

The Third Division consisted of the regular members and in addition Referee Robert W. McAllister when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Duluth, Missabe and Iron Range Railway Company

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

(1) The Agreement was violated when the Carrier assigned junior employe J. Herendeen instead of Mr. R. Tuomi to perform overtime work at Steelton on August 1, 1987 (System File 26-87).

(2) As a consequence of the aforesaid violation, Mr. R. Tuomi shall be allowed eight (8) hours of pay at the B-Machine Operator's time and one-half rate."

FINDINGS:

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

The carrier or carriers and the employe or employees involved in this dispute are respectively carrier and employees 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 waived right of appearance at hearing thereon.

On Saturday, August 1, 1987, the Carrier found it necessary to perform overtime work at Steelton, Minnesota. This work consisted of operating a track-liner, a Class "B" machine. The overtime work was offered to all qualified employees at Steelton, but they declined. The Carrier then called Trackman Herendeen, who was employed at Proctor, Minnesota, and held seniority as a Class "B" machine operator. Herendeen accepted the work at Steelton and was compensated for eight (8) hours at the overtime rate. The Claimant, who is also employed as a Trackman at Proctor, is senior to Herendeen as a Class "B" machine operator, but was not called for this service. The Claim has been made on his behalf for eight (8) hours pay at the overtime rate.

While the Carrier explains why Herendeen may have been called for the service, it does not contend that he was the appropriate employee to be used. Rather, the Carrier asserts it should have directed the junior employee at Steelton to work. It relies upon Rule 20(b), which governs overtime and reads as follows:

"All other overtime will be given to the senior qualified available employee working in the classification at the headquarters point where the overtime is to be performed. At the Duluth Ore Docks, the ore docks and the storage facility will be considered separate headquarters points.

Exception: Machine operators, assigned by bulletin to specific machines utilized in track department operations, shall be entitled to the overtime connected with the operation of such machine.

Note: In the application of paragraph (b), a senior employee may waive his right to overtime providing a junior qualified employee working in the classification at the headquarters point is available to work such overtime. In the event it is necessary to force an employee to work overtime, the most junior qualified employee in the classification at the headquarters point will be required to work such overtime."

Based on this Rule, the Carrier asserts the proper Claimant in this case is the junior employee at Steelton, who should have been forced to work overtime. The fault in this logic is that this employee declined to work. Although the Carrier contends the junior Steelton employee could have (and should have) been forced to work, he no longer had a right to claim the work after refusing it. This would seem to create a situation where the Carrier might be free to call any employee with impunity. The Agreement appears to be silent with respect to whom should be called for overtime if nobody is available at the point.

In the absence of a specific Rule governing the calling of employees for overtime under these circumstances, we must look to the Agreement for a general Rule. Rule 2, the Seniority Rule, contains the following provisions:

"(b) Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company as herein-after provided."

While the Carrier argues the above Rule is not applicable because there was no position involved, we find the term "position" to be broad enough to encompass this type of service. The term is not limited to positions that are subject to bulletin. Further, Rule 4(c) dictates the manner of filling positions and vacancies which are not subject to bulletin. The Rule reads as follows:

"Positions or vacancies of thirty (30) calendar days or less will be filled in the following order:

- 1) Bulletined relief position if established.
- 2) Senior qualified employee from the head-quarter point where the temporary position or vacancy occurs.
- 3) Senior qualified employee holding seniority in the classification."

In accordance with the third step of Rule 4(c), the Claimant, as the senior qualified employee should have been called for the overtime service in lieu of the junior employee. There is no evidence the Claimant was unavailable for service on this date.

The Carrier next argues the Claimant should not be compensated at the overtime rate as he performed no service. The Organization responds that the Claimant should be made whole by being paid what he would have received had he worked. Both parties cited numerous Awards in support of their respective positions.

We addressed this issue extensively in Third Division Award 26508. Relying upon Third Division Awards 21767 and 25601, we concluded that payment at the time and one-half rate was appropriate. Since then, Third Division Award 27707, involving the parties herein, held:

"We have reviewed the more recent decisions of the Third Division in this regard, and find that they continue to reach opposite results. However, in the view of this Board, the positions espoused in Third Division Awards 25601 and 27335 should be controlling and, therefore, we will sustain the Claim."

Finding the Agreement was violated, we will sustain the Claim.

A W A R D

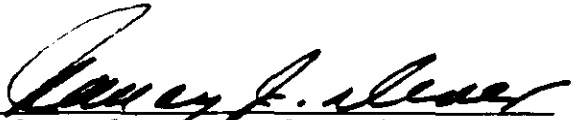
Claim sustained.

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Award No. 28687
Docket No. MW-28568
91-3-88-3-438

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1991.