status of a protected employee as of the date of his reinstatement.


The express language of Article II, Section 1 states that a protected employee "... shall cease to be a protected employee ..." if the employee fails to "... obtain a position available to him in the exercise of his seniority rights in accordance with existing rules or agreements ..." Claimant did not obtain a position available to him on Gang TS-24 because he failed to submit bids for the available positions despite receiving actual notice of the available positions. Such a bid would have been in full accord with existing rules and agreements, including the DPG Agreement. Thus, Claimant ceased to be a protected employee according to the self-executing operation of Article II,

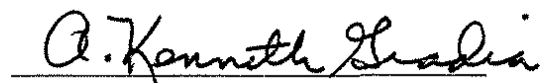
Section 1. *Special Board Adjustment No. 605, Award No. 339* (Rohman). Stated differently, Claimant was obligated to bid for available positions that he would have been awarded to maintain his protected status. *Special Board of Adjustment No. 605, Award No. 107* (Rohman).

**AWARD AND ORDER**

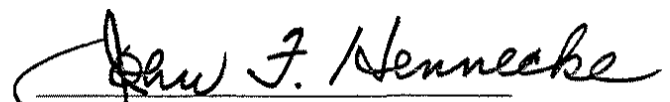
1. Claim denied.
2. The Answer to the Carrier's Question at Issue is No.


Dated: December 13, 2005

  
Rick Wehrli  
Union Member

  
Ken Gradia  
Carrier Member

  
Donald F. Griffin  
Union Member

  
John Hennecke  
Carrier Member

  
John B. LaRocco  
Neutral Member