SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to the Dispute: BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES, Division of INTERNATIONAL BROTHERHOOD OF TEAMSTERS, Organization, and BURLINGTON NORTHERN & SANTA FE COMPANY, Carrier.	)	Case No. 23 Award No. 23 **OPINION AND AWARD**

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

BOARD MEMBERS

Employe 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

Did Carrier violate the February 7, 1965 Agreement, as amended, when it permanently lowered Claimant L. C. Christensen's protected rate from the rate of Track Inspector to the rate of Section Foreman as a result of his voluntarily bidding to a lower rated position of Section Foreman on December 9, 1999?

BOARD'S STATEMENT OF THE CLAIM

Claim of L. C. Christensen for protective benefits for October, 2001.

OPINION OF THE BOARD

This Board, after hearing upon the who record and all evidence, finds that the parties herein are Carrier and Employe 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

At all times pertinent to this dispute, Claimant resided in Ellensburg, Washington. Because Claimant had accumulated more than 30 years of service with the Carrier, Claimant became a protected employee under the February 7, 1965 Job Stabilization Agreement, as amended, pursuant to the September 26, 1996 Mediation Agreement.

Beginning on or about October 26, 1998, Claimant occupied a Track Inspector position at Ellensburg. Pursuant to Rule 8(a) of the Schedule Agreement, the Carrier notified Claimant at least five workdays in advance that his Track Inspector position would be abolished on December 10, 1999.

One day before the abolishment became effective (December 9, 1999), Claimant bid on Section Foreman Position 38097 located at Easton, Washington, advertised on job Bulletin N9912A-19. The bulletin announced that bids for the Section Foreman position would be accepted through Noon on December 10, 1999 and awards released on December 15, 1999.

On December 10, 1999, the Carrier abolished the Track Inspector position held by Claimant.

Claimant exercised his seniority to place on a Relief Section Foreman temporary vacancy which was actually the position to which Claimant had previously filed a bid. Claimant was awarded

the Easton Section Foreman position on December 15, 1999. Section Foreman is lower rated than Track Inspector.

On December 10, 1999, Claimant held sufficient seniority to displace a junior employee holding a Track Inspector position at Seattle, Washington. Claimant held a Foreman position at Seattle from June 15, 1998 through July 17, 1998.

Easton is approximately 40 miles from Ellensburg while Seattle is approximately 125 miles from Ellensburg. In a written statement, Claimant attested that a one-way commute from Ellensburg to Seattle consumes about three and one-half hours and can take longer in bad weather because the route includes traversing two mountain passes. Claimant elaborated that he could avoid the commute only by staying in Seattle from Monday through Friday and returning home on weekends.

Sections 1, 3 and 4 of Article IV of the February 7, 1965 Job Stabilization Agreement, as amended, provide:

> Article IV - COMPENSATION DUE PROTECTED EMPLOYEES
> Section 1 -
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> Subject to the provisions of Section 3 of this Article IV, protected employees entitled to preservation of employment who hold regularly assigned positions on October 1, 1964, shall not be placed in a worse position with respect to compensation than the normal rate of compensation for said regularly assigned position on October 1, 1964; provided, however, that in addition thereto such compensation shall be adjusted to include subsequent general wage increases.
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> Section 3 -
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> Any protected employee who in the normal exercise of his seniority bids in a job or is bumped as a result of such an employee exercising his seniority, in the normal way by reason of a voluntary action, will not be entitled to have his compensation preserved as provided in Sections 1 and 2 hereof, but will be compensated at the

> rate of pay and conditions of the job he bids in; provided, however, if he is required to make a move or bid in a position under the terms of an implementing agreement made pursuant to Article III hereof, he will continue to be paid in accordance with Sections 1 and 2 of this Article IV.
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> Section 4 -
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> If a protected employee fails to exercise his seniority rights to secure another available position, which does not require a change in residence, to which he is entitled under the working agreement and which carries a rate of pay and compensation exceeding those of the position he elects to retain, he shall thereafter be treated for the purposes of this Article as occupying the position which he elects to decline.

Citing Article IV, Section 3, the Carrier permanently reduced Claimant's protective rate to the rate of pay of the Section Foreman position which he occupied subsequent to December 15, 1999. The Organization filed a claim challenging the Carrier's reduction of Claimant's protective guarantee and the Organization progressed the claim to this Board.

In *Award No. 8*, this Board dismissed the claim. The Board found that the record did not contain evidence concerning the location where Claimant last worked as a Track Inspector, the date on which the Carrier abolished the Track Inspector position and the precise location where Claimant resided at the time of the abolishment. The Board observed that such evidence was "necessary and indispensable" to resolve the claim. The Board wrote:

> The extensive arbitral precedent contained in the record underscores the importance of having such factual information to reach an appropriate and sound decision. For these reasons issuing a substantive decision without such critical information would be improper, inappropriate, and irresponsible because such a determination would require undue and unreasonable speculation that could easily lead to an erroneous result. This Board therefore will refrain from the temptation to reach the merits of the present dispute.

In the conclusion section of its Opinion, the Board reiterated that, ". . . the record omits sufficient factual information to address the merits of the Claim." The Board further stated, "The Organization perforce failed to prove its case by a fair preponderance of the credible evidence. The Award shall therefore indicate that the Claim is dismissed." In its Award section of the Opinion, the Board adjudged that the record ". . . fails to prove that the Carrier . . . violated . . ." the Job Stabilization Agreement.

The claim herein covers October 2001, and was filed while the parties were awaiting a decision from this Board regarding the prior claim. At the time of this claim, the pay rate of the Track Inspector was $18.48 an hour while the pay rate of a Section Foreman was $18.29 an hour. Claimant seeks protective benefits measured by the difference in pay contending that his protected rate remains the rate of pay of a Track Inspector.

II. POSITIONS OF THE PARTIES

A. The Organization's Position

Claimant was forced to make consecutive seniority exercises. Because it governs only voluntary seniority exercises, Article IV, Section 3 of the February 7, 1965 Job Stabilization Agreement, as amended, was inapplicable to this dispute. Claimant was subject to Article IV, Section 4, which mandated Claimant to involuntarily exercise his seniority to an available position not requiring a change in residence. Claimant involuntarily used his seniority to acquire the Relief Section Foreman vacancy and then, to obtain the bulletined Section Foreman position at Easton. At the time that Claimant bid on the Section Foreman position, the Carrier had already notified Claimant that his Ellensburg's Track Inspector position would be abolished on December 10.

Claimant would not have submitted his December 9 bid to the Section Foreman position if he could have continued to hold the Ellensburg Track Inspector position. Thus, his exercise of seniority was involuntary.

If Claimant had displaced the junior employee on the Seattle Track Inspector position, he would have been required to change his residence. Seattle is 125 miles from Ellensburg, Claimant's residence. Staying in Ellensburg would necessitate a daily seven-hour round trip commute. *Special Board of Adjustment No. 605, Award No. 398* (Lieberman) found that a position 100 miles from an employee's residence required the employee to change his residence.

Even if this Board rules that Claimant could have occupied the Seattle position without changing his residence, the Carrier is only permitted to treat Claimant as occupying the Seattle position as opposed to permanently reducing Claimant's protective guarantee.

In summary, Claimant was forced to file a bid to the highest rated available position not requiring Claimant to change his residence. In the interim, until Claimant was awarded the Section Foreman position, he involuntarily exercised his seniority to the Relief Section Foreman job, which was also the highest rated position available to Claimant, which did not require Claimant to change his residence. The Track Inspector position abolishment was the genesis of each of Claimant's seniority exercises. Claimant may have had a choice about how to exercise his seniority but, he was compelled to exercise that seniority.

This claim is not barred by collateral estoppel. In *Award No. 8*, this Board dismissed the claim without deciding the dispute due to a confusing and sparse factual record. Inasmuch as *Award No. 8* did not address the merits of the dispute, *Award No. 8* does not preclude this claim.

B. The Carrier's Position

The Carrier permanently lowered Claimant's protective pay rate from the Track Inspector pay rate to the Section Foreman pay rate because, on December 9, 1999, Claimant voluntarily bid to the lower rated Section Foreman position. Pursuant to Article IV, Section 3 of the February 7, 1965 Job Stabilization Agreement, as amended, Claimant's protected rate became the rate of the job to which he voluntarily bid on December 9 and to which he voluntarily moved on December 15, 1999. More specifically, Question and Answer No. 1 to Article IV, Section 3 provides that when an employee voluntarily bids to, and is awarded, a lower rated position, the employee's protective rate is the rate of the position to which the employee voluntarily bid.

When Claimant's Track Inspector job at Ellensburg was abolished on December 10, he could have displaced a junior employee on a Track Inspector position at Seattle. The Organization's contention that Claimant would have been required to change his residence to hold the Track Inspector position at Seattle is unsupported by the record. Claimant previously worked a Foreman position in Seattle. The record does not contain any evidence that Claimant was either required to change his residence or that he actually changed his residence to fill the Foreman position. As a result, Claimant has a history of working in Seattle without changing his residence.

The Organization is improperly attempting to relitigate the same issue that was considered and decided by this Board in *Award No. 8*. Since the holding in *Award No. 8* is final and binding, this claim must be dismissed. In *Award No. 8*, this Board specifically found that the Organization failed to submit proof that the Carrier violated the February 7, 1965 Job Stabilization Agreement,

as amended, by reducing Claimant's protective guarantee. Thus, this claim is barred under the doctrines of *res judicata* and *collateral estoppel.*

Moreover, should this Board should find that *Award No. 8* did not fully and finally adjudicate the claim, the Carrier detrimentally relied on the decision in *Award No. 8* which must obviate its retroactive liability. The stability of labor relations on the railroads would be forever undermined if the Organization and the Carrier could not rely on decisions issued by neutral tribunals. Since the Carrier reasonably deduced that it was the prevailing party in *Award No. 8*, it cannot be penalized for relying on *Award No. 8.*

III. DISCUSSION

The threshold issue before this Board is whether the Organization is collaterally estopped from bringing this claim based on this Board's decision in *Award No. 8.* The doctrines of *res judicata* and *collateral estoppel* bar parties from relitigating identical claims. Without these doctrines, a losing party could constantly adjudicate settled matters in the hope of someday obtaining a favorable decision. In this case, the claim covers the same Claimant and raises the same factual issues as the claim underlying *Award No. 8.* The only difference, and the difference is insignificant, is that this claim concerns a month (October, 2001) almost two years after the Carrier abolished Claimant's Ellensburg Track Inspector position. Nevertheless, for the reasons discussed below, *res judicata* and *collateral estoppel* only operate to partly bar this claim

The Board's decision in *Award No. 8* was both disingenuous and paradoxical. The Board enumerated procedural defects in the record which, according to the Board, rendered it impossible for the Board to resolve any factual issues. The Board was concerned that the record contained a

dearth of vital factual information. The Board then wrote that in the absence of the factual information, it would be "irresponsible" for the Board to issue a "substantive decision." This language connotes that the Board is refraining from reaching any decision on the merits of the claim.

Next, the Board held that the Organization failed to meet its burden of proving that the Carrier violated the Job Stabilization Agreement. Such a finding is a substantive decision. Unfortunately, the Board did not explain how it determined that the Organization failed to meet its burden of proof after the Board first found that the state of the record precluded the Board from evaluating the probative value of the evidence in the record.

The Board then compounded the contradiction by dismissing the claim when, if the Organization had not satisfied its burden of proof, the claim should have been denied.

The obvious flaws in *Award No. 8* present this Board with what may be an insoluble dilemma.

In view of the patent contradiction in *Award No. 8*, this Board concludes that we must minimize the prejudice imposed on both the Organization and the Carrier by *Award No. 8*. To minimize the harm caused by the defects in *Award No. 8*, this Board is compelled to give some effect to both prongs of the contradiction therein.

Therefore, this Board will follow the portion of *Award No. 8* which announced that the Board did not consider the merits of the dispute. However, we must simultaneously absolve the Carrier of any retroactive liability because the Carrier rightly and detrimentally relied on the Board's expression that the Organization failed to meet its burden of proof in *Award No. 8*.

Stated differently, this Board will consider the claim on its merits inasmuch as *Award No. 8* did not ostensibly reach the merits of the claim due to a paucity of factual information. Should this Board decide that the Carrier violated the February 7, 1965 Job Stabilization Agreement, as amended, any retroactive remedy is inappropriate since the Carrier properly relied on the outcome of *Award No. 8.*

The initial factual issue is whether Claimant would have been required to change his residence if he had displaced the junior employee on the Seattle Track Inspector position.

Decisions issued by Special Board of Adjustment No. 605 reveal that determining whether an employee must change his residence to occupy a position some distance from his current residence involves a pragmatic analysis without any fixed standards. *Special Board of Adjustment No. 605, Award No. 398* (Lieberman). In this case, the circumstances and practicalities show that displacing to the Seattle position would have required Claimant to change his residence.

Seattle is 125 miles from Ellensburg. To commute from Ellensburg, Claimant would have to spend three hours driving each way. In addition, due to the mountainous geography of the region, the commute would be further elongated on poor weather days. Under a practical analysis, a six-hour per day commute covering 250 miles is unreasonable. Thus, Claimant would have been required to move to the Seattle area had he displaced to the Seattle Track Inspector position. The mere fact that Claimant held a Seattle Foreman position for 30 days in 1998 does not change this analysis. Claimant occupied a position at Seattle for such a short time that he was able to endure the lengthy commute without changing his residence.

In conclusion, Claimant was not required to exercise his seniority to the Seattle Foreman position under Section 4 of Article IV of the February 7, 1965 Job Stabilization Agreement, as amended, inasmuch as the exercise of such seniority would have required Claimant to change his residence.

Inasmuch as Claimant was not obligated to displace to the Seattle Track Inspector position, the gravamen of this case is whether Claimant's December 9, 1999 bid to the Section Foreman position was a voluntary or an involuntary exercise of his seniority.

Frequently, the submission of a job bid pursuant to a job bulletin is a voluntary act. However, for several reasons, Claimant's bid to the Section Foreman position herein is best characterized as an involuntary exercise of his seniority.

First, Claimant filed the bid knowing that at the end of the next workday, his Ellensburg Track Inspector position would be abolished. It logically follows that he would be looking for an available position which did not require a change in residence per Article IV, Section 4 of the Job Stabilization Agreement.

Second, Claimant had to file the bid by Noon on December 10, which was before the abolition of his position. It is conceivable that had Claimant not filed the bid, the Carrier might have held the Easton Section Foreman position against him. Alternatively, if Claimant had not submitted a bid and the Section Foreman position was awarded to a junior employee, Claimant might have been compelled to displace the junior employee. Thus, whether he bid or not, Claimant probably would have ended up on the Easton Section Foreman position.

Third, there is not any evidence in the record that Claimant would have bid for the Section Foreman position on December 9 but for the imminent abolition of his Track Inspector position.

For these reasons, Claimant was not subject to Article IV, Section 3 of the Job Stabilization Agreement. Moreover, since Claimant involuntarily exercised his seniority to the highest rated position available to him that did not require a change in residence, Claimant was entitled to the guarantee pursuant to Article IV, Section 1. In other words, Claimant was placed in a worse position with respect to his compensation due to the abolishment of his Track Inspector position.

Therefore, the Carrier violated the February 7, 1965 Job Stabilization Agreement, as amended, by permanently reducing Claimant's protective rate.

To reiterate, the Carrier detrimentally relied on the decision in *Award No. 8* and thus, to minimize the prejudice to both the Carrier and Claimant, the Carrier is absolved of retroactive liability. However, Claimant is henceforth entitled to restoration of his protective guarantee assuming there have not been any intervening events which would otherwise affect the level of his guarantee. This Board rules that, on February 1, 2006, the Carrier shall restore Claimant's protective rate to the rate of pay of the Track Inspector position.

AWARD AND ORDER

This Board renders the following Order:

1. The Board holds that the Carrier violated Article IV of the February 7, 1965 Job Stabilization Agreement, as amended;

2. The Carrier shall restore Claimant's protective guarantee under the February 7, 1965 Job Stabilization Agreement, as amended, to the rate of pay of the Track Inspector position effective February 1, 2006, provided, no intervening event has occurred which affected the level or status of Claimant's protective guarantee;

3. The claim seeking protective benefits for October 2001 is denied; and,

4. The Carrier shall comply with this Order on or before February 1, 2006.

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