

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37697
Docket No. MW-37785
06-3-03-3-151**

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) –
(Northeast Corridor

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to allow Foreman L. White to displace junior employe R. Cross who was filling the foreman vacancy on Gang J-122 at Wayne, Pennsylvania and instead allowed junior employe G. Verna to displace junior employe R. Cross on said foreman vacancy beginning on February 19, 2002 and continuing through March 8, 2002 (System File NEC-BMWE-SD-4201 AMT).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. White shall now be allowed any and all differentials and incentives affecting the rate of pay that Mr. Verna was compensated in the gang foreman position and he shall be compensated for any and all overtime hours paid to Mr. Verna while filling said gang foreman position beginning February 19, 2002 and continuing through March 8, 2002.'"

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.

This claim protests the Carrier's action in permitting a junior employee to displace a temporary Foreman vacancy. It involves application of the following provisions:

"Rule 4 - Temporary Positions and Vacancies - Method of Filling

- (a) A position or vacancy may be filled temporarily pending assignment. When the new positions or vacancies occur the senior available employees will be given the preference, whether working in a lower rated position or in the same grade or class pending advertisement and award.
- (b) An employee so assigned may be displaced by a senior 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 similar displacement from such temporary assignment by a senior employee unless such employee is exercising seniority in accordance with Rule 18."

The record reflects that a Gang Foreman temporary vacancy existed on Gang J-122 at Wayne, Pennsylvania. On February 12, 2002, R. Cross requested and was granted approval under Rule 4(a) to fill this vacancy on his gang and did so commencing on February 13, 2002. Verna, who was senior to Cross and was assigned as a Lineman on Gang J-037 headquartered at Penn Coach Yard, submitted a written request to displace him on the temporary vacancy which was received by the Carrier on February 14, 2002. The Carrier approved Verna's request that same day to begin working the assignment on Tuesday, February 19,

2002 as Monday was a holiday. The Claimant, who was senior to Verna and was regularly assigned as a Foreman on Gang D-046 headquartered at Wilmington, Delaware, submitted a written request to displace into the temporary vacancy which was received by the Carrier on the morning of February 15, 2002. The Carrier denied the Claimant's request under the language of Rule 4(b) asserting that Verna had already displaced Cross and was not, himself, subject to further displacement. Both Verna and the Claimant presented themselves to the Foreman at the Wayne ET headquarters before the start of work time on February 19, 2002. It is the Foreman's refusal to permit the Claimant to displace onto the temporary vacancy that gives rise to the instant claim.

The Organization argues that the Carrier violated the clear terms of Rule 4 by giving preference to junior employee Verna instead of the Claimant who was undisputedly senior. The Organization notes that both the Claimant and Verna gave the appropriate Carrier officer notice of their desire to fill the temporary Foreman vacancy at least four days prior to it starting, and well in advance of either of them presenting themselves to make physical displacement onto the position. It asserts that the Carrier's application of a "first come, first served" interpretation of Rule 4 is misguided, fails to allow seniority full play, and renders the provisions of Rule 4 meaningless, citing Third Division Awards 13196, 20062 and 28723 among others. The Organization notes that the Carrier had ample time to give effect to the Claimant's seniority preference to fill this vacancy, but refused to do so, entitling him to compensation for all pay losses including the 80 hours of overtime service worked by Verna on the position.

The Carrier contends that Verna was not subject to displacement from the temporary assignment by the Claimant under the clear provisions of Rule 4(b). It posits that Cross temporarily filled the vacancy under Rule 4(a) and Verna displaced him when his request was granted and paperwork completed on February 14, 2002 under Rule 4(b) and was himself not subject to further displacement by the Claimant who was not exercising seniority under Rule 18. The Carrier asserts that an employee need not make a physical change of assignment before a displacement becomes effective, citing Third Division Awards 19003, 35402 and 35616 and notes that the Claimant was informed on February 15, 2002 that his request was denied, but chose to physically present himself at the job location on February 19 anyway. The Carrier takes issue with the Organization's apparent position that numerous employees could report to headquarters unannounced seeking to fill a vacancy and that it must sort through the horde and appoint the senior employee without

permitting the Carrier any control over its ability to plan its work force. It asserts that such reading of Rule 4 would create chaos and would render the Rule meaningless, a result which should be avoided, relying on Third Division Awards 31135, 32020 and 33857. The Carrier also highlights the impropriety of the Organization's request for compensation at the overtime rate for time not worked, especially in the absence of a showing that the Claimant suffered any monetary loss, citing Third Division Awards 31129 and 35863; Public Law Board No. 4549, Award 1.

A careful review of the record convinces the Board that, under the factual circumstances of this case, where the Carrier had ample prior notice of the Claimant's desire to displace onto the temporary vacancy to permit it adequate time to make the necessary manpower adjustments, it violated Rule 4(b) by not giving preference to the Claimant's seniority and allowing Verna to displace Cross on February 19, 2002. Permitting the Carrier to shut off a senior employee's displacement right to fill a temporary vacancy under Rule 4(b) simply by allowing it to immediately process the paperwork of a first request regardless of the length of time prior to the effective date of the actual physical displacement, and considering the displacement complete without consideration of subsequent requests, does not comply with the language and intent of Rule 4(b). The Claimant complied with his responsibility to give notice to the appropriate officer of his desire to displace prior to the starting time of the temporary vacancy, and with sufficient time to allow the Carrier to control the displacement process and the filling of vacancies. He did not just show up on the job unannounced and seek to displace an employee who had given the Carrier prior notice of his desire to displace. The Carrier had more than four days between its receipt of the Claimant's written notice and the actual date that the vacancy commenced. Our finding is that this was sufficient time to permit the Carrier to control the process while recognizing the Claimant's seniority right to fill the temporary vacancy under Rule 4(b). Employees seeking to fill temporary vacancies under Rule 4 must comply with Carrier procedures to assure that those responsible for meeting manpower requirements can perform that function.

Because the Claimant worked in the same graded classification during the claim period, there was no showing that he had a loss of wages or benefits other than the 80 hours of overtime worked by Verna on the temporary vacancy. The Carrier is directed to compensate the Claimant, at the straight time rate, for the hours of overtime worked by Verna on this position for which the Claimant was available. See Third Division Award 35863.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 30th day of January 2006.