

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 30774
Docket No. MW-29999
95-3-91-3-396

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former
(Louisville and Nashville Railroad Company)

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

(1) The Agreement was violated when, on May 6, 1990, the Carrier allowed junior employees G. Grimes, T. B. Smith and N. H. Brown to continue to work overtime on a derailment at Mile Post 16.4 on the Memphis Line, Nashville Seniority District, while requiring Claimant D. W. England to be relieved from his assigned duties (System File 11(15)(90)/123(90-713) LNR).

(2) As a consequence of the violation referred to in Part (1) above, the Claimant shall be allowed eight and one-half (8.5) hours' pay at his respective double time rate of pay and the difference between time and one-half and double time for five (5) hours at his respective 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 waived right of appearance at hearing thereon.

Claimant was relieved from his regularly assigned duty on May 6, 1990 at 9:00 A.M. after working 26 hours at a derailment site at Mile Post 16.4 on the Memphis Line, Nashville Seniority District. Three employees junior to Claimant who had worked the same amount of time as Claimant were retained. Claimant was called back at 5:30 P.M. and worked until 10:30 P.M.

The Organization argues that releasing Claimant while retaining the junior employees violated the overtime provisions of Rules 30(f) and (g) of the Agreement. The Carrier argues that Claimant was relieved after a determination was made that Claimant was too tired to safely work.

This case is resolved on examination of the parties' respective burdens and the specific factual showings made to support those burdens.

It is undisputed that, although regularly assigned, Claimant was relieved from duty while the junior employees were permitted to continue working. That fact serves as a prima facie demonstration of a violation of Rule 30(f) ("The senior available men shall be given preference in the assignment of overtime work") and Rule 30(g) ("Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have 40 hours of work that week; in all other cases by the regular employee."). The showing that employees junior to Claimant were allowed to work over Claimant shifts the burden to the Carrier to rebut the Organization's prima facie showing of the Rules violation.

In its response of July 6, 1990, the Carrier asserts that "It was determined by Mr. Zenisek, Assistant Division Engineer, that Mr. England was too tired to safely work and he was relieved to allow him to get some rest before he injured himself or someone else." In its further response of October 18, 1990, the Carrier states "The determination by a claimant's supervisor that he was in need of rest due to the extended hours worked by him was made in the interest of safety, not only to the claimant himself, but to those who worked around claimant."

The Carrier thus argues that its determination to relieve Claimant was part of its managerial prerogatives to determine the fitness and ability of its employees for work. We obviously agree with the Carrier's assertion that it is for the Carrier to determine the fitness and ability of the employees, particularly in a case like this. However, this case is determined by the type of evidentiary proof that is before us.

Because the Carrier raises the fitness and ability argument as a defense to the allegation that it circumvented the seniority provisions of the overtime Rules, and because the undisputed facts show that junior employees were retained while Claimant was relieved, the shifted burden here is now on the Carrier to demonstrate that Claimant was, in fact, unfit. It has not sufficiently done so.

First, the Carrier asserts that Claimant was unfit because he worked 26 straight hours. But the record shows that the junior employees who were retained also worked similar hours.

Second, and most importantly, while there are general assertions by Carrier officials as to the reason Claimant was relieved, there is no evidence in this record directly from the supervisor who made the decision to relieve Claimant (Zenisek) to explain why Claimant was relieved but yet employees junior to Claimant who worked similar hours were retained. What specifically was it that distinguished Claimant from the other employees to require that Claimant be relieved and the others retained? That question has not been factually answered by this record.

We therefore find that the Carrier did not offer sufficient proof to meet its shifted burden. The claim will therefore be sustained.

In terms of a remedy, in order to make Claimant whole, Claimant shall be additionally compensated for the greatest number of hours worked by any of the junior employees who were allowed to continue working beyond the time Claimant was relieved on May 6, 1990 (9:00 A.M.). This additional payment shall be at the applicable overtime rate and further in accord with the Rules of the Agreement. Therefore, for example, if Grimes and Smith were relieved at 10:00 A.M. and Brown was relieved at 1:00 P.M., Claimant would receive an additional four hours pay at the applicable overtime rate along with any additional compensation that may be provided for by the Agreement taking into account the hours worked by Claimant on the claim date.

AWARD

Claim sustained in accordance with the Findings.

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O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 6th day of April 1995.