

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40849
Docket No. SG-40961
11-3-NRAB-00003-090299

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

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(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 W. F. Lester, for compensation of all past, current and future straight time and overtime accrued on the Relief Signal Maintainer position headquartered at Eugene, Oregon, on Gang 8350, retroactive 60 days from the date initial claim was filed and continuing up to March 28, 2008, account Carrier violated the current Signalmen’s Agreement, particularly Rule 5[1], when it failed to advertise the position listed above within 30 calendar days previous to or 10 calendar days following the date such new position was created or vacancy occurred. Carrier’s File No. 1496252. General Chairman’s File No. UPGCW-51-1524. BRS File Case No. 14155-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 claim protests the Carrier's failure to bulletin the position of flagging for a pole line demolition contractor on the Brooklyn Subdivision from December 1, 2007, to March 14, 2008. It relies upon the following Agreement language:

"RULE 51 - ADVERTISING POSITIONS FOR SENIORITY CHOICE

- A. New positions and vacancies, excepting positions of Assistant Signalmen and Assistant Signalman Candidates, which are expected to be of more than six months' duration will be advertised as permanent within thirty (30) calendar days previous to or ten calendar days following the date such new position is created or vacancy occurs. New positions and vacancies of more than thirty (30) calendar days and less than six months' duration will be advertised within the above time limits as temporary. . . ."**

The record reflects that the Claimant was a Signal Inspector on Gang 7060 when junior employee Kuchynski was assigned to the position of Signalman on Gang 2665 on September 27, 2007. The Carrier assigned Kuchynski flagging duties for a pole line demolition contractor in a separate geographic location from his co-workers commencing on or about November 6, 2007, and continuing for a period in excess of 30 calendar days without posting this as a new position. The Organization filed this claim on February 8, 2008, alleging that the Carrier violated Rule 51 from on or about December 1, 2007, by not advertising this new position until Bulletin No. 1037 was posted on March 14, 2008, for a temporary Relief Signalman, which was awarded to employee Seitz, effective March 28, 2008. A typewritten statement from Kuchynski states that Seitz was assigned pursuant to Bulletin No. 1037 after Kuchynski bid on Bulletin No. 1022.

The Organization argues that this is a continuing claim timely filed under Rule 69(A). It asserts that Kuchynski was clearly sent to perform the new position of providing on-track safety protection beginning on November 7, 2007, and that the Carrier violated its advertising obligation, contained in Rule 51, when it permitted him to continue in that position for more than 30 days without bulletining it. The Organization maintains that this new position was finally advertised in Bulletin No. 1037 in March 2008 and awarded to Seitz. It avers that if the position had been posted earlier, the Claimant could have bid on it and been awarded it based upon his superior seniority to Kuchynski, thereby entitling him to the remedy requested in the claim.

The Carrier first contends that the claim is untimely, because it is not continuing and alleges a violation from December 1, 2007, but was not filed until February 8, 2008, more than 60 days from the date of the perceived infraction (failure to advertise after 30 days) relying on Third Division Awards 23953, 28826 and 31043. With respect to the merits, the Carrier argues that the flagging assignment was not a new position or vacancy that had to be advertised under Rule 51, but merely an exercise of management prerogative to assign Kuchynski to flagging duties at a distant location from his gang while he retained his position on Gang 7060. It notes that flagging is not a position unto itself, but is merely a part of his Signalman assignment. The Carrier also points out that the temporary Relief Maintainer position filled by Seitz was not the same as the flagging duties assigned to Kuchynski, because such position includes the additional tasks of a Relief Maintainer, which the Carrier determined were necessary on a temporary basis in March 2008, and not exclusively flagging.

A careful review of the record convinces the Board that the Organization has not met its burden of establishing a violation of Rule 51 of the Agreement in this case. To do so, the Organization would have to show that the flagging protection assignment given to Kuchynski during this period of time was a distinct position that was either new or a vacancy, the prerequisites for the Carrier's obligation to bulletin it under Rule 51. As noted by the Carrier, flagging is just one of the duties and responsibilities of a Signalman, and not the entire function of either a Signalman position or that of a Relief Maintainer. While Kuchynski's statement sets forth the fact that "he was providing on-track safety for a pole line demolition contractor removing old pole line on the Brooklyn Subdivision between MP 614 and

741,” and that Seitz was assigned pursuant to Bulletin No. 1037 after he bid Bulletin No. 1022, it does not establish that they were one and the same position, that the function being performed by Kuchynski was the sole job responsibility being advertised in Bulletin No. 1037, or that Seitz performed any flagging work. In the absence of proof that Kuchynski was performing the job responsibilities of the Relief Signal Maintainer position that the Claimant seeks compensation for on the basis of the Carrier’s failure to advertise prior to March 14, 2008, the claim must fail.

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 11th day of January 2011.