

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36233
Docket No. MW-36094
02-3-00-3-273**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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 J. Gricol to fill a vacant foreman position on Gang D-043 on December 14, 15, 16, 17, 21, 22 and 23, 1998 and instead assigned Lineman/HRO Operator J. Greco to fill said vacant position (System File NEC-BWME-SD-3946 AMT).**
- (2) As a consequence of the violation referenced in Part(1) above, Gang Foreman J. Gricol shall not be compensated for fifty-six (56) hours' pay at his respective time and one-half rate of pay.”**

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 in this case is whether the Carrier violated various Rules of the Agreement (1, 2, 4, 55 and 58) by assigning a Lineman who had never passed the pre-qualification Gang Foreman test to fill a temporary vacation absence in the Gang Foreman classification within the same gang 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 filling a temporary vacancy as an E.T. Gang Foreman in Construction Gang, J-122, working 7:00 A.M. to 3:00 P.M. Monday through Friday at Wayne, Pennsylvania. J. Greco owned a regular Lineman/HRO position in Maintenance Gang D-043, working 11:00 P.M. to 7:00 A.M. Sunday through Thursday at Wilmington, Delaware. This claim protests his being upgraded to the Gang Foreman vacation absence at that location (normally held by John Brady) from December 14 through 23, 1998. The record reflects that Greco was asked by his Foreman to help out and he agreed, although he had many opportunities in the past to take the gang Foreman's qualification test but decided not to because he did not want to work in that position. Greco worked the Gang Foreman position at his straight time rate. The Claimant held seniority on the Gang Foreman roster and regularly performed that work. On August 23, 1999 the Claimant was assigned by the Carrier to work as a Gang Foreman on consecutive shifts at different locations. Between February 21 and April 23, 1999, when Gang Foreman Brady was awarded a daylight position, he was asked to work his vacated position on the last trick on an overtime basis despite the presence of Greco as a Lineman on the same gang.

The Organization argues that the Carrier failed to fill the vacation absence in issue with the proper qualified and rostered employee. It notes that Greco possesses no seniority in the Gang Foreman classification, and never demonstrated his skill and ability to perform the work by passing the pre-qualification test established by the Carrier for 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. It asserts that Rule 1 requires the assignment of qualified employees to positions in order of seniority, Rule 2 requires the Carrier to administer job related tests to ascertain initial qualifications in a uniform manner, Rule 4 states that senior qualified employees on the roster involved will be given preference for the filling of temporary vacancies, Rule 55 gives preference for overtime work to employees who ordinarily perform the work, and Rule

58 permits the Carrier to assign an employee to different classes of work within the range of his or her ability.

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. It notes that the Carrier recognized this fact when it paid Gang Foreman Brady extensive overtime to fill the position created by his own award to a different truck, despite Greco being present on that gang. The Organization queries why the Carrier would not have used Greco at straight time if the Agreement enabled it to do so. It also contends that the Carrier has permitted employees to fill consecutive vacancies at different locations without raising a claim of unavailability, as it has done in this case. The Organization relies upon Third Division Awards 29712, 28723, 19432, 11279 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 avers that the Claimant expressed no interest in filling the disputed vacancy under Rule 4 (in fact he was filling another at the time) and only wished to do so on an overtime basis. The Carrier also asserts that the Claimant was not available under either the provisions of Rule 4 or 55, because his regular tour began at 7:00 A.M. some 30 miles distant from the location where the temporary vacancy occurred, with an ending time of 7:00 A.M., citing Third Division Award 28100. It notes that having once assigned the Claimant to a different location on a consecutive shift to meet the needs of the operation when no other employee was available, does not give the Claimant the demand right to such work.

The Carrier argues that determinations as to qualifications are made by management. It contends that, while the preferred method is to have a qualification test on file for the bulletin and assignment process, the absence of such a test does not prohibit the use of an employee to perform work within the range of his or her ability. The Carrier asserts that supervisors who knew Greco's work determined that the vacant position was within the range of his ability, and made the straight time upgraded assignment under Rule 58. The Carrier also notes that the claim is excessive,

because on this property the appropriate remedy for an overtime violation is the straight time rate, citing Public Law Board No. 4549, Award 1; Third Division Awards 27701, 28181, 28189 and 28349.

A careful review of the record convinces the Board that, under the specific facts of this case, the Organization has proven that the Carrier violated Rules 2 and 4 by assigning Greco to the Gang Foreman position during the claim period. 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. Third Division Award 31003. In this case no overtime was worked. However, the Carrier has designed a specific pre-qualification test to establish an employee's qualification to bid on, and receive, a Gang Foreman position. Rule 2 permits the Organization the right to assure that the application of such test is uniform to all employees. In this case, Greco had the opportunity to take this test and establish his qualifications for the Gang Foreman position, and had been requested to do so in the past, but declined, specifically stating that he had no desire to work in that position or fill this temporary vacancy. Under such circumstances, the Board finds that it was arbitrary for management to conclude that such position was within the range of Greco's abilities and to assign him to it under Rule 58 when there were qualified employees on that roster who could have performed the work, albeit on overtime. Because the Carrier has used the Claimant on consecutive shifts at different locations on other occasions, it cannot be held that he was, per se, unavailable for this job assignment.

With respect to the appropriate remedy, it has been established on this property that the payment of claims for lost overtime opportunities is at the straight time rate. Public Law Board No. 4549, Award 1; Third Division Awards 27701, 28180, 28349. Accordingly, the claim is sustained at the pro rata rate.

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 24th day of September 2002.

NATIONAL RAILROAD ADJUSTMENT BOARD – THIRD DIVISION

CARRIER MEMBER'S DISSENT TO AWARD NO. 36233, DOCKET MW-36094

The majority opinion, that Amtrak violated the agreement by utilizing an employee at the straight time rate to cover a vacancy rather than call an employee on overtime, clearly ignored the facts, the explicit language of the agreement and, the established precedent on the property.

The facts in this case were not in dispute. A Gang Foreman position needed to be covered and an employee in the gang was asked and agreed to perform that work. It was unrefuted that the claimant in this case did not seek to cover that vacancy under the temporary vacancy provisions of the agreement (Rule 4). The majority recognized that the claimant had applied for and was assigned to fill another vacancy under the provisions of that Rule. Despite the absence of any contention or evidence that the claimant sought to fill the position in question under Rule 4, the majority decided that this rule was violated.

The majority also chose to ignore the fact that the agreement specifically permits the carrier's action in this case. The majority recognized that Rule 58 is applicable to this dispute. Such rule provides:

"An employee may be temporarily or intermittently assigned to different classes of work within the range of his ability." (Emphasis added)

The majority decided that "it was arbitrary for management to conclude that [the Gang Foreman] position was within the range of Greco's abilities and to assign him to it under Rule 58" and decided that such action violated Rule 2. If Rule 58 provided that employees could be assigned to different classes of work for which qualified, there may have been justification for the majority's consideration of Rule 2 - Qualifications for Positions. However, Rule 58 does not mandate the same standards for temporary use in a different class as applies when making application for advertised positions or attempting to exercise displacement rights. In fact, it is exactly this type of upgrade that enables employees to obtain the knowledge and experience that would enable them to

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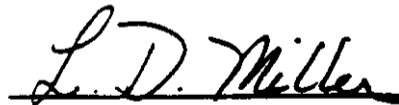
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pass a qualification test administered under Rule 2. Clearly, the majority opinion in this case can only be viewed as changing the specific negotiated language of Rule 58, which action exceeds the authority of this Board.

The remaining rule in this dispute is Rule 55 - Preference for Overtime. Since no overtime was worked, consistent with established precedent on the property, the rule has absolutely no application. However, the majority chose to decide that the claimant should have been called in on overtime to perform the work of the Gang Foreman position. In making this determination, the majority not only ignored the fact that there was no overtime on which the claimant had preference, but concluded, contrary to established precedent on the property, that he could have been used even though such use would have interfered with his availability to cover his normal tour of duty - it would have had him 30 miles away at the starting time of his assignment. In support of this determination, the majority relied upon an isolated instance, eight (8) months after the date of the claim, where the claimant was used, in emergency, for consecutive shifts at different locations when no other employee was available. Such single instance hardly rises to the level of an established practice.

We vigorously dissent to the decision of the majority in this case. The instant award is so far off the mark on so many issues that it can only be viewed as palpably erroneous and therefore has absolutely no precedential value in resolving future disputes.

A handwritten signature in cursive script, reading "L. D. Miller", is written over a horizontal line.

L. D. Miller
Carrier Member