

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44092  
Docket No. MW-42777  
20-3-NRAB-00003-190345**

**The Third Division consisted of the regular members and in addition Referee Jeanne Charles when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(Union Pacific Railroad Company**

**STATEMENT OF CLAIM:**

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

- (1) The Agreement was violated when the Carrier failed to properly bulletin and assign the position of foreman (Employee-in-Charge) of a Loram shoulder/ballast cleaner working on the Kearney Subdivision during April and May 2013 and when it assigned a junior employee thereto instead of Mr. M. Legler who was senior and qualified (System File A-1335U-218/1588500).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Legler shall '\*\*\* be allowed one hundred eighty-six (186) hours of overtime compensation at his respective overtime rate (\$39.85) for the overtime hours worked by the junior temporarily assigned employee between June 2 and June 21, 2013. This equates to seven thousand four hundred twelve dollars and ninety cents (\$7,412.10) (sic). This is compensation the Claimant would have received absent the violation of our Collective Bargaining Agreement.’”**

**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.

A vacant foreman position existed for a Loram Contractor operation. On April 10, 2013, the Carrier assigned local employees to serve as the foreman or Employee-in-Charge (EIC) of a Loram Contractor that was performing the work of shoulder/ballast cleaning on the Kearney Subdivision. The Carrier assigned employee J. Lehmkuhler, who was junior to the Claimant, to perform such work. It is undisputed that the Claimant had greater seniority than that of employee Lehmkuhler. It is also undisputed that the Claimant was qualified to perform the claimed work. The work in question began on April 10, 2013 and continued to June 21, 2013. This claim involves the period from June 2, 2013 to June 21, 2013.

Rule 20(a) provides:

“All new positions or vacancies that are to be filled, including temporary vacancies of thirty (30) calendar days or more duration created by a medical leave of absence of the regular occupant of a position and temporary positions connected thereto, will be bulletined to all employees holding seniority on the district in the class in which the new position is created or vacancy occurs.

New positions will be bulletined as much in advance of their establishment as possible but in no event later than seven (7) calendar days after they are established.

Vacancies, including temporary vacancies as defined above, will be bulletined as promptly as possible but in no event later than seven (7) days after they occur; provided, however, that temporary vacancies, which start out on an indefinite basis, will be bulletined as soon as it is known they will exist for thirty (30) calendar days or more.”

The Organization filed a timely claim on behalf of the Claimant on July 16, 2013 (received July 17, 2013) alleging the Carrier violated Rule 20 of the Agreement when it failed to bulletin the above-referenced vacant foreman position. According to the Organization, this violation infringed upon the Claimant's seniority rights provided by the Agreement.

The Carrier counters that it properly assigned the flagging duties for the Loram Shoulder Cleaner to qualified employees in the area to work as the EIC as part of their regular duties. No vacancy existed. Therefore, no position needed to be bulletined. Additionally, the Carrier argues that flagging is not exclusive to any specific craft or classification within a craft. The Carrier can assign any qualified employee to perform the duties of flagging.

The claim was properly handled by the Organization at all stages of the appeal up to and including the Carrier's highest appellate officer. The matter was not resolved and is now before this Board for resolution.

In reaching its decision, the Board has considered all the testimony, documentary evidence and arguments of the parties, whether specifically addressed herein or not. As the moving party, it is the Organization's responsibility to prove by a preponderance of evidence that the Carrier committed the alleged violation(s). A careful review of the record convinces the Board that, under the circumstances of this case, the Organization has met its burden.

Rule 20(a) is clear. Although the Loram cleaner was only scheduled to remain in the subdivision for twenty-five days, it remained there in excess of sixty days. Based upon the clear language of Rule 20(a), the Carrier knew or should have known that the position would exist for more than thirty days beginning on the thirtieth day and continuing thereafter. This exact matter was recently addressed in Award No. 43429 by Referee Betts. In that case, the Board determined that the Claimant was to be compensated for the difference between his actual overtime earnings during the period at issue and the overtime earnings he would have received had he been assigned the work provided to the junior employees. We see no reason to depart from the Board's view in Award No. 43429. Accordingly, the Claimant shall be compensated for the difference between his actual overtime earnings during the period of June 2 and June 21, 2013, and the overtime earnings he would have received had he been assigned the work provided to the junior employees during the same time period.

**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 11<sup>th</sup> day of August 2020.**