

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37145
Docket No. MW-36938
04-3-01-3-583

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 Employes
(
(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 failed to call and assign E. T. Gang Foreman D. Engel to fill a vacant foreman position on Gang P-283 beginning on August 3, 2000 and continuing through September 27, 2000 and instead assigned Lineman F. Purcell (System File NEC-BWME-SD-4074 AMT).
- (2) As a consequence of the violation referred to in Part(1) above, Gang Foreman D. Engel shall now ' . . . be compensated 120 straight time hours and any additional hours after review of paid history from Sept. 1 thru 27, 2000 to settle this matter.'"

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 by this claim is whether the Carrier violated Rules 1 and 55 of the Agreement by offering a Lineman who had never passed the pre-qualification Gang Foreman test an opportunity to fill a temporary vacancy in the Gang Foreman classification within the same gang pending advertisement and award of the position at the straight time rate rather than utilizing the Claimant, a senior qualified Gang Foreman working at a different location on overtime.

At the time in dispute, the Claimant was assigned as an E. T. Gang Foreman in Gang P-024, working 7:00 A.M. to 3:00 P.M. Monday through Friday at Rahway, New Jersey. F. Purcell owned a regular Lineman/HRO position in Gang P-283, working 10:00 P.M. to 6:00 A.M. Monday through Friday at Secaucus, New Jersey. This claim protests his being upgraded to the Gang Foreman vacancy at that location from August 3 through September 27, 2000, where he worked at his straight time rate.

The Organization argues that the Carrier failed to fill the vacancy in issue with the proper qualified and rostered employee. It notes that Purcell possesses no seniority in the Gang Foreman classification, and has never demonstrated his skill and ability to perform the work by passing the pre-qualification test established by the Carrier as the customary and historical practice for filling that classification. The Organization contends that the Carrier cannot require employees to meet the qualification standard for purposes of bidding or being awarded a posted position, but change the qualification when it wishes to assign employees to fill a temporary vacancy in that same classification. The Organization relies upon the Carrier's response to a question in the Engineering Interoffice Memorandum dated June 12, 1995 indicating that in order to step up an employee within a gang to fill a vacancy, that employee must possess the qualifications in the class you want to step him up to. It asserts that Rule 1 requires the assignment of qualified employees to positions in order of seniority and Rule 55 gives preference for overtime work to employees who ordinarily perform the work in order of seniority.

The Organization argues that the Carrier, having chosen to test to establish qualifications for the Gang Foreman classification, must determine the range of an employee's ability in this fashion, and to permit it to do so in any other discretionary fashion is arbitrary and violates the seniority rights of employees with established qualifications in that classification. The Organization relies upon Third Division

Awards 36233, 29848, 29712, 19432, and Fourth Division Award 4895 in support of its assertion that the claim must be sustained.

The Carrier contends that there is nothing in the Agreement that requires it to utilize an employee to fill a temporary vacancy on overtime when the work in question can be performed at straight time, as it was in this case, citing Third Division Award 31003. The Carrier asserts that the Claimant expressed no interest in filling the disputed vacancy under Rule 4 because he did not bid on it when it was posted and only wished to do so on an overtime basis, as shown by the fact that the claim alleged a violation of Rule 55. It posits that there is a conflict between the remedy being sought in this claim, payment at straight time for all hours worked in the Foreman position by Purcell (which the Claimant already received for the hours he worked in his regular assignment during the claim period) plus additional overtime worked by Purcell (which the Claimant also received for overtime he worked during this period), and the asserted violation of Rule 55, which deals with preference for overtime. The Carrier argues that if the Board sustains the Claimant's entitlement to be called on overtime, no employee will ever seek to fill a temporary vacancy under Rule 4. It notes that it was forced to assign a junior qualified Gang Foreman to the vacant position permanently under Rule 18(b) on September 28, 2000 because it received no bids from qualified Foremen during the entire posting period, including the period it filled the temporary vacancy disputed herein.

The Carrier argues that determinations as to qualifications and abilities are made by management. It contends that the language of Rules 1 and 2 concerning qualifications to obtain a permanent position affording seniority differs from that in Rule 58 under which this temporary assignment to a different class was made, and which only speaks of the work being "within the range of his ability." The Carrier contends that the supervisor determined that the Gang Foreman responsibilities involved in this temporary vacancy were within the range of Purcell's ability, despite the fact that he was not a qualified rostered Foreman which would have been necessary to be successful in obtaining the permanent bid position. It notes that Purcell never refused to take the pre-qualification test or expressed his opposition to being used as a Gang Foreman, which was the case in Third Division Award 36233, and he could have declined the assignment. The Carrier asserts that the Organization failed to sustain its burden of proving that the temporary position was not within Purcell's range of ability and that such determination was arbitrary. It argues that Third Division Award 36233 was wrongly decided as noted in its Dissent, is palpably erroneous, and is distinguishable from the facts of the instant case.

A careful review of the record convinces the Board that this case is distinguishable both on its facts and in the alleged violation from the situation addressed by the Board in Third Division Award 36233. First, that case was limited to its specific facts, which included that the employee used had declined to take the Foreman qualification test despite repeated requests that he do so and informed his supervisor that he did not want to work in that classification, supporting the Board's finding that the determination that the job was within his range of abilities under those circumstances was arbitrary. Second, the Organization alleged a violation of Rules 1, 2, 4, 55 and 58, and the Board found a violation of Rules 2 and 4. Neither of those Rules were cited in the instant claim or argued on the property. Third, there was no evidence presented herein concerning a practice by the Carrier of assigning the Claimant to consecutive shifts to fill a Foreman vacancy on overtime, as there was in Third Division Award 35233. Fourth, the claim for overtime payment was clear in the other case. The instant case appears to be in conflict between the nature of the violation and the requested remedy for straight time compensation for the hours worked by Purcell. It is undisputed that the Claimant already received straight time (and overtime) compensation for his regular shift on the claim dates. It is unclear upon what basis he seeks these additional straight time hours, because he did not express interest in filling the vacancy under Rule 4 (although given the opportunity to) and was obviously protesting his rights to this work under the preference for overtime provision of the Agreement.

By holding that this case is distinguishable from Third Division Award 36233, the Board is not overruling the precedent therein established. As stated in Third Division Award 36233, there is no doubt that the Carrier need not assign an employee at the overtime rate when a qualified employee is available to be temporarily upgraded to perform the disputed work at the straight time rate. See Third Division Award 31003. In this case there has been no showing that overtime was worked. The language of Rule 58 permits the Carrier to temporarily assign an employee to different classes of work based upon its determination that such work falls within the range of his ability. This is different from the "qualification" language found in the Rules governing permanent assignments, as an employee temporarily upgraded under Rule 58 accrues no seniority in the class to which assigned. To the extent that Third Division Award 36233 implied otherwise, it is herein clarified.

Under the facts of this case, and in the absence of showing that the Carrier's determination that performance of the Gang Foreman functions on Gang P-283 to which he was regularly assigned fell within the range of Purcell's abilities was

arbitrary, or that the Carrier had an established practice of using the Claimant or other rostered Foremen to fill temporary vacancies on overtime, or that the filling of this temporary vacancy ran afoul of the Agreement's requirements for permanently filling the Foreman position, the instant claim must fail. The record reveals that the Carrier was unable to obtain any qualified bidders on the posted Foreman vacancy and had to force assign a junior Foreman to such position under Rule 18(b). There was no contention by the Organization that the Carrier's efforts to obtain qualified bidders initially and its eventual assignment to the position was somehow undermined or hampered by its filling the vacancy temporarily with Purcell.

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 25th day of August 2004.