

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24240  
Docket Number MW-23827

Carlton R. Sickles, Referee

PARTIES TO DISPUTE: { **Brotherhood** of Maintenance of Way Employes  
(Southern Pacific Transportation Company (**T&L** Lines))

STATEMENT OF CLAIM: "Claim of the System **Committee** of the Brotherhood that:

(1) The Carrier violated the Agreement when it **asssinged** junior Extra Gang Laborer Manuel **Cedillo** to perform overtime service on October **13, 14** and 24, 1979 instead of calling and using Extra Gang Laborer L. **Z. McQueien** who was senior, available and willing to perform that service (System File **MW-80-11**).

(2) Extra Gang Laborer L. **Z. McQueien** shall be allowed thirty-one (**31**) hours of pay at his time and one-half rate and seven and one-half rate and seven and one-half (**7-1/2**) hours of pay at his double time rate because of the aforesaid violation."

OPINION OF BOARD: We are concerned here with the applicability of the seniority provisions of the Agreement in effect. There appears to be no dispute **between** the parties that, **under** ordinary circumstances, the applicable rules would have required the Claimant to be awarded the **overtime** in question. The issue is whether the Carrier was justified in not using the incumbent, but rather using an **employe** with lesser seniority. It alleges to have so done because of the age and physical condition of the **Claimant** as well as the inconvenience, in one instance, because of the location of the *Claimant* away from the location of the work to be performed.

The **Carrier** alleges that the age of the **Claimant**, sixty-three, and his medical history, which included two injuries to his back, and **their** concern of **possible** damage to his legs was the cause for not having given him the assignment in question. The allegation is that the assignment of working on a rail-grinding train involves the necessity of jumping up and down incessantly which would possibly be injurious to the Claimant. The decision of the Carrier was based **upon** the day-to-day observance of the Claimant in the performance of his **normal** duties.

In a separate instance, the rationale of the Carrier was that the **Claimant** was not trained to be a welder's helper, and the need for the overtime was at a position away from the location of the **Claimant** which would have necessitated extended travel back and forth which would have delayed the entire process.

At issue then is whether there are extenuating circumstances which would authorize the Carrier to ignore the clear language of the seniority provisions in the Agreement and, if so, whether these alleged factors are sufficient. A **complete** review of the factual situation indicates to this **Board** that, in this instance, there is not sufficient factual basis for ignoring the

language of the Agreement for the reasons that the **Claimant** was not as spry as the person who was utilized for the jobs. The medical evidence does not **in** itself establish that the Claimant was not adequate to perform the job properly. By its very nature, a seniority provision **will give preference** to those **persons** who are older and recognizes that the aging process may indeed take some toll on the vigor of the individual and such provisions are designed, in part, to prevent such persons **from** being affected negatively. **This** is not to say that, **under** some circumstances, it may be abundantly clear and established by clear evidence that a parson, because of his age, may not **be** equipped to perform some functions. **However**, the Board does **not** feel that this has been established **on** this record.

The Board feels, **in analyzing** the work performed as a helper to the track welder, the Carrier may have been justified, under the **circumstances**, to **use** a **person** other than the Claimant who was not readily available to perform the overtime. Co the basis of the need for the **Claimant** to be available, it is reasonable under the **circumstances** that the Carrier would use the helper who **was** indeed available and working at the **time**. A review of the record does not show that the **Organization overcame** the **presumption** that the **assignment** of the person other than the **Claimant** **was** not clearly based upon the lack of availability of the **Claimant** at the **time** and place and, therefore, justified. For these **reasons**, the Board will allow the claim of the Claimant for the **reimbursement** of the wages lost **on** the first two days **involved** at the **straight-time** rate and will deny the claim for the **third** day.

**FINDINGS:** The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

**That** the Carrier and the Employees involved **in** this dispute are respectively Carrier and **Employees** within the **meaning** of the Railway Labor Act. as approved **June 21. 1934**;

**That** this **Division** of the **Adjustment** Board has jurisdiction over the dispute involved herein; end

**That** the **Agreement** was violated.

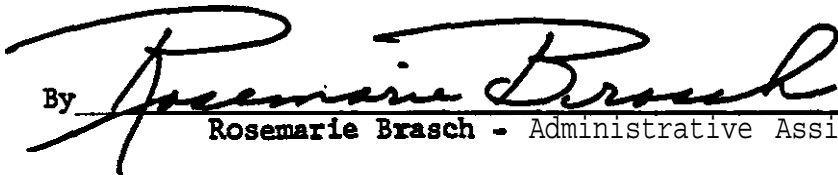
A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: **Acting** Executive Secretary  
National Railroad Adjustment Board

By



Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of March 1983.