

PUBLIC LAW BOARD NO. 7098

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYEES DIVISION
(
(UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to assign Foreman D. Berning to a foreman position, per Bulletin No. 7136, on System Gang 9087 on March 25, 2004 and instead assigned junior employee K. Struss (System File UPRM-9547T/1397420).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Berning shall now “*** be compensated for all lost wages and per diem allowances.”

FINDINGS:

Public Law Board No. 7098, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimant, D. L. Berning, has a service date of April 8, 1974, and established a Track Foreman seniority date of September 17, 1977, on the UP Consolidated System Gang Foreman Seniority Roster, which was also his seniority date on C&NW District T-4. On March 18, 2004, the Carrier posted Vacancy Bulletin No. 7136 for a Track Foreman position on System Gang 9087 headquartered on-line. The Claimant and employee K. R. Struss were among those who bid for the position. Mr. Struss has a service date of June 1, 1978, and a Track Foreman seniority date of August 8, 1979.

On March 25, 2004, the Carrier assigned K. Struss to the vacancy. On April 1, 2004, the Organization, by Vice Chairman Mulder, filed a claim with the Carrier on behalf of the Claimant contending that as the senior employee the assignment should have gone to the Claimant. In support of the claim the Organization relied on Section 4. (A) (1) of Appendix T of the July 1, 2001, Agreement, which states as follows:

(A) When employees with home road designations and seniority dates of June 1, 1998 or earlier apply for bulletined Group 20, 26, and 27 positions, assignments will be handled as follows:

(1) When bids are received from only C, S, W, and/or D designated employees, the employee listed on the applicable seniority roster with the superior seniority date/ranking will be assigned.

...

Both the Claimant and Mr. Struss had a C(W) home road designation. The Track Foreman vacancy in question was a Group 26, Class (a) position. The claim letter requested that the Claimant be compensated for all lost wages and per diem allowances.

The Carrier, by Pam Allen, Manager Labor Relations, replied to the claim on May 19, 2004, stating that "the claim as presented is declined in its entirety." The Carrier contended that the Claimant was not qualified for the position because he "has never been assigned to a System Foreman position." It cited Rule 19(f), which states, "System Track Gang Foremen and Assistant Foremen assigned to rail laying, tie ballast, switch gang, rail and tie distribution, and rail pick-up will be selected from available qualified employees in the Track Subdepartment." In addition, the Carrier asserted, "Rule 20 gives the Carrier the negotiated right to select employees for these positions." The Carrier also asserted that the Claimant was not entitled to per diem allowance since he was never assigned to the position and incurred no travel or lodging costs.

The particular vacancy in issue was that of System Material Foreman, UP System Gang 9087. It is not disputed that the Claimant had never worked a System Material Foreman position

on the UP System prior to the posting of the vacancy. Mr. Struss, who was selected to fill the vacancy, had occupied the position of System Material Foreman on UP System Gang 9086 during the period November 25, 2003, through January 9, 2004.

The Organization, by letter dated June 21, 2004, from General Chairman K. L. Bushman to the Carrier's Director Labor Relations, appealed the denial of the claim. The appeal noted that the Claimant was subsequently assigned to a Track Foreman position on System Gang 9048 effective June 1, 2004. It argued that Rule 19(f) is not applicable because Claimant was a qualified track foreman since September 17, 1977, his track foreman seniority date. Rule 20(l) does not apply, the appeal contended, because the Claimant has already established a seniority date in Class (a) or (b) of Group 26. Rule 20(d) is applicable, the appeal asserted, in that it states that "the senior applicant retaining seniority in the applicable class will be assigned to bulletined positions." It further states, the appeal noted, that "[i]f no qualifications for the position have been previously established, the employees assigned will be given full cooperation and assistance of supervisors and others in their efforts to qualify."

By letter dated August 19, 2004, the Carrier, by its Director Labor Relations, replied to the Organization's appeal. In addition to repeating the arguments previously made by the Carrier, but with greater detail, the Carrier took the position that the issue in this case had already been decided in Public Law Board No. 6302, Award No. 27, which held that the Carrier properly assigned the junior bidder with experience to an advertised Group 19 Class (a) System Pick Up Foreman position to the exclusion of the senior bidder without experience. Both employees had seniority in the group and class, but the senior employee had not worked previously as a Pick Up Foreman. The junior employee had previously worked the position. The present Group 26 was previously called Group 19.

The claim in the present case was conferenced on November 9, 2004, without settlement

being reached. In a letter dated December 29, 2004, to the Director Labor Relations of the Carrier, the Organization reiterated its position as stated during conference, including the following contentions: 1) In PLB No. 6302, Award No. 27 the circumstances were not identical to the present case because “[t]he award involves UP System employees in March 1997, before the existence of the current 1998 System Gangs Agreement, Appendix T.” 2) Section 4. (A) (1) of the 1998 Implementing Agreement is specific on how assignments are handled. 3) According to Section 6. (A) of the Implementing Agreement, the applicable guidelines for filling Group 26 positions are found in Section 4 (A) (1) of the Implementing Agreement.

The Organization is correct that Award No. 27 of Public Board No. 6302 was decided before the Implementing Agreement (also known as Appendix T of the parties’ collective bargaining agreement) came into being. The significance of that point is undercut, however, by the fact that in Award No. 96 the same Public Board No. 6302 ruled identically to how it ruled in Award No. 27. Award No. 96 is dated June 12, 2006, and held that the Carrier did not violate the Agreement when it assigned seven junior Group 26, Class (a) foremen to foreman positions on various gangs on March 29, and April 5, 2001, instead of assigning senior Group 26, Class (a) Foreman D. L. Ludwig to any one of those positions.

Five of the foremen were assigned to Tie Ballast Foreman positions based on their experience in that capacity whereas Mr. Ludwig lacked such experience. One foreman was assigned to a District Gang Foreman position based on his prior experience in such job for which Mr. Ludwig had no experience. The seventh foreman was assigned to a Material Foreman position based on his prior experience as a Material Foreman. Mr. Ludwig lacked such experience. All seven foremen had less Group 26, Class (a) Foreman seniority than Mr. Ludwig. Public Law Board 6302, Award No. 96 held that Rule 20(l) and the consistent past practice of assigning the senior qualified foreman to system gang foreman positions permitted the Carrier to

pass over Mr. Ludwig for the seven foreman assignments.

Rule 20 (l) provides as follows:

- (l) Management will retain the right to select employees for service in Classes (a) and (b) of Group 26, and employees so selected will 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 will be concurrently recalled as system extra gang foremen.

This Board notes that the Organization did not even argue in Award No. 96 that Section 4. (A) of the Implementing Agreement should control the outcome of the case rather than Rule 20(l). The Board views that fact as implicit acknowledgment by the Organization that Section 4. (A) of the Implementing Agreement does not supersede Rule 20(l) with regard to filling Group 26, Class (a) and (b) vacancies. Section 6. (A) of the Implementing Agreement states, "Except as provided in Sections 4. and 5., all new Group 20, 26 or 27 positions or vacancies that are to be filled, will be bulletined and assigned in accordance with Rule 20 of the UPRR/BMWE Collective Bargaining Agreement. . . ." This Board does not interpret that provision to mean that Rule 20(l) of the Agreement has no application to the selection of foremen for system gangs.

First, in Award No. 96, even though the claimant, Mr. Ludwig, had a seniority date earlier than June 1, 1998, no contention was made by the Organization that his right to the foreman assignments in question (all of which were Group 26, Class (a) positions) should be determined on the basis of Section 4. (A) of the Implementing Agreement rather than Rule 20(l) of the Agreement. Second, Rule 20(l) is a specific provision dealing with a subset of Group 26,

namely, Classifications (a), System Gang Foreman, and (b), System Gang Assistant Foreman.

Section 4. (A) of the Implementing Agreement, on the other hand, is a general provision applicable to Group 20, 26, and 27 positions. A frequently used rule of contract interpretation is that “a specific provision controls a general one and may operate as an exception to it.” E. Allan Farnsworth, Contracts, (1982) §7.11. In this Board’s opinion Section 4. (A) should be read together with Rule 20(l) and, consistent with the cited rule of contract interpretation, Rule 20(l) be viewed as an exception to Section 4. (A).¹

Under such an approach, as a general rule, employees working under the Union Pacific/BMW collective bargaining agreement will bid for and be assigned to Group 20, 26, and 27 positions in accordance with Section 4. (A) of the Implementing Agreement. However, with regard to the selection of employees for vacancies in positions that fall in Class (a) or (b) of Group 26 in situations where the senior bidder lacks prior experience for the position, Rule 20(l) applies. That Rule reserves to Management “the right to select employees for service in Classes (a) and (b) of Group 26” Such interpretation is consistent with Award 96 of Public Law Board No. 6302 and with the parties’ past practice, as noted on page 5 of that Award. The general rule in arbitration is that except in unusual circumstances an arbitrator will follow an earlier award that involves the same parties, the same agreement, and the same issue. This Board sees no reason to depart from that rule in this case.

The Carrier’s action in this case was compatible with the decision in Award No. 96 of

¹Award No. 96, PLB No. 6302 traces the history of Rule 20(l). The language goes back to at least the 1981 Agreement and, according to the Carrier, the principle embodied in the rule, to at least the 1937 Schedule Agreement. It does not seem reasonable that the Carrier would have agreed to give up such a longstanding right with regard to the selection of foremen. Award No. 96, page 4, first sentence, last full paragraph makes indirect reference to the Implementing Agreement and shows that the parties were well aware of the Implementing Agreement when they litigated the meaning of Rule 20(l) of the collective bargaining agreement. No argument was made in that case that Rule 20(l) did not apply to the selection of foremen and assistant foremen for system gangs. The only argument was as to the meaning of Rule 20(l).

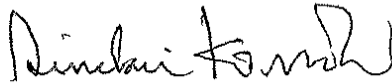
Public Law Board No. 6302 involving the same parties and the same Agreement, the past practice of the parties, and Rule 20(l) of the Agreement. The claim will be denied.

A W A R D

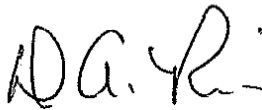
Claim denied.

O R D E R

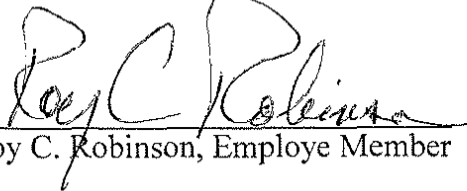
This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.



Sinclair Kossoff, Chairman & Neutral Member



Dominic A. Ring, Carrier Member



Roy C. Robinson, Employee Member

Chicago, Illinois
Dated: September 9, 2008