

NATIONAL MEDIATION BOARD
PUBLIC LAW BOARD NO. 5651

John C. Fletcher, Chairman & Neutral Member
D. D. Bartholomay Organization Member
E. N. Jacobs, Jr., Carrier Member

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
NORFOLK & WESTERN RAILWAY COMPANY

Docket No. 1
Award No. 1

Date of hearing December 16, 1995⁵⁴
Date of Award June 19, 1995

STATEMENT OF CLAIM:

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier abolished a previously advertised foreman-track patrolman position at Moberly, Missouri and thereafter re-advertised said position on Bulletin No. 4100 dated November 12, 1990 with the requirement:

*** successful applicant must live within 30
miles of the headquarters point. ***

(Carrier's File MW-DECR-90-95-LM-6950)

2. As a consequence of the aforesaid violation, Claimant John Kempf shall be compensated for all wage loss suffered from the date (December 3, 1990) of the assignment to O. L. Adams and the Carrier shall remove the residency requirement from the foreman-track patrolman position at Moberly, Missouri.

FINDINGS:

Public Law Board No. 5651, upon the whole record and all of the evidence, finds and holds that the Employee(s) and the Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, the Board has jurisdiction over the dispute(s) herein; and, that the parties to the dispute(s) were given due notice of the hearing thereon and did participate therein.

First it is necessary to dispose of procedural arguments raised by Carrier, seeking a dismissal award in which the Board does not resolve the claim before it on its merits. In its submission Carrier states:

As previously explained, the claim before this Board (Claim #3) is not the only claim that the Organization has submitted challenging Carrier's right to required [sic] the successful bidder on Foreman-Track Patrolman positions to live within 30 miles of the headquarters point. That same issue was raised in Claim #1 and Claim #2. While it is Carrier's steadfast position that the Organization's failure to institute timely proceedings in Case #2 bars Case #3 from being considered on the merits, if that is not the case, then certainly the organization's failure certainly is fatally prejudicial to it [sic] position on the merits in Case #3 on the basis of the doctrine of res judicata.

The Board finds this argument completely meritless. It is without any degree of persuasion, whatsoever. For one thing, Carrier is in error in its representation of the effect of a failure of the Organization to timely pursue or appeal a claim that it has denied. Only the claim that is not timely presented or appealed is barred from further consideration on its merits, not "other similar claims or grievances" that may involve identical issues. The right of the organization to have "similar claims or grievances" considered on their merits is specifically preserved by explicit language in paragraph (b) of Rule 31 which is incorporated by reference into paragraph (c). For another, the doctrine of *res judicata* does not cover a matter that has not been settled by a judgment on its merits. Black's Law Dictionary defines *res judicata* as:

[The] rule that final judgment or decree on merits by court of competent jurisdiction is conclusive of rights of parties or their privies in all later suites on point and matters determined in former suit.

Turning to the merits of the claim, the issue is quite simple:

Can Carrier, under the Agreement, require that successful applicants for positions of Foreman-Track Patrolman live within thirty miles of the headquarters point of the job?

In seeking an answer to this question the parties' bulletin and assignment rule has been studied very carefully. It is noted that this Rule, while detailing several qualifications for Foreman-Track Patrolmen positions, does not include therein a requirement that the successful applicant reside in the headquarters area of the job. Further, there is no showing in this record that heretofore such a condition was the practice of the parties under the Agreement. Accordingly, the Board must conclude that the Agreement was violated when Carrier did not assign Claimant to the Foreman-Track Patrolman position at Moberly, Missouri because his residence was not within thirty miles of the headquarters of the job.

In reaching this result the Board has considered carefully the awards cited by Carrier, which it argued supported its position in this matter. Several of the authorities relied upon were dismissed out of hand because the involved a demonstrable qualification for the position, a valid drivers license for example. In the case of Foreman-Track Patrolmen, the actual location of their

residence is not material if they are able to report for work at the starting times assigned and are able to respond for emergency call-out within a reasonable response time. Of particular interest in the authorities relied on by Carrier was Award 16, PLB 4433, a Signaller dispute arising on a component Carrier. That award was not found persuasive because it involved a slightly different issue than the one under review here and seems to have relied on another award involving a Carrier wherein a residency practice existed. The claim before the Board in Award 16 was:

[That] Carrier violated the current agreement, as amended, when it added note to Bulletin No. S-86-2 which required employees assigned to certain bulletined positions to furnish their addresses and telephone numbers in the immediate vicinity of the headquarters point.

In denying the claim Award 16 cited Third Division Award 3992. Award 3992, upheld a residency requirement because "it had been the practice of the Carrier on this railroad to require it."

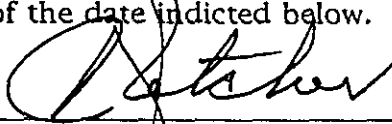
Without an existing practice, or clear language in the bulletin and assignment rule, which rule includes other specific qualifications for position of Foreman-Track Patrolman, Carrier has not established a basis for the inclusion of a requirement that "successful applicant must live within 30 miles of headquarters point." Accordingly, the Agreement was violated when Claimant was not assigned the position re-advertised in Bulletin No. 4100. The Board will now order that he be awarded the position and paid for all losses sustained.

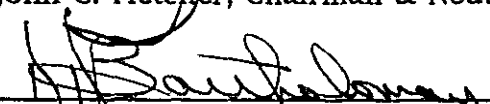
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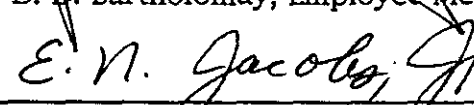
Claim sustained as indicated above.

O R D E R

Carrier is directed to comply with this award and make all payments due within thirty days of the date indicated below.


John C. Fletcher, Chairman & Neutral Member


D. D. Bartholomay, Employee Member


E. N. Jacobs, Jr., Carrier Member

Dated at Mt. Prospect, IL, this 19th day of June, 1995