

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39888
Docket No. MW-39058
09-3-NRAB-00003-050493
(05-3-493)

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 Employees Division –
(IBT Rail Conference
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and 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 call and assign Machine Operator E. Juneau to perform machine operator overtime service (operate ballast regulator) at Muskego Yard, Milwaukee, Wisconsin on September 11 and 12, 2003 and instead called and assigned junior employee R. Rojas (System File C-39-03-C060-11/8-00219-116 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. Juneau shall now be compensated for fourteen (14) hours at his respective time and one-half time 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 a junior employee, instead of the Claimant, to perform certain Machine Operator overtime work.

The Organization initially contends that there is no dispute as to the Claimant's superior seniority as a Group 2 Machine Operator. The Organization asserts that this dispute therefore turns on the Carrier's four basic defenses to the instant claim.

The Organization points out that in its initial denial, the Carrier alleged that the subject work was emergency service and that the junior employee somehow was better qualified than the Claimant. Nearly 21 months later, the Carrier asserted that the junior employee was the regular employee to be considered for the overtime because he had been assigned to operate the ballast regulator during the workweek, and that the Claimant expressed no desire to work the overtime. The Organization argues that the Claimant was the proper employee to be assigned the overtime service, and the Carrier's affirmative defenses are without merit.

Citing Rules 1 through 5 and a number of prior Awards, the Organization maintains that there can be no question but that the Carrier violated the Agreement when it assigned a junior employee to perform the subject overtime service without making any attempt to call and offer said work to the Claimant.

The Organization insists that the Carrier failed to come forward with any evidence to support its affirmative defense that this was emergency work. The Organization emphasizes that numerous prior Awards have held that a party

asserting an alleged emergency must submit proof thereof, and mere assertions are not acceptable substitutes for such proof. The Organization points out that even if it assumed that an emergency did exist, the Carrier failed to call the Claimant and assign him to perform the work. As prior Awards have held, the Carrier must make a reasonable effort to call and use the employees stipulated by the Agreement, even in an emergency situation.

Turning to the Carrier's assertion that the junior employee was the most qualified, the Organization contends that there is no provision in the Agreement that permits the Carrier to select employees for overtime work based on the arbitrary determination of whom is better qualified. Moreover, the Carrier has not presented any evidence that the Claimant was not qualified to perform the work in question. Pointing to prior Awards, the Organization insists that the senior employee need not be the most qualified person for the work; his ability need only be sufficient for the purpose. The Organization maintains that seniority is the basis for making assignment such as the one at issue in this dispute.

With regard to the Carrier's allegation that the junior employee was entitled to the overtime because he was the regular employee who had performed such work during the workweek, the Organization contends that the Carrier raised this argument for the first time nearly two years after the violation occurred, and the Carrier presented no probative evidence to support this assertion. The Organization emphasizes that the Claimant was assigned by bulletin to a Machine Operator position with Production Crew No. 6, while the junior employee was assigned as a Machine Operator to Production Crew No. 6 on the dates of September 8 through 11, 2003. In addition, there is no dispute that the Claimant was the more senior employee. Even if the junior employee had been temporarily assigned to operate the ballast regulator, and there is no evidence of such an assignment, the Organization insists that such a temporary assignment would not give the junior employee preference to the overtime work.

Turning to the Carrier's assertion that the Claimant made no request to perform the disputed work, the Organization contends that this presumes that the Claimant was aware that the Carrier would require a Machine Operator to perform the overtime work at issue. The Organization points out that the record indicates

that the Carrier notified only the junior employee of the overtime work. The Organization additionally asserts that the Claimant's right to the overtime work was established in accordance with the Agreement's seniority provisions, and the Carrier is obligated to make assignments with respect to seniority.

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

The Carrier initially contends that the Agreement does not require it to "call" in the manner suggested by the Organization. It asserts that there is no evidence that the Claimant operated the ballast regulator during the normal working hours of the preceding week.

The Carrier argues that during the week leading up to the overtime at issue, the Claimant was not assigned to, nor did he operate, the ballast regulator. The Carrier submits that if the Claimant did not operate the ballast regulator, then the junior employee obviously did. The Carrier emphasizes that under Rule 23(K) the junior employee was the "regular employee" for purposes of the work to be performed on an unassigned day. There is no evidence of the Claimant operating the ballast regulator during normal working hours, while the junior employee operated this equipment during the week prior to the overtime in question.

The Carrier then points out that there is no evidence that the Claimant desired to perform the overtime work in question or that he was available to do so. The Carrier emphasizes that under Rule 8(c) positions of less than 30 days, such as the instant position, can be filled without bulletining, and that senior employees upon request will be given preference. The Carrier insists that there is no evidence of such a request from the Claimant, while the junior employee did make such a request.

The Carrier additionally contends that emergency work may be performed without regard to seniority. The Carrier argues that the record shows that walkways were unsafe, and forces were refusing to walk the tracks. The Carrier asserts that such a refusal would result in the entire yard being "shut down" with no train operating in or out until the condition was corrected.

The Carrier goes on to address the Organization's assertion that the Carrier failed to contact the Claimant for the overtime work. The Carrier insists that the Organization failed to cite any Agreement provision that requires the Carrier to contact the Claimant in the manner suggested.

The Carrier asserts that the employee performing the work during the regular workweek is entitled to perform the same work on overtime. The Carrier emphasizes that the junior employee therefore was entitled to the overtime in question, not the Claimant. The Carrier argues that because the Claimant made no proper application for the position, the Carrier was within its rights under Rule 8(c) to place the junior employee on the ballast regulator.

The Carrier contends that the junior employee requested the position, and the Claimant did not. The Carrier points out that the Claimant certainly could have requested the vacant position, but he did not do so. The Carrier argues that the Claimant obviously had no intention of working the ballast regulator, but he then purported to express a desire to operate the ballast regulator when overtime work was to be performed. During the week prior to the overtime work in question, the junior employee was temporarily assigned to operate the ballast regulator, in accordance with Rule 8(c) so he, therefore, was the "regular employee" in connection with this work. The Carrier insists that it could find no evidence of the Claimant ever operating a ballast regulator. Moreover, the Organization failed to submit any evidence that the Claimant had performed such work.

The Carrier argues that the Organization has not established that the Carrier's failure to assign the Claimant to this position resulted in a clear abuse of managerial discretion.

The Carrier asserts that the Claimant suffered no loss in connection with this matter. The Claimant was fully employed. The Carrier additionally submits that there is no provision in the Agreement that allows for penalty pay.

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. Therefore, the claim must be denied.

The record reveals that the individual who was asked to perform the overtime on the date in question (although the junior employee) had been performing the work and operating that machine on regular basis. The Carrier has shown that the person who was used on the overtime in question had been operating that ballast regulator all day long. This was not planned overtime, and the Claimant could not show that he had been operating the ballast regulator during the week in question. The Claimant had an opportunity to request the full-time position, but failed to do so. Because R. Rojas was the regular employee assigned to the position, the Carrier simply had him perform the overtime work on the days in question. The Board cannot find that the Carrier acted in violation of the Agreement. Therefore, the claim is 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 31st day of July 2009.