

SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to Dispute:)	
)	
BROTHERHOOD OF MAINTENANCE)	Case No. 26
OF WAY EMPLOYES DIVISION,)	Award No. 26
INTERNATIONAL BROTHERHOOD)	
OF TEAMSTERS,)	
)	
Organization,)	OPINION AND AWARD
)	
and)	
)	
BURLINGTON NORTHERN SANTA FE)	
RAILWAY COMPANY,)	
)	
Carrier,)	
)	

Hearing Date: May 24, 2006
Hearing Location: Washington, D.C.
Date of Award: August 4, 2006

MEMBERS OF THE BOARD

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

EMPLOYEES' STATEMENT OF CLAIM

Claim for compensation benefits under the February 7, 1965 Agreement, as amended September 26, 1996 ("Feb. 7th Agreement"), for the months of February, March and April 2003. The Claimant, D. K. Wald, is an employee subject to protection under Article I, Section 1 of the February 7th Agreement and was furloughed during the months in question. The Union seeks all wage stabilization and other benefit payments and credits due to the Claimant as a furloughed protected employee for the dates the Claimant was in furlough status during those three months.

CARRIER'S QUESTION AT ISSUE

1. Did D. K. Wald fail to retain or obtain a position available to him in the exercise of his seniority right in accordance with existing rules or agreements?

OPINION OF THE BOARD

This Board, after hearing upon the whole 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 the 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

The Carrier hired Claimant on May 14, 1979 which is also his Sectionman's seniority date. Claimant acquired seniority as a Truck Driver on or about May 23, 1988. Due to his lengthy service, Claimant is a protected employee under the September 26, 1996 Mediation Agreement, which updated and amended the February 7, 1965 Job Stabilization Agreement.

Claimant is a multi-rated protected employee. According to the Organization, Claimant's original multi-rated protective guarantee was nine (9) months at the Truck Driver pay rate and three (3) months at the Sectionman pay rate. The Organization charged that prior to December 2002, the Carrier unilaterally and improperly reduced Claimant's protected guarantee to twelve (12) months at the Sectionman pay rate.¹

On December 2, 2002, Claimant was displaced from a Truck Driver position and, the next day, Claimant exercised his seniority to bump an employee from a Sectionman position. On December 9, 2002 Claimant was displaced from the Sectionman position and, on the following day, he displaced onto a Truck Driver position. Claimant was again displaced on December 18, 2002. On December 19, 2002, he displaced to another

¹ The Organization filed a separate claim challenging the Carrier's reduction of Claimant's protected rate.

Truck Driver position. During the next two (2) months, Claimant held several positions for short periods of time. In each instance, after the position that he held was abolished, he was able to exercise his seniority to another position.² Beginning on February 24, 2003, Claimant could not exercise his seniority to any available position. Claimant was furloughed. On March 24, 2003 the Carrier recalled Claimant to a Truck Driver position. One week later, on March 31, 2003 Claimant was again displaced and he briefly reverted to furlough status until he was recalled on April 7, 2003.

During the first ten (10) days of December 2002, the Carrier posted advertisements for numerous positions on Regional and System Maintenance of Way Gangs, with the positions to be activated sometime during the early part of 2003. Regional System Gang Bulletin RO301-01 specified that the bids were open until Noon on December 10, 2002. Truck Driver Position No. 05106 on a Relay Gang was among the many jobs advertised in the Bulletin. Claimant did not bid for Position No. 05106 and the record does not contain any evidence that he filed a bid for any of the Regional and System Gang positions advertised in Bulletin R0301-01. The Carrier issued the bid awards on positions for the System and Regional Gang on December 15, 2002. J. R. Fiechtner, who held a Truck Driver seniority date of October 28, 1991, was awarded Position No. 05106. Fiechtner began working the position when the Carrier activated the Relay Gang on February 18, 2003. The Organization explained that even though Claimant was senior to Fiechtner, Claimant could not displace Fiechtner when Claimant's Truck Driver position was abolished on February 23, 2003 because Rule 7(k) of the

² While Claimant's work record is not entirely clear, he apparently held a succession of Truck Driver positions.

Schedule Agreement shields members of Regional and System Gangs from most displacements. The Carrier did not refute the Organization's assertion that Claimant could not displace Fiechtner in February 2003.

Claimant filed timely applications for protective benefits covering the days that he was on furlough in February, March and April, 2003. Citing Article II, Section 1, of the February 7, 1965 Job Stabilization Agreement, the Carrier denied the applications contending that Claimant should have bid for Position No. 05106.

Article II, Section 1 provides:

"An employee shall cease to be a protected employee in case of his termination, death, retirement, dismissal for cause in accordance with existing agreement, 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."

Although Article II, Section 1 provides for forfeiture of protected status if an employee does not exercise seniority as specified therein, the parties on this property amended the February 7, 1965 Job Stabilization Agreement to provide for a suspension, as opposed to a forfeiture, of protection when a protected employee is subject to Article II, Section 1.

II. POSITIONS OF THE PARTIES

A. The Organization's Position

In his application, Claimant proved a *prima facie* case. Claimant was in furloughed status on certain days in February, March and April 2003 and he could not

exercise his seniority to any position. The burden of proof, therefore, shifts to the Carrier to show how Claimant could have exercised his seniority to an available position. Since the Carrier failed to justify why it refused to pay Claimant protective benefits, the Carrier did not satisfy its burden of proof.

When Claimant was displaced on December 2, 2002, Schedule Rule 8(g) afforded Claimant ten (10) days to exercise his seniority. Claimant took just one (1) day to displace to Sectionman position. Similarly, after the December 9, 2002 displacement, Claimant took only one (1) day to exercise his seniority to a Truck Driver position. During the two (2) days that he was purportedly off work (December 2 and 9, 2002) per Rule 8(g), Claimant was not under any obligation to bid on Regional or System Gang positions advertised in Bulletin R0301-01. Rule 7(c) of the Schedule Agreement permits the Carrier to bulletin positions for Regional and System Gangs well in advance of when the positions will become active but nothing in Rule 7 requires employees to apply for positions on Regional and System Gangs. Indeed, Claimant fully utilized his seniority to claim a position that was at or above his protective guarantee. After acquiring the Truck Driver position on December 10, 2002 Claimant properly exercised his seniority several additional times until February 24, 2003. Each of his seniority exercises complied with existing rules. On February 24, 2003, no position was available to Claimant in the exercise of his seniority. He was barred, by Schedule Rule 7(k), from displacing Fiechtner from the Truck Driver position on the Relay Gang. Since Claimant was unable to claim any position, he could not exercise his seniority, and thus, he did not fall within the purview of Article II, Section 1.

The Carrier improvidently argues that Claimant could have successfully bid for the position held by Fiechtner and so he would have been working on February 24 and thereafter. If the Carrier's interpretation of the Job Stabilization Agreement is correct, then Claimant could have remained in furlough status from December 2, 2002 through February 18, 2003. In other words, the Carrier's interpretation implies that after filing a successful bid for Position No. 05106, Claimant would not have been under an obligation to do anything more until Position No. 05106 was activated on February 18, 2003. Such an interpretation is absurd because it would leave Claimant in a state of "suspended animation" for more than two (2) months. In addition, if Claimant should have bid on Position No. 05106, then the question becomes why the Carrier did not treat him as occupying a lower rated job pursuant to Article IV, Section 4 beginning in December, 2002.

In sum, the propriety of Claimant's actions can only be evaluated by determining positions available to Claimant at the time he exercised his seniority. Thus, Claimant was entitled to Job Stabilization protective benefits on days he was furloughed in February, March and April, 2003.

B. The Carrier's Position

Between December 1 and December 10, 2002 Claimant could have bid for several positions bulletined on Regional Gangs. Had he bid, Claimant would have obtained Position No. 05106 which was awarded to a junior employee (Fiechtner). In essence, Claimant voluntarily refrained from exercising his seniority to obtain a position which mandated the suspension of his protective status in accord with Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended. Instead, Claimant delayed

exercising his seniority on two (2) days in December 2002. As of December 2 and 9, positions advertised in Bulletin R0301-01 positions were available to Claimant. As a result of Claimant's failure to exercise his seniority, a junior employee remained in active service while Claimant was furloughed. Under Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, Claimant was obligated to avoid placing himself in a situation where he could not hold Position No. 05106.

The Organization argues that Claimant's multitude of seniority exercises were permitted by the Schedule Agreement. This may be true but, Claimant still must suffer the consequences of not fully exercising his seniority as required by the Job Stabilization Agreement. Where an employee deliberately elects to restrict the area to which he can exercise seniority, the employee is subject to the operation of Article II, Section 1. Special Board of Adjustment No. 605, Award No. 96 (Friedman). Although Claimant was not obligated to bid for positions in Bulletin R0301-01 under the rules of the Schedule Agreement, he gambled that his seniority was sufficient to keep him working on other positions after the junior employee occupied Position No. 05106. Claimant lost the gamble. He cannot escape the consequences of losing the gamble. Special Board of Adjustment No. 605, Award No. 290 (Friedman).

In sum, Claimant's voluntary election not to bid for positions on the Regional and System Gangs was a failure to exercise his seniority within the meaning of Article II, Section 1 of the Job Stabilization Agreement and so, the Carrier properly denied his application for protective benefits for the months of February, March and April 2003.

III. DISCUSSION

The Carrier points out the well established principle under the February 7, 1965 Job Stabilization Agreement that a protected employee is not necessarily insulated from the adverse consequences of Article II, Section 1 merely because the protected employee exercises seniority in conformity with the bidding and displacement rules in the Scheduled Agreement. Special Board of Adjustment No. 605, Award No. 339 (Rohman). In Award No. 339, the protected employees, acting in accord with schedule rules, voluntarily placed themselves on an extra list but, in doing so, they surrendered their regular positions triggering Article II, Section 1. Similarly, in Special Board of Adjustment No. 605, Award No. 96 (Friedman) a protected employee deliberately restricted the territory in which the employee could exercise seniority. Restricting the geographical scope of seniority was permissible under the rules, but the employee was nonetheless subject to the provisions of Article II, Section 1. Therefore, the mere fact that Claimant exercised his seniority, in successive instances, to available positions in accord with Schedule Rules does not necessarily mean that he was immune from Article II, Section 1. However, Award Nos. 96 and 339 of Special Board of Adjustment No. 605 did not address the particular factual situation presented in this case. Indeed, none of the awards cited by either party concerned a situation where an employee bypassed an opportunity to bid for a position that might become available in the distant future to displace to another position which was immediately available and then was furloughed after the future position began work and was held by a junior employee. The Carrier relies on Special Board of Adjustment No. 605, Award No. 290 (Friedman). However, in that case, a protected employee refrained from bidding for a position which was

established virtually coincident with the abolishment of the protected employee's position. It did not concern foregoing a bid to a position to be activated two (2) months later. Thus, the dispute herein appears to present an issue of first impression.

To resolve this issue, the Board starts with an examination of the express language of Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement as amended. Article II, Section 1 provides that an employee shall cease to be a protected employee if the 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, ..." In this case, the phrase referring to existing rules and agreements is not relevant because the two displacements Claimant made on December 2 and December 10, 2002 were permissible under existing rules. In addition, bidding for positions on Regional or System Gangs also would have been in accord with the Schedule Rules. Rather, the key words in Article II, Section 1 are "to retain or obtain a position available" with the seniority exercise. The terms "retain" and "obtain" are expressed in the present tense. Along with the words "position available", the word "obtain" strongly suggests that the acquisition of a position is considered in the present rather than the future. It would be stretching the ordinary and literal meaning of the word "obtain" if the protected employee was forced to forecast, two months into the future whether, based on a bid, he would be able to remain in active service whereas a different seniority exercise would eventually result in a furlough. Stated differently, Claimant could hardly predict that he would be furloughed in late February 2003. Similarly, even if Claimant had bid for and been awarded Position No. 05106, there is not any evidence that the Carrier would have activated the position in February, or for that matter, that it would have ever activated the

position. Similarly, there is not any evidence in the record that Claimant knew that the positions to which he displaced on December 9, 2002 and thereafter would have been quickly and successively abolished while Position No. 05106 would turn out to be a secure job. Put simply, Article II, Section 1 does not require a protected employee to engage in speculative prognostications about his potential job status weeks after refraining from bidding on a position so long as he exercises his seniority to "retain" or "obtain" a position.

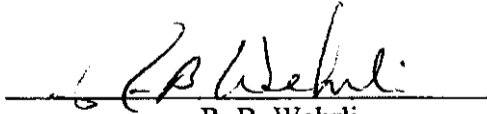
Besides the express language in Article II, Section 1, the Carrier's interpretation that Claimant should have bid for Position No. 05106 raises some questions that the Carrier left unanswered. What would be Claimant's obligations under the Job Stabilization Agreement until the position was activated? What if Claimant held a higher rated job than Position No. 05106 once it was activated? What if Claimant stayed on the position that he held on February 18, 2003 in lieu of going to Position No. 05106? Absent answers to these questions, the Carrier's interpretation of Article II, Section 1 is unreasonable.

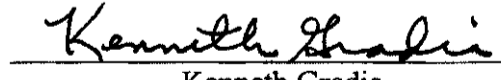
The Board emphasizes that our decision applies only to the peculiar facts in this record. We narrowly hold that under the facts herein, Claimant was not under a duty to predict future events to determine that he could have held Position No. 05106 after his position was abolished on February 23, 2003.

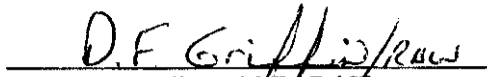
AWARD AND ORDER

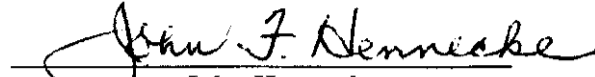
1. The Claim is sustained.
2. The answer to the Carrier's question at issue is, No.

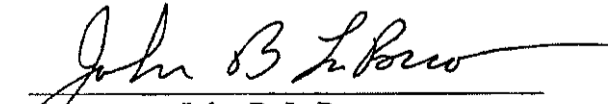
DATED: August 4, 2006


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