

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 42247
Docket No. MW-41846
16-3-NRAB-00003-120133

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier utilized junior employe K. Malzner to flag for bridge construction work between Mile Posts 126 and 127.75 on Jeff City Subdivision on September 29, 30, October 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 25, 26 and 27, 2010 instead of regularly assigned Flagman R. Garrison (System File UP754BT10/1543853 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Garrison shall now be compensated at his respective and applicable rates of pay for all straight time and overtime hours worked by junior employe K. Malzner in the performance of the aforesaid work on September 29, 30, October 4, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 25, 26 and 27, 2010.”

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 Organization contends that the Claimant, who has Foreman seniority, should have been assigned to perform the flagging work in question beginning on September 29, 2010, because the Claimant had greater Foreman seniority than the employee who performed the flagging duties on and after that date. The employee who performed the work was regularly assigned as a Truck Operator and had no Foreman seniority. The Organization asserts that the Claimant was available and qualified to perform the flagging work and would have performed it had the Carrier assigned him the work.

The position designated to perform the Flagman duties was advertised as a Foreman position on a one-person gang identified as Gang 1710. The Organization notes that the Claimant bid for and was assigned to the flagging job, but was removed by his Supervisor from the duty of Flagman and required to operate a backhoe. The Organization contends that by being ordered to run the backhoe, the Claimant was denied the opportunity to earn 73 hours of overtime. The Organization cites Rule 1 - Seniority Datum and Rule 2 - Seniority Rights as the Agreement provisions that were allegedly violated by the Carrier's action.

It is the position of the Organization that because the Claimant was performing his regularly assigned Gang 1710 Foreman-Flagger duties of providing on-track protection for the contractor's employees performing bridge construction work prior to September 29, 2010, he had superior entitlement, as compared with the junior employee, to continue performing the flagging work on and after September 29. The Organization contends that the Carrier improperly removed the Claimant from his regularly assigned Foreman-Flagman position on Gang 1710 in favor of the junior employee who was compensated at the Foreman rate of pay for all straight-time and overtime hours spent on that assignment.

The Organization cites a number of Awards which it contends stand for the principle that when an employee is assigned to a position, the employee is entitled to all work assignments, straight time and overtime, that accrue to that assigned position. The Organization contends that (1) the Claimant was regularly assigned to perform the flagging work of providing on-track protection for the employees performing the aforementioned bridge construction work; (2) the Claimant's Gang

1710 Foreman-Flagman assignment remained in effect throughout the time period involved here; and (3) the Carrier violated the Claimant's rights, both as the regular employee for the assignment and the senior employee, when it removed him from his regular assignment as Foreman-Flagman and assigned a junior employee to perform the flagging work that belonged to the Claimant's regularly assigned position.

The Carrier contends that the Agreement contains no language that reserves flagging work exclusively to the Claimant. It asserts that various crafts can perform flagging work and that Trainmen, Signalmen, B&B, and Track employees all are qualified to perform the duties associated with flagging and have been utilized in the past for flagging work. The Claimant, the Carrier states, was required to work as a Backhoe Operator and does not have the right to pick and choose when and where to work. The work, according to the Carrier, was assigned "with due regard to operational requirements" and not in violation of Rules 1 or 2 of the Agreement.

In a letter to the Carrier following the Parties' conference regarding this claim, the Organization stated that its representative explained to the Carrier's representative ". . . that the only reason that [the Claimant] was not the regular assigned employee was because his Manager removed him from the flagging position and required him to operate a backhoe because they had no other qualified operator."

In its response to the claim the Carrier attached a statement from the Manager Track Maintenance. He stated that (1) the flagging job at issue originated at the request of the contractor for the bridge work who asked for additional protection because of the location of the work and (2) different employees, including the Claimant, performed the flagging job at different times. According to the Manager, the job "was placed on bid line," and the Claimant was assigned to the flagging job on October 22, 2010.

It is not disputed that the Agreement permits an employee assigned to a position pursuant to a bid to be held over for up to 20 days. In his statement the Manager wrote that the Claimant ". . . was not released from his regular assignment as his skills were required . . . to operate [the] backhoe at Jefferson City." The intended release date, the Manager stated, was November 5, 2010, but flagging was no longer required as of November 5, and the flagging job was abolished on that date. The Manager further noted that the junior employee (with regard to Foreman seniority) assigned to the flagging job in question between September 29, and

November 5, 2010, was a qualified Flagman who had previously been used to flag on other jobs without any problem. In his statement, the Manager asserted, "I know of no reason that a flagman has to be a foreman, although we normally allow this rate due to the increased responsibility."

The Carrier argues that the principle that the regularly assigned employee on the job is entitled to work the overtime on the job defeats rather than supports the Organization's case. Flagging work, the Carrier contends, is not scope-covered work and can be assigned to any qualified employee. Accordingly, in the Carrier's view, the flagging work in question was properly assigned to multiple employees, including the Claimant and the junior employee. The employee who was assigned the work on straight-time, the Carrier asserts, was entitled to perform such work on overtime. The Carrier further asserts that the Flagman-Foreman position was advertised for bid once it was learned that it would extend for a period of time and that the position did not become the Claimant's regularly assigned position until October 22, 2010, when it was assigned to him pursuant to his bid. In addition, the Carrier contends, the Claimant was not available to perform the flagging work between October 22 and November 5, 2010, because he was properly held over and not released from his existing position on Gang 1706.

The Board cannot agree that the Claimant was the regularly assigned Foreman-Flagger on Gang 1710 on September 29, 2010, and the days following as asserted in the claim. Had the Claimant in fact been the regularly assigned Foreman-Flagger on that gang as of September 29, 2010, there would have been no need to advertise the position at that time, or to assign it to the Claimant effective October 22, 2010. In fact, during the progression of the claim the Organization acknowledged on the property that the Claimant was not the regularly assigned Foreman-Flagger on Gang 1710 as of September 29, 2010, when it stated in a letter dated June 20, 2011, addressed to the Director Labor Relations that during the Parties' conference discussions the representative of the Organization explained to the representative of the Carrier ". . . that the only reason that [the Claimant] was not the regular assigned employee was because his Manager removed him from the flagging position and required him to operate a backhoe because they had no other qualified operator."

The Organization made no argument that the junior employee or any other employee on the Claimant's regular gang besides the Claimant was qualified to operate a backhoe. The Engineering Supervisor, in his response to the claim, stated, "The Claimant was required to work as a Backhoe Operator and he has no demand

right to pick and choose when and where he wants to work.” The Organization made no argument that the Carrier does not have the right to assign someone in the Claimant's classification to perform Backhoe Operator duties. Its contention, rather, as stated in its letter dated February 3, 2011, addressed to the Director Labor Relations, is that the “. . . Claimant bid on the flagging position, he did not ask to run the back hoe, he was required to by his supervisor.”

The record establishes that as of September 29 and continuing until October 22, 2010, the Claimant was not the employee regularly assigned to the Foreman-Flagger position on Gang 1710. During that period of time, the Carrier had the right to assign him to work as a Backhoe Operator on his regular gang because he was qualified to perform that work and it was work that the gang normally performed. There has been no proof or claim that the junior employee or any other member of the gang was qualified to operate a backhoe during the claim period. The record evidence also establishes that the junior employee was qualified to perform flagging duties, and the Carrier therefore had the right to assign him to work as a Flagman during this period of time on the aforementioned bridge construction project. Flagging work is not scope-covered work or work reserved to a particular classification. Both the Claimant and the junior employee performed flagging work prior to September 29, 2010, without objection. Because he was the regularly assigned Flagman on straight-time between September 29 and October 22, 2010, the junior employee had precedence over the Claimant to work any Flagman overtime on the bridge construction project during that time period. See Third Division Awards 40405 and 29795. The Claimant, it should be noted, was fully employed on his regular work schedule during the period of time in question in the performance of tasks that did not include flagging.

On October 22, 2010, the Claimant was assigned to the Foreman-Flagger position on Gang 1710 pursuant to his bid. Normally that would have given him the right to perform the flagging duties in question both on straight-time and overtime as of that date. However, the Agreement permits the Carrier to delay the transfer of a successful bidder to his or her new position for up to 20 days if the employee is needed on the old position. That was the case here where the Claimant was needed to operate the backhoe. The Foreman-Flagger position on Gang 1710 was abolished on November 5, 2010, which was less than 20 days after the Claimant's regular assignment to that position. The record establishes that the Carrier had a legitimate operational need to hold him over on his former position between October 22 and November 5, 2010.

Finally, in its Submission, the Organization made the following argument, which was never made on the property: "The Claimant was a foreman, so operating a machine was outside of his job classification." No contract language or Award was cited in support of that belated assertion. Because the argument was raised for the first time on appeal before the Board and the Carrier had not had the opportunity to respond to the contention, the Board will not address that argument.

Accordingly, the instant claim must be denied.

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 29th day of February 2016.