NATIONAL RAILROAD ADJUSTMENT BOARD
Form 1 THIRD DIVISION Award No. 30078
Docket No. MW-30046
94-3-91-3-455

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(Terminal Railroad Association of St. Louis

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

(1) The Agreement was violated when, on June 27, 28 and 29, 1990, the Carrier assigned junior System Machine Operator L. B. Crouch instead of senior System Machine Operator J. West to work overtime moving rail with a burro crane on the McArthur Bridge and at 2nd Street in East St. Louis, Illinois (System File 1990-14/013-293-15).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. West shall be allowed seventeen and one-half (17 1/2) hours' pay at his 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 employes involved in this dispute are respectively carrier and employe 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.

The issue to be decided in this case is whether the Carrier violated the Agreement when it assigned a junior System Machine Operator in lieu of Claimant, to work overtime on June 27, 28 and 29, 1990.

When this dispute arose, Claimant and the junior employee were working in the general vicinity of St. Louis, Missouri, and East St. Louis, Illinois, with a regular work week of 7:30 a.m. to 4:00

p.m. Monday through Friday. Both individuals were qualified to operate and assignable to any of several large machines. However, by choice, Claimant regularly and customarily operated a "Swingmaster" and the junior employee regularly and customarily operated a "Burro Crane."

During June 1990, the Carrier experienced several derailments necessitating numerous emergency repairs. Carrier stated that it knew overtime would be necessary and, after discussing the situation with the Organization's General Chairman, asked each Large Machine Operator if they desired to switch to another large machine or stay with their "usual equipment." Carrier asserted throughout handling on the property that Claimant "declined the offer and made no request to move or operate any other large machine." Claimant and the Organization did not refute that fact until the final appeal letter when it was submitted that Carrier did not raise the "switch offer" until after Claimant filed his claim.

On June 27, 28 and 29, 1990, the junior employee operated his "usual" machine, the Burro Crane, and the Claimant operated the Swingmaster, his "usual" machine. During this time period, in addition to his regular shift work on the Burro Crane, the junior employee worked 17 1/2 hours of overtime on the Burro Crane. It is not refuted that Claimant worked the regular hours associated with the Swingmaster on those dates and overtime on the Swingmaster on other dates, but apparently the Swingmaster was not used on overtime on the claim dates.

On July 19, 1990 the Organization filed a claim for:

> "... all pay Mr. West lost due to the Carrier violating Rule 3-Seniority, Rule 7-Seniority Limits, and Rule 31-Overtime, when Carrier allowed a less senior employee, Mr. L. B. Crouch, also a large machine operator of the T.R.R.A. track department, to work on June 27, 1990 from the hours of 5:00 a.m. to 7:00 p.m. On June 28, 1990 from 5:00 a.m. to 8:30 p.m., and on June 29, 1990 from 5:00 a.m. to 6:30 p.m. On the above dates Mr. West was not allowed to start early, but did work his regular hours 7:30 a.m. to 4:00 p.m. on each day. If the Carrier would have allowed his seniority rights in which would have allowed him this overtime he would have received 5 1/2 hours at time and one-half on 6-27-90, 7 hours at time and one half on 6-28-90 and 5 hours at time and one half on 6-29-90."

Carrier denied the claim stating that:

> "Mr. West did not request to trade machines with Mr. Crouch; therefore, on the dates claimed, Mr. Crouch stayed with his usual machine, as did Mr. West; and on this date, the burro crane worked the overtime. On other dates, the swingmaster worked the overtime and the crane did not. All of these arrangements were discussed with you at the time. It would be wholly impractical to transport Mr. West to the burro crane to operate it from 5:00 a.m. to 7:30 a.m., change out with Mr. Crouch from 7:00 a.m. to 4:00 p.m., change out again from 4:00 p.m. to 7:00 p.m., just to collect the overtime without swapping machines. This claim has no merit and is denied."

Further correspondence failed to resolve the dispute which is now properly before this Board for adjudication.

According to the record, the junior employee was working his normally assigned position, operating his "usual machinery" on the dates at issue. Claimant was also working his normally assigned position, and operating his "usual machinery" on those dates. The overtime rule in question, Rule 31 reads, in pertinent part, as follows:

"RULE 31
OVERTIME

(a) Time worked preceding or following and continuous with a regularly assigned eight-hour work period shall be computed on actual minute basis and paid for at time and one-half rates, with double time computed on actual minute basis after sixteen continuous hours of work in any twenty-four hour period computed from starting time of the employe's regular shift. . .

* * * *

(g) Overtime work required following and continuing with the regular eight (8) hour work period shall be performed by

the necessary senior employes working on the job."

In the circumstances presented on this record, we are persuaded that Carrier complied with the letter and spirit of Rule 31 (g) by assigning the overtime to the necessary senior employee "on the job", i.e. to the regular employee on the Burro Crane. But for Claimant's election to work the regular and overtime hours on his own "regular" machine, the Swingmaster, he could have been the employee "on the job" for purposes of overtime hours on the Burro Crane. This interpretation of Rule 31 (g) is consistent with prior awards of this Board under similar provisions. See Third Division Awards 29624, 29551, 29435.

As the charging party in this dispute, the Organization has the burden of proving, by substantial evidence, that the Carrier violated the Agreement. There is not a shred of evidence that the Carrier intentionally deprived the Claimant of the opportunity to work overtime hours on June 27, 28 and 29, 1990. In that connection, Carrier made a proper and timely objection to the Organization's de novo introduction of intra-union documents. As this Board has established in a myriad of decisions, de novo evidence is not accepted, nor is it considered.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 15th day of March 1994.