

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43797
Docket No. SG-44456
19-3-NRAB-00003-170598**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Railroad Signalmen
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the CSX Transportation (formerly C&O Pere Marquette):

Claim on behalf of S.M. Sinke, for 30 hours at the Lead Signalman’s straight-time rate of pay, and for the difference in pay between the straight-time and overtime rates of pay for a Signal Foreman’s Position for 120 hours; account Carrier violated the current Signalmen’s Agreement, particularly Rules 203 and 221, when midway through the Claimant’s regular workweek on February 5, 2016, it suspended his regular shift, and then improperly assigned him to fill a vacant foreman’s position on another crew on February 9, 2016, for the purpose of avoiding overtime compensation. Carrier’s File No. 2016-226118. General Chairman’s File No. 16-05-PM. BRS File Case No. 15686-C&O(PM).”

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.

Rule 203, Absorbing Overtime, states:

“Employees will not be required to suspend work during assigned working hours for the purpose of absorbing overtime.”

Rule 221, Relief of Independent Signal Maintainers, Foremen, Leading Maintainers and Leading Signalmen, states:

- “(a) In relieving an independent signal maintainer (signal maintainer working independently) a signal maintainer assigned to a signal maintenance unit on the territory involved, if available, will be used. If such signal maintainer is not available and relief is necessary, another qualified signal employee will be used. Employees used to relieve an independent signal maintainer will be paid the rate of pay applicable to the independent signal maintainer position while so used.
- (b) In relieving signal or communication foremen, if there is a qualified employee on the force he will be used to relieve the foreman and will be paid the foreman’s rate.

.”

At the time this dispute arose, the Claimant, S.M. Sinke, was assigned as the Lead Signalman for Signal Boring Gang #7XA3, headquartered at Line of Road. He worked an alternate 8/6 schedule regular tour of duty, Tuesday through Tuesday, with rest days Wednesday through Monday. In January 2016, the Claimant bid the Foreman vacancy on Construction Team #7XC5 and was awarded the position. Prior to reporting, however, a senior employee (Morey) exercised seniority and displaced Claimant from the 7XC5 Foreman position. However, the Foreman position required a Commercial Driver’s License (CDL), which Morey did not have and his displacement was declared null and void. However, the Carrier afforded him the opportunity to obtain a CDL. In the interim, the Claimant, who already had a CDL, was sent home Friday, February 5, 2016, from his Lead Signalman position on team #7XA3 and placed temporarily in the 7XC5 Foreman position, to start on the first day of that team’s schedule, February 9,

2016—7XC5 was on the alternate Tuesday to Tuesday schedule to 7XA3. The senior employee successfully obtained his CDL and again exercised his seniority to the 7XC5 position, displacing the Claimant who returned to his Lead Signalman position on 7XA3 on March 1, 2016, sixteen days later.

The Organization filed this claim on April 2, 2016, alleging that the Carrier had violated Rule 221 regarding relief of signal foreman and Rule 203 regarding absorption of overtime when it required him to suspend work in the middle of his workweek. The parties having been unable to resolve the dispute through the normal claims procedure, the matter was appealed to the Board for final and binding adjudication.

According to the Organization, the Carrier should have permitted the Claimant to finish his work week as assigned. This would have resulted in overtime for Claimant when he assumed duties as the Foreman of 7XC5, and the Carrier violated the clear language of Rule 203 when it required him to go home on February 5-8, 2016, in order to avoid paying him overtime. If the Carrier wanted to use the Claimant for the temporary Foreman coverage, it should have allowed him to finish his regularly assigned work period and paid him at the Foreman overtime rate for the hours he worked on his regularly assigned rest days throughout the temporary assignment. The Carrier also violated Rule 221(b): Gang 7XC5 had a qualified Lead Signalman, a Mr. King, who should have been used to fill in for the vacant Foreman position on his Gang, instead of the Claimant. Moreover, it has been the practice in the past to utilize the Gang's Lead Signalman to fill in for the Foreman when he or she is absent or the position is vacant for any reason, and King had filled in for the Foreman in the past. The language of the Rules at issue is clear and unambiguous.

The Carrier responds that its actions were entirely consistent with both Rule 203 and Rule 221. The Claimant was moved into the temporary Foreman's position on Gang 7XC5 because he was a qualified Foreman and the Lead Signalman, contrary to the assertions of the Organization, was not deemed qualified by the Carrier, which has the right to determine employees' qualifications. Rule 203 was not violated because the Claimant was not required to suspend work for the purpose of avoiding overtime. The Carrier suspended his work week after he had earned forty hours in order to provide him with rest days before switching to the alternate 8/6 schedule that Gang 7XC5 was on. It is the Carrier's exclusive prerogative to determine workforce needs and to determine when and under what circumstances supervision is assigned. The Carrier used reasonable business judgment in exercising its managerial rights in this case. It was reasonable to assign the senior qualified bidder for the Foreman position, the Claimant, temporarily while the Carrier afforded the senior employee an opportunity to acquire

a valid CDL—had the senior employee failed in his attempt, Claimant would not have been displaced and would have been permanently awarded the position. Rule 221 is not applicable here. It addresses relief of foremen; it does not govern the filling of permanent or temporary vacancies. Even if it were applicable, the Lead Signalman was not qualified for the position, and the Organization presented no credible evidence to show that he was qualified or held Foreman seniority. His alleged use as a fill-in does not grant him seniority rights as a Foreman nor does it make him qualified for the position.

The record includes an e-mail dated May 12, 2016, from the Regional Construction Engineer to the Carrier's Labor Relations representative, explaining what happened:

“With this situation, we had Mr. Sinke who had bid (and was awarded) the foreman's position on this team. Prior to reporting, Mr. Morey bumped the job at which point, Mr. Sinke continued to work the lead job on 7XA3. Once it was confirmed that Mr. Morey did not possess the qualifications to work the position, his bump was disqualified. Since 7XCS was working opposite schedule from 7XA3, we decided to have Mr. Sinke complete his work day on Friday ensuring he got his 40 hour week in and then return on the following Tuesday to get on the correct cycle. Our intention was not to circumvent the need for overtime or to inconvenience Mr. Sinke. We simply wanted to get him on the correct cycle as soon as possible as we do when teams are converting from a front to back or back to front cycle. Should we have waited and let him complete his existing cycle and then transition into the next cycle, he would have worked 16 consecutive days. This would not be a choice that we would ever make when we had other options. The root of this issue was due to an unwarranted bid by Mr. Morey's team member on his RacfID which we worked with you to have corrected to Mr. Sinke's award, only to have Mr. Morey attempt the above mentioned bump soon after.”

Mr. Sellers' statement is credible and was not disputed by the Organization with any concrete evidence.

Having carefully considered the record, the Board concludes that the Carrier did not violate Rule 203 when it sent the Claimant home on Friday, February 5, 2016, instead of permitting him to complete his normal assigned work schedule of Tuesday to Tuesday. Rule 203 states that “Employees will not be required to suspend work during

assigned working hours *for the purpose of absorbing overtime.*” (Emphasis added.) There is no evidence that the Claimant was sent home early in order to avoid paying him overtime. Signal employees work alternate Tuesday to Tuesday schedules: one group works Tuesday to Tuesday and has Wednesday through Monday off while the second group reports to work on the last Tuesday of the first group’s schedule to begin their Tuesday to Tuesday stint. Sellers’ statement indicated that the Carrier followed its normal practice when employees are switching from one Tuesday to Tuesday schedule to the other: employees are sent home after they have worked forty hours the last week of their old schedule, so that they can report to work rested and ready for their new schedule. That is a reasonable approach and is entirely unrelated to overtime needs or scheduling. As Sellers pointed out, if employees worked their full Tuesday to Tuesday schedule and picked up with the alternate schedule right away without a break, they would be working sixteen days in a row. There is no need for that. Nor is the Carrier required by anything in the Agreement to assign employees to work overtime when there is no need for it.

The Board also concludes that the Carrier did not violate Rule 221. The Claimant bid on and was awarded the Foreman position on Gang 7XC5. This established his qualifications for the position. He was displaced by a senior employee who turned out not to have the requisite qualifications for the position, in that he did not possess a valid CDL. Accordingly, the Carrier rescinded the Claimant’s displacement. Due to the Carrier’s decision to permit the senior employee to obtain a CDL—a managerial decision it had the right to make—the Foreman’s position was vacant at least temporarily and, if the senior employee was unable to get a CDL, possibly permanently. It made sense for the Carrier to place the original successful bidder for the position, the Claimant, into the vacancy temporarily: he was already qualified and, should the senior employee fail to get a CDL, he would already be in the position. It is not necessary for the Board to determine if Rule 221(b) applies only to relief and not to temporary appointments, as the Carrier contends. Under Rule 221(b), the Carrier is required to assign “a qualified employee on the force.” The Carrier has the right to determine employees’ qualifications. It determined that the Lead Signaller on 7XC5, Mr. King, was not qualified, and the Organization did not submit probative evidence that he was, only assertions—which this Board has held repeatedly are not evidence. All things considered, the Carrier did not violate the Agreement when it assigned the Claimant to the temporary vacancy in the Foreman position on Gang #7XC5.

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 16th day of July 2019.