

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39733
Docket No. MW-38426
09-3-NRAB-00003-040383
(04-3-383)**

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 called and assigned T. Vanderpool for overtime service (operate the speed swing machine regularly assigned and operated by R. Nichols) to thread in and prepare new rail for installation between CPF 499 and CPF 503 in Delanson, New York on June 12 and 13, 2003, instead of R. Nichols (Carrier’s File 8-00373 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Nichols shall now be compensated for seven (7) hours at his respective 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 Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it assigned an employee other than the Claimant to overtime service that involved operating a speed swing that the Claimant regularly operated.

The Organization initially contends that there is no dispute as to the factual circumstances giving rise to the instant claim. The Organization asserts that both the Claimant and System Equipment Operator (SEO) Vanderpool were assigned as Speed Swing Operators, but the machine operated by Vanderpool was out of service for mechanical repairs on the claim dates. The Organization points out that the Carrier assigned Vanderpool to perform overtime service on the claim dates, during which Vanderpool utilized the speed swing that the Claimant operated on a daily basis in performance of his regular duties.

The Organization argues that the Claimant was available, fully qualified, and willing to perform the subject work. The Organization maintains that the Claimant would have performed the work if the Carrier had afforded him the opportunity to do so. The Organization emphasizes that there is no dispute as to the number of overtime hours worked by Vanderpool.

The Organization asserts that there is no merit to the Carrier's defense that employees are assigned to jobs, and not to equipment. Citing prior Awards, the Organization contends that it is well established that when an employee bids for and is assigned to a regular position, the employee is entitled to all work of that position.

The Organization points out that there is no dispute that the speed swing operated by Vanderpool was out of service for mechanical repairs on the claim dates, and that the Claimant continued to operate the speed swing involved here on a daily basis in connection with his regular assignment. The Organization emphasizes that on each of the claim dates, Vanderpool was called and utilized the

speed swing for three and one-half hours preceding the regular shift, and the Claimant thereafter operated it in connection with his regular assignment.

The Organization argues that based on these facts, when the Carrier determined that the speed swing that the Claimant operated on a daily basis was to be utilized for overtime on the claim dates, the Carrier should have assigned the employee who operated that machine on a daily basis, that is the Claimant. The Organization asserts that there is no relevance to the Carrier's suggestion that under the Organization's theory, a job would have to be rebid if the machine used on that job were to be replaced for any reason. The Carrier's argument relates to a different scenario that does not apply here. The Organization contends that, as prior Awards have held, all work of a regular position accrues to the employee assigned to that position. The Organization insists that because the Claimant was regularly assigned to operate the speed wing utilized for overtime by the Carrier on the claim dates, the overtime should have accrued to the Claimant. The Organization asserts that the Claimant essentially was displaced from his machine when it came to overtime.

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

The Carrier initially contends that there was no Rule violation in connection with the instant matter. The Carrier asserts that there is no dispute that Vanderpool is senior to the Claimant as a SEO. There also is no dispute that the Claimant and Vanderpool ordinarily and customarily worked as SEOs, that they operated speed swings, and that they worked on the same rail gang. In addition, there is no dispute that one of the two speed swings operating on this rail gang was out of service for repair on the claim dates. The Carrier argues that what is in dispute is whether the Carrier was required to call the Claimant, a junior SEO, before Vanderpool, a senior SEO, to operate the speed swing in question.

The Carrier asserts that both the Claimant and Vanderpool were assigned to operate speed swings on this gang, and they did not bid on one particular speed swing. Although the Organization has attempted to argue that the Claimant and Vanderpool were assigned to specific speed swings, the Carrier emphasizes that the

Organization failed to present any factual documentation to support such an allegation. The Carrier points out that if the Organization were correct, then both the Claimant and Vanderpool would have had to bid in and be awarded specific machines, and the Organization would be able to provide a copy of the bid and/or award that would identify the specific speed swing that each employee bid and was awarded. The Carrier insists that the Organization did not provide such documentation because it does not exist; SEO positions are not advertised or awarded in this manner. Instead, they simply are advertised as SEO positions with the location of the work.

The Carrier argues that under the Organization's theory, if a piece of equipment were to become disabled for any reason, and a replacement was brought in, then that job would have to be abolished and re-advertised. The Carrier contends that no such restriction currently exists in the Agreement.

The Carrier insists that Rule 11.8 is the controlling Rule in connection with this matter. It contends that the senior Speed Swing Operator, that is Vanderpool, ordinarily and customarily performed such work. Vanderpool was called to work the overtime in question, in full compliance with the parties' Agreement. The Carrier points out that even if both speed swings had been in service, only the senior SEO (Vanderpool) would have been called for the overtime.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it assigned T. Vanderpool for overtime service instead of R. Nichols. Therefore, the claim must be denied.

The record reveals that Vanderpool was the senior Operator as between he and the Claimant. Although the speed swing that was regularly operated by Nichols was the one that Vanderpool operated on the date in question, it is clear that Nichols was assigned to the job and not to a particular machine. Both the Claimant and Vanderpool were assigned to operate speed swings on the gang and they did not bid

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on one particular speed swing or another. The Carrier assigned the more senior person for the overtime in question. That senior SEO was Vanderpool. The Carrier followed the requirements of the Agreement in its assignment.

For all of the above reasons, the claim must be denied.

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 26th day of June 2009.