

SPECIAL BOARD OF ADJUSTMENT NO. 1087

Parties to the Dispute,	)	Case No. 20
	)	Award No. 20
BROTHERHOOD OF MAINTENANCE OF	)	
WAY EMPLOYEES, INTERNATIONAL	)	
BROTHERHOOD OF TEAMSTERS,	)	
	)	
Organization,	)	
	)	
and	)	
	)	
NORFOLK SOUTHERN RAILWAY	)	OPINION AND AWARD
COMPANY,	)	
	)	
Carrier,	)	
_____	)	

Hearing Date: September 9, 2005
Hearing Location: Chicago, Illinois
Date of Award: December 27, 2005

BOARD MEMBERS

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

CARRIER'S QUESTION AT ISSUE

Does Claimant D. Endicott meet the requirements of Article II, Section 1 of the February 7, 1965 Mediation Agreement, as amended, to qualify for protective benefits?

BOARD'S STATEMENT OF THE CLAIM

Claim of D. Endicott for protective benefits subsequent to June, 2000.

OPINION OF THE BOARD

This Board, after hearing upon the who 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 a 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

Since Claimant entered service with the Carrier as a Track Laborer on April 28, 1980, he was an employee protected by the February 7, 1965 Job Stabilization Agreement, as amended by the September 26, 1996 Mediation Agreement. Claimant established seniority as a Bridge and Building (B&B) Carpenter on November 10, 1993 on the NKP seniority district.

As of early 2000, Claimant occupied a carpenter/truck driver position on B&B Gang 206 at Leipsic, Ohio. The Carrier abolished this position effective February 4, 2000.

The Carrier submitted a displacement form dated January 31, 2000 showing that Claimant could displace to a B&B carpenter position at Bellevue, Ohio, which was occupied by Carpenter Randy Thomas, who held a carpenter seniority date of April 19, 1996. A handwritten notation on the form indicates that Claimant intended to displace Thomas.

In a statement dated November 9, 2005, Claimant attested that a supervisor told him that he could not bump to Bellevue. Claimant denied knowing that he could take the position occupied by Thomas.

In a statement dated December 15, 2005, the present Manager of Administrative Services in the Carrier's Engineering Department attested the displacement form is a record routinely generated in a displacement situation. The Manager expounded that the handwritten note, presumably written by an assignment clerk, is "typical" information that would be recorded on the form. The Manager

opined that "... it is not plausible that the clerk would print a sheet if an employee did not call ..."
because the clerk would record information gained from the employee on the sheet.

Claimant did not exercise his seniority to displace Thomas from the Bellevue carpenter position.

On February 18, 2000, Claimant applied for protective benefits under the February 7, 1965 Job Stabilization Agreement, as amended, stating that he had been laid off his regular position as of February 7, 2000. Claimant wrote on the application form that he "... could not bump to another position."

On or about March 28, 2000, the Carrier advised Claimant that he was entitled to benefits at a rate of \$17.35 an hour. According to the Carrier, Claimant received protective benefits from February 2000 through June 2000.

The Carrier represented that sometime in July 2000, the Carrier's labor relations department learned that Claimant had failed to displace Thomas. On September 27, 2000, the Carrier wrote to Claimant stating that Claimant had received benefits to which he was not entitled. The Carrier's correspondence went on to allege that Claimant had the seniority to bid to "several positions" including a B&B carpenter position at Bellevue yet, Claimant failed to file any bids. The Carrier's correspondence ended by asserting that Claimant ceased being an employee protected under the Job Stabilization Agreement.

The Carrier issued Bulletin No. 54257, dated May 26, 2000, advertising six B&B positions at Bellevue, Ohio. A bulletin dated June 26, 2000 indicates that Claimant was not among the employees awarded the six positions. The Carrier supplied documents showing that two of the positions advertised in the May 26, 2000 bulletin were awarded to employees having carpenter seniority dates of December 20, 1993 and so, both employees were junior to Claimant.

Per Bulletin No. 54518, dated September 15, 2000, the Carrier advertised a carpenter/truck driver position at Bellevue with bids to be filed by September 29, 2000. On September 26, 2000, Claimant submitted a bid for this position. In a written statement dated September 15, 2001, Claimant attested that he was told that a more senior employee was awarded the position.

The Carrier related that, during July 2001, Claimant failed to respond to a recall to work. Consequently, he forfeited his seniority rights and thus, Claimant's employment with the Carrier was permanently severed.

II. THE POSITIONS OF THE PARTIES

A. The Organization's Position

Seven months after the Carrier abolished Claimant's carpenter/truck driver position, the Carrier advertised a similar job at Bellevue, Ohio. Claimant bid on the Bellevue position on September 26 but the position was awarded to an employee with greater seniority than Claimant.

The Carrier improperly ignored this bidding process by asserting, on September 27, 2000, that Claimant ceased to be a protected employee even though the bidding period for Bulletin No. 54518 ran from September 15 through September 29, 2000. The Carrier improvidently stripped Claimant of his protected status even though Claimant did not hold sufficient seniority to be awarded the Bellevue position advertised in Bulletin No. 54518.

Although the Carrier contends that Claimant failed to bid on other available jobs, the Carrier failed to meet its burden of proving this affirmative defense. In its September 26 correspondence, the Carrier asserted, without any supporting evidence, that Claimant failed to bid on "several positions" yet, the Carrier never identified those positions. The Carrier also never proved that Claimant could have displaced Thomas at Bellevue at the time that his job was abolished.

Since the Carrier never offered specific information about the charges it leveled against Claimant, the Carrier has not satisfied its burden of proof.

In conclusion, Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, did not apply to Claimant.

B. The Carrier's Position

Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, provides that an employee shall cease to be protected if the employee fails to retain or attain a position available to him by the exercise of his seniority.

Claimant held sufficient seniority to displace Thomas at the time that the Carrier abolished Claimant's Leipsic position. The displacement sheet is a reliable business record. As the Manager of Administrative Services stated, an assignment clerk typically writes notes on the displacement sheet. More importantly, the assignment clerk would not make a notation, like the one stating that Claimant intended to displace Thomas, unless Claimant had actually communicated his intent to the assignment clerk. By failing to displace Thomas, Claimant forfeited his protective status.

Even after Claimant went on voluntary furlough, he had sufficient seniority to attain other positions. Two of the jobs advertised in the May 26, 2000 bulletin were awarded to employees with less seniority than Claimant. Despite several opportunities to bid for available positions, Claimant stayed on furloughed status.

The February 7, 1965 Job Stabilization Agreement, as amended, contains a mutuality of obligation. In exchange for protective benefits, Claimant was obligated to retain or obtain an available position. His multiple failures to do so resulted in the loss of his protected status.

III. DISCUSSION

Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended, reads:

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

The January 31, 2000 displacement form shows that Claimant was senior to Thomas who held a B&B Carpenter position at Bellevue. A notation on the form indicates that not only was Claimant notified of his displacement rights but also Claimant represented to the Carrier that he planned to displace Thomas. According to the Manager of Administrative Services, the displacement sheet, and the notation therein, is a regular business record and would not have been generated unless Claimant told an assignment clerk that he planned to displace Thomas. Conversely, Claimant asserted that a supervisor informed him that he could not obtain a Bellevue position. Claimant denied knowing about his ability to bump Thomas.

The Board need not resolve this factual discrepancy inasmuch as the Carrier commenced providing Claimant with protective benefits. While receiving protective pay, Claimant was obligated to bid on available positions. He failed to submit a bid on the positions advertised in Bulletin 54257. When two of the bulletined positions were awarded to junior employees, Claimant lost his protective status. Stated differently, Claimant's failure to bid on the positions triggered the self-executing operation of Article II, Section 1 of the February 7, 1965 Job Stabilization Agreement, as amended. Since Claimant failed to obtain a position to which his seniority entitled him, he ceased to be a protected employee. *Special Board of Adjustment No. 605, Award No. 212 (Rohman)*; *Special Board of Adjustment No. 605, Award No. 339 (Rohman)*.

Therefore, even if Claimant accurately related that he was unable to displace to Bellevue on January 31, 2000, he nevertheless ceased to be a protected employee on or about June 26, 2000, when Bellevue B&B positions were awarded to employees junior to Claimant. In the interim,

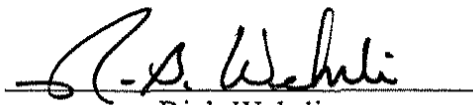
between February 1 and June 30, Claimant received protective benefits. Thus, the Carrier properly stopped paying Claimant protective benefits.¹

This Board notes that, while Claimant bid for, and was not awarded, an available position in September 2000, his bid was irrelevant to this claim since he had previously forfeited his protective status.

AWARD AND ORDER

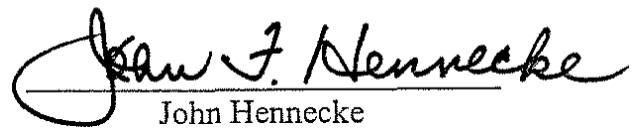
1. Claim denied.
2. The Answer to the Carrier's Question at Issue is No.

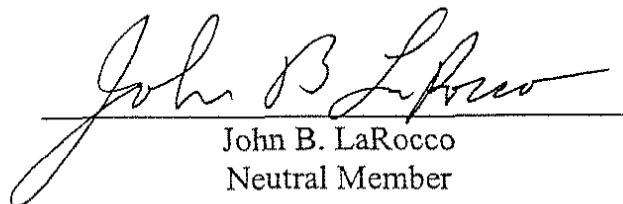
Dated: December 27, 2005


Rick Wehrli
Union Member


Ken Gradia
Carrier Member


Donald F. Griffin
Union Member


John Hennecke
Carrier Member


John B. LaRocco
Neutral Member

¹ Nothing in this Opinion should be construed to mean that the Carrier was obligated to pay Claimant protective benefits beginning in February 2000. The Carrier may or may not have mistakenly paid benefits from February through June 2000. We merely hold that the presence of those payments do not mandate a resolution of the factual dispute regarding Claimant's alleged capacity to displace Thomas especially since this claim seeks benefits subsequent to June 2000. If Claimant had not received protective benefits, this Board would have resolved the issue of whether or not Claimant was informed that he could displace Thomas.