

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42886  
Docket No. MW-43674  
18-3-NRAB-00003-160464**

**The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**  
**(Springfield Terminal Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier failed to assign Mr. R. Principato to a temporary I&R Foreman vacancy on April 2 and 3, 2015 and instead assigned junior employe R. Parker (Carrier’s File MW-15-29 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Principato must now be compensated at the I&R Foreman rate of pay for sixteen (16) hours at the straight-time rate of pay and for five and one-half (5.5) hours at the 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 Claimant, a Foreman, had a September 24, 2004 seniority date with a rank of 32 in Seniority Zone 3. Mr. R. Parker has held seniority since June 2, 2008 with a rank of 43 in Seniority Zone 3. Both men are in the Carrier's Track Sub-Department and both were qualified Foremen on April 2-3, 2015, when Foreman Parker was assigned to a temporary Inspection & Repair (I&E) Track Foreman vacancy in Rumford, ME. While performing the temporary assignment, Parker worked 16 hours straight time and five and one-half (5.5) hours overtime at the Foreman rate of pay. Because the Claimant was not given the opportunity to do the work, a timely claim was filed.

The Organization notes that there is no dispute that the Claimant was the senior of the two and qualified and contends that his seniority rights were violated by the egregious contract violation, which resulted in lost earnings. Because the Organization has made a *prima facie* case, the Carrier must prove an affirmative defense. The Carrier has not shown with payroll records that the Organization has furnished improper overtime hours and cannot argue persuasively that the overtime was a continuation of Foreman Parker's regular assignment because the Claimant should have been assigned originally. He was not given an opportunity to express an interest in the temporary position although he should have been canvassed. The Claimant should be made whole for losses stemming from the violation.

The Carrier believes that the Organization has not proven a violation. Article 8.4 does not support the claim that the Claimant was deprived of a right to be assigned to or to be offered the temporary vacancy inspecting the Rumford Branch on the dates claimed. There is no evidence that the Claimant told the Carrier of his desire to fill the position within three days of it being advertised as the position was already owned and therefore was not advertised. The temporary vacancy was filled by the qualified Foreman already working with the crew in accordance with past practice. Moreover, had the Claimant filled the temporary vacancy, his duties would have had to have been covered. The Organization's reliance on two mutually exclusive contract theories shows a lack of a contractual basis for the

claim. Just because the Claimant was senior did not require the Carrier to assign him to the vacancy, nor did the Carrier have to reach out to the Claimant and offer him the chance to fill the temporary vacancy. No existing contractual procedure has been violated. PLB 5606 Award 54 supports the Carrier's position.

Between them, the parties have pointed to Articles 8, 4, 5, 6 and 30, but Article 35 is not a part of the record in this case. Article 8, Filling Vacant Positions, and more specifically parts of Article 8.4 are seen as most relevant:

- (a) Temporary positions are positions of thirty (30) days or less and permanent positions pending award.
- (b) If a temporary position is to be filled, the provisions of Article 35 will apply. In the event an employee desires to fill a temporary position, he will advise the Carrier within three (3) days of the position being advertised. . . .

Yet, Article 8.3(a) does not require vacancies expected to be less than 30 days to be advertised. If there is a contractual requirement that temporary vacancies under 30 days be offered on the basis of seniority, the Organization, with the burden of proof in this case, has failed to show the relevant language. Moreover, in the on-property Award No. 54 of PLB 5606, that Board denied the claim of the Production Tie Crew Operator who was not selected to fill a six-day Chauffeur/Truck Driver vacancy on a different Production Tie Crew, with the temporary vacancy filled by a Maintenance Crew Foreman. Relative seniority is not mentioned in the award, which states "If a temporary position is to be filled, the provision of Article 35 will apply."

The Board has read and considered the many awards provided by the Organization and fully accepts the principle that seniority rights "are not a gift of management" but amount "to a valuable property which is earned by an employee who expends his energies and efforts on behalf of his employer over a period of time." First Division Award 15128. Nevertheless, seniority rights are not to be applied without restrictions, but must be applied in accordance with the relevant contractual provisions. The Organization has not provided substantial evidence of a misapplication in this case.

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**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 10th day of January 2018.**