

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39732
Docket No. MW-38425
09-3-NRAB-00003-040382
(04-3-382)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(CP Rail System (former Delaware and Hudson
(Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign Trackmen E. Carr and K. Allard to overtime service (breaking up tie plugs) on June 11, 2003 and instead assigned junior employees P. Delamater and J. Grant (Carrier's Files 8-00372 and 8-00377 DHR).**
- (2) As a consequence of the violation referred to in part (1) above, Claimants E. Carr and K. Allard shall now each be compensated for three and one-half (3.5) hours' pay at their respective time and one-half rates 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 Organization filed the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it assigned System Equipment Operators to perform certain overtime work, instead of the Claimants, who hold seniority as Trackmen.

The Organization initially contends that employees holding seniority and work rights in the Maintenance of Way Department as Trackmen historically and customarily have been used to break apart tie plugs. The Organization asserts that this Division has held that work of the character involved here is reserved to employees holding seniority as Trackmen in accordance with custom and practice in the Scope Rule. The Organization argues that there is no dispute that the claimed work customarily is performed by employees in the Trackman classification, and not the System Equipment Operator classification.

The Organization points to Rule 11.8, which clearly and unambiguously provides that employees, if qualified and available, shall be given preference in seniority order for overtime work of a type that ordinarily and customarily is performed by them. The Organization maintains that there is no dispute that the Claimants ordinarily and customarily performed the type of work at issue, so there should be no doubt that the instant claim must be sustained.

The Organization then emphasizes that the Carrier did not present a valid defense to the instant claim. The Organization contends that the Carrier's so-called "compassion" is no defense of its violation of the parties' Agreement. The Organization asserts that if the Carrier wanted to allow the System Equipment Operators to work, rather than sit idly by, then the Carrier could have assigned them work within their classification. The System Equipment Operator classification does not include breaking apart plug ties as part of its principle duties.

As for the Carrier's reliance on Rule 17, which does contemplate temporary assignments outside an employee's regular assignment, the Organization maintains that the disputed work was not a temporary assignment pursuant to Rule 17. The work at issue was simply overtime, and it is governed by Rule 11. The Organization points out that Rule 11 gives a seniority-based preference to those employees who

ordinarily and customarily perform the work during the course of their workweek. The Organization also maintains that this Division consistently has held that when employees are assigned, working, and enjoying benefits of a higher classification, they are not entitled to the benefit of performing service that contractually accrues to a lower classification.

The Organization further argues that the Carrier failed to present any credible evidence that System Equipment Operators ordinarily and customarily suspend their machine operator duties to break apart tie plugs. The Organization therefore asserts that the Carrier did not present any valid defense to the instant claim. Moreover, because the Carrier did not dispute that the System Equipment Operators spent three and one-half hours of overtime in breaking apart the tie plugs, there can be no doubt that the instant claim must be sustained.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that it is undisputed that the System Equipment Operators in question were not called in to work early on June 11, 2003. The Carrier asserts that on this date, it simply had some compassion for two employees who were hanging around, waiting to go to work, and gave them something to do while they waited so that they would be under pay until their normal workday began. The Carrier insists that it did not seek to take advantage of this situation, and it certainly was not planned. The Carrier points out that had these two employees not arrived early, then no additional plugs would have been prepared until the start of the normal work day, on straight time.

The Carrier asserts that there is nothing in the parties' Agreement that specifically reserves the work of "breaking tie plugs" or "unloading a truck" for Trackmen. No such restrictions exist. The Carrier argues that even if such a restriction did exist, Rule 17.1 allows for the temporary assignment of an employee to different classes of work. The Carrier insists that, at worst, this is all that occurred in the instant disputes.

The Carrier argues that on June 11, 2003, it had called a Foreman and a System Equipment Operator in early to thread new rail in, in preparation of the day's work of installing new rail. The Carrier points out that no Trackmen were

called in early because none were required. Because employees carpool to work, the two System Equipment Operators in question also arrived at work early, although they had not been called to report early. The Carrier asserts that the compassionate supervisor allowed these two employees to unload water from a truck and break tie plugs until their regular shift started. The Carrier asserts that there is no restriction in the parties' Agreement that requires this work to be performed by any class of service, particularly Trackmen.

The Carrier submits that the Organization failed to meet its burden of proving that a Rule violation occurred in this matter. The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization met its burden of proof that the Carrier violated the Agreement when it failed to call and assign the two Claimants to overtime service for the purpose of breaking up tie plugs and instead assigned junior employees to perform that work.

The facts in this case are not in dispute. The Carrier had the junior employees perform work that is normally performed by the Claimants. The Carrier has a "compassion" defense, but that is clearly not a defense to its violation of the Agreement. The two junior employees were System Equipment Operators and not Trackmen; and the work that was at issue was normally performed by Trackmen during the course of their work day.

Rule 11.8 makes it clear that employees, if qualified and available, will be given preference for overtime work ordinarily and customarily performed by them during the course of their workweek or day. That preference must be done in order of seniority.

In the case at hand, the Carrier assigned two junior employees to perform the work instead of the two senior Claimants. The Carrier has not disputed that the System Equipment Operators expended three and one-half hours of overtime breaking apart the tie plugs on the date in question. Consequently, the claim must be sustained in its entirety.

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AWARD

Claim sustained.

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 26th day of June 2009.