

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37792
Docket No. SG38257
06-3-04-3-154**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of G. D. Ryan, for \$145.60, the difference in pay between signal foreman and signalman, account Carrier violated the current Signalmen’s Agreement, particularly Rules 26 and 80, when on February 10, 11, 12 and 13, 2003, the Claimant’s signal foreman was on vacation and Carrier assigned a junior man to relieve the foreman’s position instead of assigning the Claimant who was the senior Class 1 employee on the gang and has been assigned to relieve the foreman’s position in the past. Carrier’s File No. 1359819. General Chairman’s File No. W-26-248. BRS File Case No. 12842-UP.”

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 case requires an interpretation and application of Rule 26 - RELIEVING FOREMEN AND MAINTAINERS, which reads as follows:

“When Signal Gang Foremen are off during vacation periods, or for other reasons, they will be relieved by the Assistant Signal Foreman or Lead Signaller assigned to that gang, if available. If not available, they will be relieved by the senior qualified employee in Class 1 assigned to the Signal Gang.

When Signal Maintainers or Signal Maintenance Foremen are off for periods that exceed one week in duration, they will, if relieved, be relieved by the Relief Signal Employee; and if not available, the senior qualified employee of Class 1 assigned to the Signal or Maintenance Gang.

The Carrier will make every effort to provide vacation relief on Signal Maintainer positions when the incumbent is off duty longer than one week.”

The Claimant in this case was regularly assigned as a Signaller on Signal Gang No. 5780. On the four dates specified in the Statement of Claim, the Foreman of the gang was absent from the gang. The Assistant Foreman assigned to the gang was also absent from the gang. To fill the Foreman position on these four dates, the Carrier assigned a Signaller member of the gang who was junior in seniority to the Claimant.

It is the Organization’s position that the Claimant had greater seniority than did the Signaller who was used to fill the Foreman vacancy; that the Claimant had in the past been used to relieve the Foreman’s position and was, therefore, qualified to do so; and that the language of Rule 26 clearly requires the use of the senior qualified Class 1 employee assigned to the gang to be used to relieve the Foreman in his absence.

The Carrier in its denial of the claim stated that “Management felt Signaller Romo was qualified and therefore he was assigned these duties.” This, the Carrier contends, was its managerial prerogative.

At no time during the on-property handling of this dispute did the Carrier refute the Organization's contention that the Claimant had in the past been used to relieve the Foreman position. At no time during the on-property handling of this dispute did the Carrier state or otherwise indicate that the Claimant was not qualified to relieve the Foreman position. Rather, the Carrier nit-picked the Organization's claim by arguing that the Foreman was not, in fact, on vacation as contended by the Organization, but rather was absent from his position attending a training program. The Carrier further argued that "The Foreman would have to be absent for six days, which is longer than one week, for this rule to apply."

Both of these arguments are unconvincing.

There is no disagreement that the Carrier does *possess* the right to determine qualifications. However, this determination does not exist in a vacuum. See Third Division Awards 11633 and 12931.

It is also an established principle that material assertions made by either party and not refuted on the property must be accepted as fact. See Third Division Awards 28459 and 30460.

In this *case*, the Carrier never refuted the Organization's contention that the Claimant had in fact previously relieved the Foreman. In this case, the Carrier never specifically contended that the Claimant was not qualified to serve as Foreman. Therefore, the Board is left with the language of the Rule which in its initial paragraph sets forth the measure that applies in this case. That is:

"If not available, they will be relived by the senior qualified employee in Class 1 assigned to the Signal Gang." (Emphasis added)

The Carrier's argument relative to the second paragraph of Rule 26 is misplaced and not applicable in this case.

It is the Board's conclusion on the basis of the case record that the Claimant was the senior qualified employee in Class 1 assigned to the Signal Gang and should have been used to fill the Foreman vacancy on the dates in question.

The claim as listed is sustained.

AWARD

Claim sustained.

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 31st day of May 2006.