

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36618
Docket No. MW-35074
03-3-98-3-821**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(CP Rail System (former Delaware and Hudson
(Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1) The Agreement was violated when the Carrier recalled and assigned junior Trackman/Foreman H. Utter to perform foreman's duties on Surface Gang No. 6 from April 5 through 21, 1997, instead of recalling and assigning senior Laborer/Foreman C. Hewitt to perform said work (Carrier's File 8-00056 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, senior Laborer/Foreman C. Hewitt shall be compensated for all wage loss suffered at his appropriate straight time and overtime rates for all hours worked by the junior employe from April 5 through 21, 1997 and he shall be properly credited with an equal number of days worked by the junior employe for Railroad Retirement, health insurance and vacation qualifying purposes.”**

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.

There is no dispute regarding the material facts giving rise to this grievance. Prior to April 1997, both C. Hewitt (whose Track Foreman seniority dates from August 23, 1976) and H. Utter (whose Track Foreman seniority dates from July 14, 1980) were in furlough status. Both of these employees accepted furlough at the end of the 1996 work season and each filed appropriate applications for bulletined Track Foreman positions in maintenance gangs for the 1997 season, prior to the close of the bidding period on April 3, 1997. The Claimant was notified of his recall to service by telephone call on April 3, 1997 and directed to report for a return-to-work physical examination and drug screen test scheduled for April 9, 1997. The record shows that C. Hewitt ("Claimant") was awarded Surface Gang #6 Foreman position (Bulletin No. 17.97) by notice posted on April 4, 1997.

On April 5, 1997, however, a day after the Claimant had been awarded the Surface Gang #6 Foreman position (Bulletin No. 17.97) and four days before his scheduled April 9, 1997 return-to-work examinations, the Carrier placed junior applicant H. Utter in the Surface Gang #6 Foreman position (Bulletin No. 17.97) Six days later, effective April 11, 1997, the Carrier awarded the Claimant a different Foreman position on the Burro Crane (Bulletin 20.97). For reasons not fully explained on this record, the Carrier did not receive the results of the Claimant's April 9, 1997 examinations until April 21, 1997, at which time he was allowed to begin work on the Burro Crane (Bulletin 20.97) position.

The foregoing undisputed facts make out a prima facie violation of the Claimant's seniority rights under Rules 3 and 4 of the controlling Agreement. The Carrier's assertions that the delay in receipt of the Claimant's examination results made it impossible to place him in the Burro Crane Foreman position (Bulletin 20.97) earlier than April 21, 1997, begs the question presented by the claim, i.e., the leap-frogging of the junior applicant into the Surface Gang #6 Foreman position (Bulletin No. 17.97) on April 5, 1997, which position the Claimant had been awarded on April 4, 1997. Assuming, arguendo, the Carrier had made a special accommodation to the junior employee's request to take his return-to-work examinations prior to the awarding of the bids, that does not justify placing the

junior applicant in the Claimant's awarded position several days before the Claimant even took his scheduled return-to-work examinations.

Based on the unique facts and circumstances of this record, the claim is sustained for the period April 5 through April 11, 1997.

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 29th day of July 2003.