

The Third Division consisted of the regular members and in addition Referee **Gil** Vernon when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to permit '**B**' Foreman Richard Foulds to displace '**B**' Foreman R. L. Miller on Inter-Regional Rail Gang No. 201 effective July 28, 1983 (System Docket CR-670).

(2) Because of the aforesaid violation, Mr. Richard Foulds shall be allowed the difference between what he should have earned for all regular and overtime hours as a '**B**' Foreman on Inter-Regional Rail Gang No. 201 and what he did earn in the lower rated trackman's position beginning July 28, 1983 and continuing until such violation has been corrected or discontinued."

FINDINGS:

The Third Division of the Adjustment Board 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 employees within the meaning of the Railway Labor Act **as** approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

R. L. Miller and the Claimant possess Foreman's seniority on **Interregional Seniority District #1**. Claimant is senior to Miller in the Foreman class. Prior to July 28, 1983, both Miller and Claimant held Foreman positions in Rail Gang No. 101 which was working on the Harrisburg Division, seniority **District #1**. Miller handled the front end of the dual rail gang and was in charge of laying the dual rail, while Claimant worked the rear end being involved with anchor application. Rail Gang No. 101 was abolished on July 28, 1983. Beginning August 8, 1983, Rail Gang 201 started work on the Pittsburgh Division, Interregional Seniority District **#2**. This was the first

time that a dual rail gang had worked in Seniority District #2 and no Foreman in Seniority District #2 was qualified to work the front end of a dual rail gang. In order to get the work started, Foreman Miller was temporarily assigned to Rail Gang 201 to instruct Foreman F. M. Trevost on the front end operation of dual Rail Gang No. 201. Foreman Miller worked with the gang through the month of August, 1983, at which time he returned to Seniority District #1. Neither Miller nor Claimant possess seniority as Foreman on Interregional Seniority District #2.

The Organization relies on Rule 3, Section 1 and Section 4 which are as follows:

"RULE 3 - SELECTION OF POSITIONS

Section 1. Assignment to position.

In the assignment of employees to positions under this Agreement, qualification being sufficient, seniority shall govern.

The word 'seniority' as used in this Rule means, first, seniority in the class in which the assignment is to be made, and thereafter, in the lower classes, respectively, in the same group in the order in which they appear on the seniority roster.

* * *

Section 4. Filling temporary vacancies.

(a) A position or vacancy may be filled temporarily pending assignment. when new positions or vacancies occur, the senior qualified available employees will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award.

When furloughed employees are to be used to fill positions under this Section, the senior qualified furloughed employees in the seniority district shall be offered the opportunity to return to service. Such employees who return and are not awarded a position or assigned to another vacancy shall return to furlough status.

(b) An employee so assigned may be displaced by a senior qualified employee working in a lower rated position or in the same grade or class, provided displacement is made prior to

the starting time of the assigned tour of duty, by notice to the foreman or other officer in charge. The latter employee will not be subject to displacement from such temporary assignment by a senior employee unless the senior employee is unable to exercise seniority to another position not requiring a change in residence.

* * *

(e) The word 'senior' as used in paragraph (a) of this Section means, first, senior in the class in which the assignment is to be made and, thereafter, in the lower classes, respectively, in the same group in the order in which the classes appear on the seniority roster. The word 'senior' as used in paragraph (b) of this Section means 'either senior in the class in which the assignment has been made or senior in the highest class in the same group in which the employee assigned holds seniority.

(f) Vacancies which are not advertised may be filled in like manner."

Based on the facts and the relevant Rules, the Organization believes the Claimant was entitled to the vacancy in question. The Organization recognizes that the Claimant did not possess seniority on District 1. However, when the Carrier went outside District 1 to District 2, they assert the Claimant's seniority over Miller controlled. Moreover, they do not believe that the Carrier established that the Claimant was unqualified.

The Carrier argues that for several reasons the claim is invalid. (1) they assert there was no vacancy in Rail Gang 201, instead Miller was only acting as an instructor. (2) they argue that the provisions of Section 4 of Rule 3 are limited to the seniority district in which the employees possess seniority. (3) they contend the Claimant wasn't qualified. And, (4) they contend no violation occurred on July 28 as the claim indicates since Miller was not assigned until August 8, 1983.

It is the conclusion of the Board that the claim must be sustained. First, there is no reason not to consider the work Mr. Miller performed with Gang 101 on District No. 2 as a "vacancy" or "position" within the meaning of Rules 3 or 4. Assignment as an acting instructor or facilitator is not a reason, based on any of the language found in the Agreement, to exempt the Carrier from the application of Rules 3 or 4.

Second, the Carrier contends Rules 3 and 4 only apply to Districts on which seniority is held. The Carrier is plainly wrong. So long as the Carrier went outside the confines of District 1, the Claimant was entitled to compete against Miller based on his seniority in the production gang "B"

foreman classification. This **result** is dictated, if not by the specific language of Section 4 (**e**), by the general precept of seniority implied by Rule 3. This is also consistent with previous Board Awards involving similar circumstances. See Third Division Awards 5939 and 13127.

The other substantive issue relates to whether the Claimant was qualified. Certainly the priority operation of seniority is premised on sufficient fitness and ability. However, there is insufficient evidence in this record to support the Carrier's affirmative defense that the Claimant did not meet the minimum qualifications required by the position. While working on the front end of a gang might have made Miller more qualified than the Claimant it does not per se or necessarily mean that the Claimant's **qualifications** weren't "sufficient." We would need more explanation than the blind assertion to conclude, because he only worked the rear end of a gang (**anchor-application**), that he couldn't have satisfactorily assisted Gang 101 on District 2.

Last, it is not a procedural flaw that Miller didn't start in the vacancy until August 8, 1983. Obviously, while not a basis to dismiss the claim, it is a relevant consideration for remedy purposes.

In view of the foregoing, the claim is sustained and the Claimant is entitled to compensation for the time period Miller spent in the vacancies.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 30th day of March 1988.