

NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD 6537

BURLINGTON NORTHERN SANTA FE, INC.
(FORMERLY BURLINGTON NORTHERN RAILROAD COMPANY)
(Carrier)

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
(Organization)

Carrier File No. 15-99-0004
BMWE File No. 67-30-12331
NMB Case No. 0068
Award No. 2

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier improperly removed Mr. E.L. Landry, Jr. from the lead welder position in the Louisiana Prior Rights Seniority Zone at Lafayette, Louisiana beginning on December 14, 1998 and continuing.

(2) As a consequence of the violation referred to in Part I above, Claimant E.L. Landry, Jr. shall now be reinstated to

said lead welder position and he shall be compensated for the difference in pay between the Welder A position and said lead welder position beginning on December 14, 1998 and continuing until this violation is corrected.

FINDINGS

Upon the entire record and all the evidence, after the March 27, 2003 hearing at the Carrier's office in Fort Worth, Texas, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted by agreement and has jurisdiction of the parties and of the subject matter.

DECISION

Claim sustained.

A hearing was held in the above-entitled matter on March 27, 2003 before Public Law Board 6537, comprised of Roy C. Robinson, Organization Appointed Arbitrator; William A. Osborne, Carrier Appointed Arbitrator; and Daniel F. Brent, duly designated as Impartial Referee. The claimant was notified of the time, date, and place of the hearing. The claimant's letter submission dated September 9, 2002 was considered by the Board.

NATURE OF THE CASE

In 1997, the Burlington Northern and Santa Fe purchased a stretch of track running from Iowa Junction to Avondale, Louisiana. Thereafter, the Carrier entered into the UP-SP Trackage Rights Implementing Agreement I between the Carrier and the BMW. In pertinent part, this Implementing Agreement created a new Louisiana Prior Rights Seniority Zone of the Southern Region Seniority District No. 2, covering all of the newly acquired territory. In addition, the Brotherhood of Maintenance Way Employees Schedule Rules on the Santa Fe Railroad, as modified and amended, became applicable in the newly acquired territory. Each former SP employee transferring to the BNSF established a seniority date of April 28, 1997, the date of the Implementing Agreement. Former SP employees with this seniority date

were to be placed on the various rosters in the same order as they appeared on the former SP rosters. Finally, former SP employees who took positions in the newly established Louisiana Prior Rights Seniority Zone would be afforded prior rights to assignments in that Zone, including the right to promotion to assignments in a higher class than those in which the employee currently held seniority.

The former Atchinson-Topeka and Santa Fee agreement was applicable on the territory between Iowa Junction and Avendale, Louisiana. Rule 8(a) of the Implementing Agreement establishes how promotions were to be effectuated. The Agreement also obligated the Carrier to establish Lead Welder positions pursuant to Rule 39 of the Agreement.

Rule 8(a) provides that:

Promotions, assignments and displacements shall be based on seniority, fitness and ability. If fitness and ability of applicants are sufficient, seniority shall prevail. Note: The word "sufficient" is intended to clearly establish the rights of the senior qualified employee having adequate fitness and ability for the position or vacancy.

Article 39(b) provides that:

A Gang Foreman shall be assigned to supervise welding gangs composed of more than six (6) men and may be used as workmen.

Article 39(c) provides that:

In welding gangs composed of six (6) men or less, in which two (2) or more Welders are employed, one of the Welders shall be designated as "Lead Welder" who will direct the work and make necessary reports, etc., for which service he will be paid the Lead Welder's rate.

The instant grievance was submitted by the Organization after a Welder who did not have "prior rights" standing in the acquired territory known informally as the "Louisiana Purchase" displaced to a welding gang position at Lafayette, Louisiana on December 14, 1998. The Welder who bumped to the welding gang had a welder's seniority date of March 31, 1997. The Claimant's seniority date was April 28, 1997. The Carrier assigned the Lead Welder position to the bumping Welder based on what the Carrier construed to be his earlier seniority date.

According to the Carrier, assignment to the Lead Welder position on this gang was not a promotion since both the Lead Welder and the Welder position are Group 6, Class 2 assignments. Consequently, according to the Carrier, the Lead Welder assignment was properly given to Mr. Whitty, whom the Carrier deemed to be the senior employee.

The Claimant, E. L. Landry, Jr., sought reinstatement to the Lead Welder position and compensation for the difference in pay between the Welder A position and the Lead Welder position from January 14, 1998 through June 30, 1999. According to the Organization, Mr. Whitty had been improperly assigned as Lead Welder because he had no prior rights designation in Seniority District 2, Zone 1. The

Organization contends that the Claimant had been properly assigned the Lead Welder position before December 14, 1998, notwithstanding that he had less over-all Welder A seniority than two other BNSF employees in his work group. The Organization contends that the removal of the Claimant as the designated Lead Welder when BNSF Welder E. Whitty displaced Welder J. K. Paton from the Claimant's assigned welding gang headquartered at Lafayette, Louisiana within the Louisiana Prior Right Seniority Zone of the Southern Region Seniority District No. 2, violated the applicable UP-SP Trackage Rights Implementing Agreement I, thereby causing a 32¢ per hour wage reduction in violation of the collective bargaining agreement.

OPINION

The supplemental UP-SP Trackage Rights Implementing Agreement I agreement affords prior rights to former SP employees in the Southern Region Seniority District, known colloquially as the "Louisiana Purchase". Consequently, the Carrier does not enjoy unfettered discretion to assign employees as Lead Welders in contravention of the negotiated Prior Rights Agreement. To hold otherwise would obviate the concept of prior rights.

Twenty-six to twenty-nine former SP employees in the Louisiana Seniority Zone brought their prior rights to their positions and assignments. The Carrier's contention that the instant case does not involve a bid and bump assignment and, therefore, the Carrier can select any Lead Welder contravenes the explicit language of Article 2, Section 3 of the UP-SP Trackage Rights Implementing Agreement, which provides, in relevant part, that:

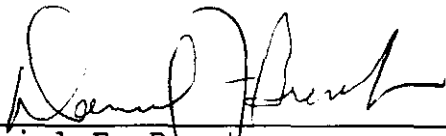
"Former SP employees who take positions in the newly established Louisiana prior rights seniority zone will have prior rights to assignments in that zone. This will include the right to promotion to assignments in a higher class than those in which an employee presently holds seniority."

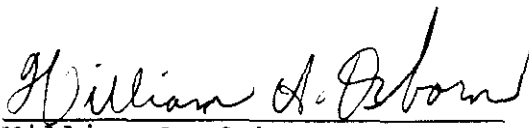
The second sentence clearly states that the rights "include" the right to promotion. The word "include" clearly and necessarily implies that the right extends beyond promotions. Thus, the Carrier improperly interpreted the Prior Rights Agreement as limited to cases involving promotion as the Prior Rights Agreement expressly affords former SP employees preference to assignments and positions regardless of whether the appointment of a Lead Welder is a promotion. The grievant was a former SP employee in the Louisiana seniority zone. That fact is sufficient to give him prior rights to the Lead Welder assignment. The UP-SP Trackage Rights Implementing Agreement was consistently interpreted and applied in this manner in the past.

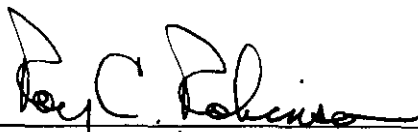
Both the claimant and the employee who displaced him as Lead Welder were fit and able to perform the duty of Lead Welder, but the claimant had a prior right to the assignment by application of the explicit terms of the prior rights agreement, which the Board must enforce as intended by the parties.

Therefore, based on the evidence submitted, the Agreement was violated when the Carrier improperly removed E. L. Landry, Jr. from the Lead Welder position in the Louisiana Prior Rights Seniority Zone at Lafayette, Louisiana beginning on December 14, 1998 and continuing through June 30, 1999. The Claimant shall be paid 32¢ per hour for every hour of straight time he worked between these dates and shall be paid 48¢ per hour for every hour of overtime he worked between these dates.

By Order of Public Law Board 6537


Daniel F. Brent,
Neutral Member and Chairman


William A. Osborn,
Carrier Member


Roy C. Robinson,
Organization Member

Executed On:

October 23, 2003