

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 31563  
Docket No. MW-31157  
96-3-93-3-189**

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

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

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

(1) The Agreement was violated when the Carrier assigned junior employe L. E. Morris to perform overtime work (plating, spiking and tamping timbers) at Bay View South End on October 25, 1991 (System Docket MW-2382).

(2) As a consequence of the violation referred to in Part (1) above, Claimant O. S. Lewis shall receive pay for the total number of man-hours expended by the junior employe in the performance of the overtime service at his respective trackman's 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 assigned as a Trackman on Surfacing Gang SC-231 with a work-week of four ten-hour days Monday through Thursday. Claimant had bid on and was

assigned a Welder's position beginning Monday, October 28, 1991. Overtime work was performed by a Trackman from Gang SC-231 on Friday, October 25, 1991. There is no dispute the Trackman used was junior to the Claimant.

The Organization argues the Carrier violated Rule 17 of the Agreement when it assigned the junior Trackman the overtime work. Rule 17 reads as follows:

**"RULE 17 - PREFERENCE FOR OVERTIME WORK**

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 the order of their seniority."

It avers that Claimant was still a member of Gang SC-231 until the rest days of the workweek were over.

The Carrier takes the position that the Claimant was released from the group at the completion of the last work day of the week, October 24, 1991.

The Organization has the burden to prove the Agreement has been violated. While it cites several Awards, none of them deal with the same circumstances as this case. It also fails to cite any practice on the Carrier dealing with other similar cases.

The Carrier cites Third Division Award 31264 resolving a similar dispute between the same parties. In that case the Board held:

"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 25th day of July 1996.