

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42791
Docket No. MW-43453
17-3-NRAB-00003-160182

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, starting September 1, 2014 and continuing, the Carrier failed to advertise an assistant foreman flagging position and assigned junior employees D. Cook and A. Jett thereto instead of senior employee J. Wilder (System File B15612514/2014-177387 CSX).
- (2) As a consequence of the violation referred to in Part (1) above, ‘. . . the Carrier shall now properly advertise the position/vacancy according to the collective bargaining agreement and the Claimant shall now be paid for all wages worked by all improperly assigned employees to this position from the beginning of this violation up to the time it is corrected. ***”

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.

At all times relevant to this dispute, Claimant was regularly assigned as a foreman. Beginning on September 1, 2014, Mr. Charley, the incumbent of an assistant foreman flagman position on Force 5FNO, was unable to work his position for reasons that are not relevant to this dispute. The Organization alleges that the Carrier utilized employees with less assistant foreman seniority than Claimant to fill the vacancy created by Mr. Charley's absence. It says this continued until Mr. Charley returned to work on November 28, 2014. The Organization asks that Claimant be compensated for all of the overtime worked by the employees filling the vacancy.

Our review of the record before us leads us to the conclusion that the facts, as asserted by the Organization, are correct. We do not, however, agree that Claimant had a right to work this vacancy from the beginning. Initially, this was a temporary vacancy that would be filled in accordance with Rule 3, Section 4(a), which states, in pertinent part, as follows:

“A position or vacancy may be filled temporarily pending assignment. When new positions or vacancies occur, the senior qualified available employees will be given preference, whether working in a lower rated position or in the same grade or class pending advertisement and award.”

Because Claimant was working in a higher rated foreman position, he would not have had a right to be assigned to the assistant foreman position. This issue was addressed by Public Law Board No. 7163, between these parties. In Award No. 175, that Board held:

“Rule 3, Section 4 clearly states that “the senior qualified employee will be given preference, whether working in a lower rated position or in the same grade or class.” Claimant was working as a foreman at the time this temporary vacancy opened for an assistant foreman - flagman. The foreman position is a higher class or grade than the assistant foreman position. Since Claimant was in a higher classification than the advertised assistant foreman position, he could not fill a temporary vacancy as an assistant foreman – flagman. The junior employee, however, was working as a machine operator which is the same grade or class as the advertised assistant

foreman. Given these findings, the junior employee received preference in accordance with Rule 3, Section 4. As the Carrier complied with the Agreement, the alleged rules violations are denied.”

The Agreement, however, required the Carrier to post the vacancy by the 21st day. Rule 3, Section 3(a) states, “All positions and vacancies will be advertised within thirty (30) days previous to or within (20) days following the dates they occur.” Thereafter, Claimant had the right to bid on a lower rated position if he chose to do so. Because the Carrier did not post the vacancy, we find that it violated the Agreement. Claimant is entitled to be compensated for the difference between what he earned on his regular position and what he would have earned had he worked the position in question after the twentieth day of the vacancy until Mr. Charley’s return to the position.

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 28th day of November 2017.