

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36051
Docket No. MW-36191
02-3-00-3-388

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(National Railroad Passenger Corporation (Amtrak))

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Shop Craft employe P. Sleighter to perform the duties of B&B foreman on August 24, 25, 26, 27, 28 and 31, 1998 instead of assigning B&B employe D. Mullenhoff to perform said duties (Carrier's File BMWWE-353 NRP).
- (2) As a consequence of the violation referenced in Part(1) above, Claimant D. Mullenhoff shall now be compensated for the difference in pay between that of which he was paid as B&B mechanic and that which he would have been paid had he properly been assigned to perform said B&B Foreman duties.”

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 employee 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 were given due notice of hearing thereon.

The issue raised in this case is whether the Carrier violated Rule 8 by filling the vacation absence of B&B Foreman Lesniak with Electrician Sleigher rather than the Claimant, who was the senior B&B Mechanic under Lesniak's supervision. The pertinent provisions of Rules 8 and 18 are reprinted below.

"Rule 8 - BULLETIN, ASSIGNMENT AND DISPLACEMENT

Short vacancies of thirty (30) days or less may be filled by any available qualified employee covered by this Agreement. However, if the employee assigned to a short vacancy under this paragraph is other than the senior employee, he may be displaced by a senior employee on written notice to the supervisory official, provided written notice is made within five (5) days after the position is first filled, or in accordance with paragraphs 3, 4, and 5 of this rule.

Rule 18 - VACATION

1. The December 17, 1941, Nonoperating National Vacation Agreement, together with amendments and interpretations, is adopted as the Amtrak-Brotherhood of Maintenance of Way Employees Vacation Agreement. (See Appendix "C")

Appendix C, Section 12(b)

As employees exercising their vacation privileges will be compensated under this agreement during their absence on vacation, retaining their other rights as if they had remained at work, such absences from duty will not constitute 'vacancies' in their positions under any agreement. When the position of a vacationing employee is to be filled and regular relief employee is not utilized, effort will be made to observe the principle of seniority."

The Organization argues that the Carrier violated Rule 8 by going outside the Agreement to fill the Foreman's vacation absence. It points to the Claimant's written statement as evidence that the vacation absence was filled by Sleigher, who relayed work

assignments to the Claimant, was the contact for problems, and reviewed time cards during this period. While the Organization admits that the Carrier may blank a vacation absence, it notes that once it chooses to fill the assignment, it must do so by seniority. The Organization asserts that the Carrier submitted to the Board new evidence in the form of time and pay records that cannot be considered in determining whether Sleigher filled the Foreman's vacation absence.

The Carrier contends that Rule 8 is inapplicable, because Rule 18 makes clear that absences due to vacation do not constitute vacancies, and notes that it has the option of filling or blanking such position. The Carrier argues the Organization failed to sufficiently prove that it, in fact, filled this vacancy, especially in light of its repeated assertion and supporting evidence that it blanked the position, and that Sleigher's performance of the few tasks noted by the Claimant were de minimis, and do not prove that he filled the position which encompasses far more than what he did. The Carrier asserts that even if Rule 8 applied, the Claimant's failure to meet his obligation of serving written notice to the Carrier of his desire to fill the position undermines any claim he may later assert to his entitlement.

A careful review of the record convinces the Board that, under the facts of this case, the Organization failed to sustain its burden of proving a violation of the Agreement. The parties appear to acknowledge that an absence due to vacation is not to be considered a vacancy, and that it may be filled or blanked at the Carrier's option. The Carrier repeatedly asserted that it was blanked, while the Organization presented the Claimant's statement that Sleigher performed specific Foreman's functions during this time period in support of its contention that it was filled. On the property, the Carrier did not dispute these underlying facts, but only the conclusion that such de minimis functions constituted filling the position. We have not considered any new documentary evidence presented by the Carrier for the first time to the Board.

The Organization's claim is based upon an alleged violation by the Carrier of Rule 8. The Board finds that it need not decide whether the position was, in fact, filled or blanked because the Claimant, whose entitlement to the work is premised on Rule 8, failed to meet his obligations thereunder. It is undisputed that the Claimant did not give written notice to the Carrier within five days of Sleigher's alleged assumption of the Foreman position, of his desire to displace him as the senior qualified employee. Had he done so, the Carrier could have either proven that it had blanked the position or reconsidered its assignment. The Claimant's failure to notify the Carrier of his desire

to fill the position prior to instituting the instant claim, defeats his attempt to be compensated for the work assignment. The Organization's argument on the property that the Carrier should have known of the Claimant's interest in the position based upon past claims of a similar nature is insufficient to meet the Claimant's underlying Rule 8 obligation.

AWARD

Claim denied.

ORDER

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

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of May, 2002.