Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39949
Docket No. MW-40164
09-3-NRAB-00003-070403
(07-3-403)

The Third Division consisted of the regular members and in addition Referee Martin H. Malin when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
(
(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 (except for May 8, 2006) it failed to call and assign available and qualified E. T. Gang Foreman H. Kennedy to fill the vacant foreman position on Gang D-143 on March 28 through May 17, 2006 and instead upgraded and assigned Foreman J. Bolt or Lineman R Orsini to fill said vacant position (System File NEC-BMWE-SD-4599 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant H. Kennedy shall now be compensated a total of two hundred eighty (280) hours at the applicable 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 basic facts underlying the instant claim are not in dispute. On the dates in question, the Carrier assigned J. Bolt and R. Orsini to fill a Gang Foreman vacancy in Gang D-143 from 11:00 P.M. - 7:00 A.M., Sunday through Thursday, after the vacancy went no bid. The Claimant was assigned as a Lineman on Gang D-124, with tour of duty 7:00 A.M. to 3:00 P.M., Monday through Friday. Bolt and Orsini were not qualified on the physical characteristics of the territory. The Claimant was qualified and available to fill the vacancy on an overtime basis.

The Organization recognizes that the Carrier is not precluded from assigning work at straight time during an employee's regular tour of duty instead of assigning it as overtime. The Organization maintains, however, that such an option was not available to the Carrier in the instant case because the employee to whom the Carrier assigned the work lacked one of the qualifications for the position, i.e. qualification on the physical characteristics of the territory. Consequently, the work should have been offered to the Claimant on an overtime basis in accordance with Rule 55(a). The Carrier maintains that it properly assigned the work to Bolt and Orsini in accordance with Rule 58.

Rule 58 provides:

> "An employee may be temporarily or intermittently assigned to different classes of work within the range of his ability. In filling the position of an employee which pays a higher rate, he shall receive such rate for the time thus employed. If assigned to a lower rated position for reasons other than reduction in force or his request or fault, he will, except as provided in Rule 50, be paid the rate of his

> regular position. When work of an incidental nature is performed, employees performing such work will receive the rate of their position only. Incidental work is work which is a necessary detail of accomplishing a main task."

Two prior Awards of the Board address the relationship between Rules 55 and 58. In Third Division Award 36233, the Carrier assigned a Lineman who had never passed the pre-qualification Gang Foreman test to fill a temporary Gang Foreman vacancy rather than use the Claimant to fill the vacancy on overtime. The record reflected that the Lineman had had many opportunities to take the pre-qualification test but had declined to do so because he did not want to work in a Gang Foreman position. In sustaining the claim for loss of the overtime opportunity, the Board reasoned:

> "There is no doubt that 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."

In Third Division Award 37145, the Carrier again assigned a Lineman who had never passed the pre-qualification Gang Foreman test to temporarily fill a Gang Foreman vacancy rather than offer the work to the Claimant on overtime. The

Board denied the claim and distinguished Award 36233 on the ground, among other grounds, that the Carrier's determination in Award 36233 that the Lineman it had upgraded performed within the range of his abilities was arbitrary because the Lineman had repeatedly declined to take the pre-qualification test. The Board continued:

> "The language of Rule 58 permits the Carrier to temporarily assign an employee to different classes of work based upon its determination that such work falls within the range of his ability. This is different from the 'qualification' language found in the Rules governing permanent assignments, as an employee temporarily upgraded under Rule 58 accrues no seniority in the class to which assigned. To the extent that Third Division Award 36233 implied otherwise, it is herein clarified.
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> Under the facts of this case, and in the absence of a showing that the Carrier's determination that performance of the Gang Foreman functions on Gang P-283 to which he was regularly assigned fell within the range of Purcell's abilities was arbitrary, or that Carrier had an established practice of using the Claimant or other rostered Foremen to fill temporary vacancies on overtime, or that filling of this temporary vacancy ran afoul of the Agreement's requirements for permanently filling the Foreman position, the instant claim must fail."

Reading Awards 36233 and 37145 together, we hold that the temporary upgrade of an employee pursuant to Rule 58 to fill a vacancy instead of calling a qualified employee on overtime does not violate Rule 55 as long as the temporary upgrade falls within the range of the employee's abilities. The Organization has the burden to prove that the Carrier's determination that the temporary upgrade fell within the range of the employee's abilities was arbitrary. The mere fact that the temporarily upgraded employee did not meet all of the qualifications to hold the position permanently does not meet the Organization's burden of proof.

In the instant case, the Organization rested its case on Bolt's and Orsini's failure to meet one of the qualifications for the Gang Foreman position, i.e. failure to be qualified on the territory's physical characteristics. We conclude that the Organization failed to carry its burden of proof that they were working beyond their range of abilities.

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 30th day of September 2009.