

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 6302

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

and

UNION PACIFIC RAILROAD COMPANY

)

) Case No. 34

)

) Award No. 96

)

Martin H. Malin, Chairman & Neutral Member

D. D. Bartholomay, Employee Member

D. A. Ring, Carrier Member

Hearing Date: April 4, 2006

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned junior Group 26, Class A Foremen G. Martinez, A Rodriguez, A. Goodrich, C. McCoy, S. Sudik, S. Senerich and D. Novak to the foremen positions on Gangs 9067, 9077, 9068 and 9082 on March 29 and April 5, 2001, instead of assigning Group 26, Class A Foreman D. L. Ludwig to any one of those positions (System File D-0120-03/1271858).
2. As a consequence of the violation referred to in Part (1) above, Claimant D. L. Ludwig must be assigned to the referred to bulletin in his order of preference and that bulletin must be corrected showing the proper assignment. Further Mr. Ludwig must be allowed any loss in wages or overtime because of this improper assignment. Also, this Claimant must be allowed any loss incurred because of away from home expense that would not have been experienced had he been assigned to the referred to position.

FINDINGS:

Public Law Board No. 6302, upon the whole record and all the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

Claimant holds a Foreman's seniority date within Group 26, Class A of March 16, 1987. On March 29, 2001, Carrier assigned five Tie Ballast Foremen positions by Bulletins GNSF

5230, GNSF 5229, GNSF 5239, and GNSF 5232 (two positions) to Foremen with less Group 26, Class A seniority than Claimant but who had prior experience as Tie Ballast Foreman, whereas Claimant lacked such experience. Also on March 29, 2001, by Bulletin 5340, Carrier assigned a District Gang Foreman position to an employee with less Group 26, Class A Foreman seniority than Claimant but who had prior experience as a District Gang Foreman, whereas Claimant lacked such experience. On April 5, 2001, by Bulletin 5261, Carrier assigned a Material Foreman position to an employee with less Group 26, Class A Foreman seniority than Claimant but who had prior experience as a Material Foreman, whereas Claimant lacked such experience.

The Organization contends that although Carrier has the right to select foremen and assistant foremen for system gangs, once Carrier selects them, Rules 19 and 20(d) require Carrier to assign then by seniority. Carrier maintains that Rules 19(f) and 20(l) give it the right to act as it did in the instant case.

Rule 20(d) provides:

Except as otherwise provided in this Agreement, the senior applicant retaining seniority in the applicable class will be assigned to bulletined positions. If no qualifications for the position have been previously established, the employee assigned will be given full cooperation and assistance of supervisors and others in their efforts to qualify. Employees who are disqualified within the first thirty (30) working days, shall vacate the position on which disqualified and return to their former position provided it has not been acquired by a senior employee or abolished, in which event the disqualified employee may exercise seniority pursuant to Rule 21.

Rule 20(l) provides:

Management shall retain the right to select employees for service in Classes (a) and (b) of Group 19,¹ and employees so selected shall establish a seniority date in Class (a) or (b) of the group. In the recall of system gang foremen when gangs are established, the senior system gang foreman with maximum experience and specialization in the type of work involved may be recalled for such service even though senior foremen with experience on other gangs remain off in force reduction. In the event senior foremen are off in force reduction they shall be concurrently recalled as system extra gang foremen.

The issue posed by the instant claim was before this Board in Case No. 29, Award No. 27. In that Award, we denied the claim, reasoning:

On its face, Rule 20(l) appears to allow Carrier to bypass a senior foreman in Classes (a) and (b) of Group 19 who does not have experience and specialization in the

¹Over the years, the numbering of this class has changed between Group 19 and Group 26. The parties agree that Group 19 and Group 26 are the same class and may be used interchangeably.

type of work involved for a junior foreman who has such experience and specialization when establishing new gangs. Carrier contends that its long standing practice has been to award the position to the senior foreman who has such experience and specialization and who bid on the position, but if no qualified bidders are available, to recall a junior foreman who has the requisite experience and specialization.

The language of Rule 20(1) supports Carrier's interpretation and practice. Moreover, during handling on the property, Carrier maintained that this was its long standing practice and produced bid sheets documenting the practice. The Organization did not dispute Carrier's evidence. To the extent that there is any ambiguity, the ambiguity is resolved by the undisputed past practice. Accordingly, we find that the Organization has not met its burden to establish a violation of the Agreement.

We applied our holding in Case No. 30, Award No. 28 and Case No. 31, Award No. 29 to deny similar claims. The Organization now asks that we reconsider those rulings in light of what it presents as evidence that was not before us in those cases. Carrier objects to our consideration of such new evidence, arguing that under the principle of stare decisis, we are bound by our prior Awards. Carrier further contests the Organization's additional evidence and maintains that we should reject it and reaffirm our prior holdings.

We believe it appropriate to consider the additional evidence proffered by the Organization. The evidence falls into two categories: evidence that the past practice that we relied on in our prior cases was, in fact, a mixed practice, and evidence concerning the bargaining history of Rule 20(1).

The Organization has submitted evidence that Claimant was assigned to a System Pick Up/Distribution Foreman position on December 20, 2001, by Bulletin NSF05628 and to a System Tie Gang Foreman position on February 7, 2002, by Bulletin NSF05770, despite not being qualified for those positions. The Organization maintains that Claimant's history demonstrates that there was a mixed practice rather than the consistent past practice relied on in Award No. 27.

Carrier has responded that Claimant acquired qualification as a Tie Gang Foreman on September 25, 2001. Carrier also has responded that with respect to the December 20, 2001, bulletin, only one other employee who bid on the position listed it as his first preference. That employee also did not have the requisite qualification. The other employees who bid on the position listed it as a preference ranging from 3 to 27. Carrier maintains that they either did not have the requisite qualification or were assigned to their higher preferences. In any event, Carrier maintains, that the Organization failed to prove otherwise.

It is apparent from the evidence developed on the property that there is, at most, a factual dispute as to whether Bulletins NSF05628 and NSF05770 established a mixed practice with respect to assignment of Group 26 Foreman based on seniority and qualification. The Organization has failed to carry its heavy burden of persuasion that our Award No. 27's finding

of a consistent past practice to award Group 26 foreman positions to the senior bidder who possesses the qualifications was erroneous. Accordingly, we reaffirm that finding.

With respect to bargaining history, the Organization has averred that prior to the early 1980s system gang positions were not bulletined and system gang employees who were displaced or whose jobs were abolished did not have seniority/displacement rights to exercise. A February 9, 1981, Agreement granted all system gang employees who worked prior to October 1, 1981, a common seniority date of October 1, 1981, and all system gang employees assuming such positions after October 1, 1981, a seniority date based on their pay status in the class of the group involved. The Agreement further provided that system gang positions would not be bulletined, but provided in section 3(c):

Management shall retain the right to select employees for service in Classes (a) and (b) of groups 26 and 27, and employees so selected shall establish a seniority date in Class (a) or (b) of the group. In the recall of system gang foremen when gangs are established, the senior system gang foreman with maximum experience and specialization in the type of work involved may be recalled for such service even though senior foremen with experience on other gangs remain off in force reduction. In the event senior foremen are off in force reduction they shall be concurrently recalled as system extra gang foremen.

The Organization contends that if the first sentence of section 3(c) applied to the assignment of system gang foremen, system gang foremen would acquire a new seniority date every time they were assigned to a position that they had not previously worked. The Organization avers that such an interpretation does not make sense, particularly considering that the purpose of the 1981 Agreement was to recognize system gang employee seniority rights. Rather, in the Organization's view, the first sentence of section 3(c) gave management the right to initially assign employees as system gang foremen but once so assigned, they obtained seniority as system gang foremen generally. However, because system gang positions were not bulletined, the second sentence of section 3(c) controlled how system gang foremen with seniority would be assigned to system gang foremen positions.

The Organization maintains that, effective January 1, 1989, the parties agreed to bulletin system gang positions. In the Organization's view, this negated the effect of the second sentence of section 3(c). However, the Organization avers, that sentence was retained because without it, Rule 20(c) would have required Carrier, when no bids were received, to assign the senior unassigned employee in the System Gang Foreman classification. The second sentence of section 3(c) thus served a new purpose of enabling Carrier in such limited circumstances to bypass seniority if the senior unassigned System Gang Foreman was not qualified for the position. Section 3(c) became Rule 20(1).


Carrier disputes the Organization's characterization of the bargaining history of Rule 20(1). Carrier maintains that the rule governing assignment of system gang foremen can be traced back to at least the 1937 Schedule Agreement. Carrier maintains that the 1981 Agreement carried that rule forward and it has been applied consistently since. Carrier rejects the

Organization's contention that if Rule 20(l) is interpreted as Carrier urges, a system gang foreman will have a changing seniority date every time the foreman qualifies for a new position. Carrier urges that the foreman's seniority date remains constant but the foreman's qualifications change. Thus, in Carrier's view, under Rule 20(l), a senior employee who lacks the qualifications for a particular position is by-passed for a junior employee who is qualified. If in the future, the senior employee becomes qualified, from that date forward he will be considered ahead of the junior employee.



We have considered the controverted additional evidence of bargaining history carefully. The Organization bears a heavy burden to persuade us to reverse the interpretation of Rule 20(l) rendered in our prior Awards. The Organization has failed to carry that burden. The conflicting views of bargaining history presented by the parties do not overcome the language of Rule 20(l) and the consistent past practice of assigning the senior qualified foreman to system gang foremen positions. We reaffirm the holding of Award No. 27.

AWARD

Claim denied.



Martin H. Malin, Chairman


D. A. Ring,
Carrier Member
D. D. Bartholomay,
Employee Member

Dated at Chicago, Illinois, June 12, 2006.

June 26, 2006