

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37279
Docket No. MW-36403
04-3-00-3-650

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Burlington Northern and Santa Fe Railway Company
(former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it allowed junior employe R. G. Femrite to displace Flagman M. H. DeRosa on a flagman position at 15th Avenue in Union Yard at Minneapolis, Minnesota on May 16, 1999 and continuing (System File T-D-1840-B/11-99-0486 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. H. DeRosa shall now be compensated ‘. . . for eight (8) hours straight time and all overtime worked each day by the junior employe beginning on May 17, 1999 and continuing until the violation ceases.* * *”

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.

According to the evidence, the Claimant was working in "Laborer Lyndale" position No. 37422. A temporary position No. 37393 for a Foreman/Flagman for less than 30 days was created to begin working on May 7, 1999. The position was bulletined as a Foreman/Flagman position due to the "... high level of responsibility . . ." associated with the position. Foreman positions correspond with Rank A seniority whereas Laborer and Flagman positions are both Rank C seniority.

The Claimant submitted a request for the temporary position per Rule 19A. The Organization quoted the following portion of Rule 19A in support of the claim (no other portion of the Rule was cited in the on-property record) and in subsequent appeals:

"A new position or vacancy of thirty (30) calendar days or less duration, shall be considered temporary and may be filled without bulletining . . . preference will be given to the senior qualified employe who is not assigned in the rank in which the vacancy occurs and who has on file a written request to fill such vacancy. . . ."

The Claimant's Rule 19A request was honored and he began working on the temporary position. On May 14, 1999, however, the Claimant was informed that he was being displaced by R. G. Femrite. It is undisputed that the Claimant had some 20 years greater Rank C seniority than Femrite. Femrite, however, had slightly greater Rank A seniority than the Claimant.

The Carrier maintained that because the temporary position was filled based on Rank A Foreman seniority, it was proper for Femrite to displace the Claimant through the exercise of his greater Rank A seniority. The Organization, however, saw the Carrier's action as permitting an employee with junior Rank C seniority to displace the Claimant, who has considerably greater Rank C seniority.

In studying the parties' Submissions, we encountered new material and argument that was not part of the record developed on the property. Consequently, we disregarded those new matters.

Our review of the remaining record reveals irregularities that undermine this claim. The Organization maintained that the Claimant received the temporary assignment per Rule 19A and could not be displaced by an employee with junior Rank C seniority. The Carrier responded by asserting that the position was a Foreman/Flagman position and pointed out that the Claimant was assigned the position based on his Rank A seniority. Thereupon, the Organization refuted those assertions. In response, the Carrier provided three pieces of evidence: (1) a copy of the position vacancy form showing it to have been created as a Foreman/Flagman position; (2) a typewritten (but unsigned) statement from a Manpower Planner which set forth the responsibility reason for the dual Foreman/Flagman character of the position; and (3) a copy of the Claimant's Rule 19A request.

After reviewing the documents provided by the Carrier, the Organization asserted that the Claimant's Rule 19A request provided his Rank C seniority date. This is only partially true. Examination of the request form readily reveals that the Claimant put down both his Rank A and Rank C dates. Moreover, his request confirms that he was working in a Rank C position at the time he submitted the request. This is important because, in accordance with the portion of Rule 19A on which the Organization relies, the Claimant could not have received the assignment based on his Rank C seniority. The Rule rather clearly gives preference to the senior qualified employee who is not assigned in the rank in which the vacancy occurs. Because the Claimant was already working in a Rank C position at the time he filed his request, he could not have been assigned to another Rank C position per the quoted portion of Rule 19A.

Therefore, on this record, the Claimant had to attain the Foreman/Flagman position based on his Rank A seniority. There is no evidence to the contrary.

In the latter stages of the on-property handling, the Organization disputed the propriety of the Foreman/Flagman character of the temporary position. This, however, is a different type of claim from the initial claim. Moreover, as the Carrier

pointed out, the Organization was beyond the time limit for advancing such a challenge.

Given the state of the record in this matter, we do not find that the Organization has met its burden of proof to establish a violation of the Agreement.

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 5th day of November 2004.