

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31264
Docket No. MW-30931
95-3-92-3-736

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

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

- (1) The Agreement was violated when the Carrier assigned Mr. K. L. Wunder to perform rest day service on the Columbia Subdivision instead of calling and assigning Mr. J. R. Blackwell to perform the overtime work on May 4 and 5, 1991 (System Docket MW-2093).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. R. Blackwell shall be allowed sixteen (16) hours' pay at his respective time and one-half 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.

The Organization asserts in its initial Claim of May 20, 1991, that the Carrier violated Rule 17. Although additional Rules were subsequently amended at the final appeal on property, the Board holds that the proper dispute herein before us is that of overtime allocation.

In the facts at bar there is no dispute on the following. The Claimant worked his tour of duty Monday through Friday on the Columbia Subdivision. On Saturday May 4 and Sunday May 5, 1991, the Carrier found it necessary to call an employee to work overtime. There is no dispute in the on-property record over the fact that the Carrier did not consider the Claimant available for the overtime and called instead a junior employee.

The Organization alleges that the work performed was "ordinarily and customarily" performed by the Claimant. Rule 17 governs the allocation of overtime stating:

"Employees will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them during the course of their work week or day in order of their seniority."

As the Claimant was the senior qualified employee who performed this work during the week, he had preference over a junior employee. The Organization argues that the Carrier clearly violated the Rule.

The Carrier's defense is that the Claimant had bid on a Welder Foreman's position headquartered in Harrisburg, Pennsylvania. The Carrier maintains that the Claimant had been released at the end of his tour of duty on May 3, 1991, and therefore was not available for the overtime.

This Board, after discounting the numerous issues and argument inappropriately raised by both parties after this case was appealed, has focused on the central issue of preference to overtime. The Organization asserts that the Claimant had overtime preference in that unilateral "release" by the Carrier on May 3, 1991, cannot be issued. The Organization's arguments that the Claimant held the position until the effective date of the newly awarded position (May 6, 1991) are without proof. On this scant record, the Claim must fail. Central to our conclusion is the Carrier's statement of December 26, 1991, that:

"Our investigation has determined that it is the standard practice on the Harrisburg Division to release an individual at the end of his last scheduled tour of duty prior to starting a new assignment. You have been unable to show anything to the contrary."

In the following nine months prior to appeal to this Board, this assertion was not rebutted. Unrebutted assertions stand as fact. While clear contract language must prevail, this record does not contain sufficient evidence for the Board to determine clear applicability by seniority and assignment of Rule 17 to these instant circumstances. The Board must deny the Claim.

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 1st day of November 1995.