

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35601
Docket No. MW-33255
01-3-96-3-725

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

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(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. Wilson to perform overtime service on the Philadelphia Production Zone between Morrisville, New Jersey and Allentown, Pennsylvania on November 17, 18 and 19, 1994 and on the Philadelphia Production Zone between Port Reading and Portside, New Jersey on December 2, 3 and 4, 1994, instead of calling and assigning senior employe B. R. Kudel (System Docket MW-3878).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. R. Kudel shall be allowed fifty-nine (59) hours' pay at the vehicle 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 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 were given due notice of hearing thereon.

Although the dispute as stated above involves six separate dates on which overtime service is being claimed, the Carrier submits that, as discussed on the property, the Claimant and the named junior employee (L. E. Wilson) both received compensation for one of the dates listed, namely, November 17, 1994. In this respect, the record shows that the Organization responded to this Carrier assertion on July 28, 1995 in the following manner: "If that was the situation, we shall subtract nine (9) hours from the total hours due Mr. Kudel. Resulting in total of fifty (50) hours at overtime due Mr. Kudel."

There is no question that both the Claimant and junior employee Wilson hold seniority in the Track Department on the Philadelphia Seniority District as Vehicle Operators, with the Claimant having a more senior date of April 2, 1985, and Wilson having a date of December 18, 1985. It is also undisputed that although both the Claimant and Wilson work in different track gangs that both gangs were headquartered at Elizabeth, New Jersey, during the time mentioned in the claim.

The Claimant and Wilson each hold a position that works ten hours per day on four consecutive days, with Friday, Saturday and Sunday as rest days. The overtime work here at issue occurred on the rest days of their assignments.

Basically, the Claimant maintains that as the senior vehicle operator that he should have been called for overtime work on the five days at issue instead of the Carrier utilizing the services of Wilson.

The Carrier defends its utilization of Wilson as having been proper under the terms of Rule 17 of the Agreement, which states in pertinent part:

"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."

The Carrier says given the fact that Rule 17 provides that preference for overtime work will be given to employees who ordinarily and customarily perform the work in need of an overtime service during their workweek, that because the work to be

performed on the rest days was not unlike that which Wilson was assigned at the time to perform with a log loader, that he was therefore entitled to perform the overtime work notwithstanding the fact that he was junior in seniority to the Claimant. Conversely, the Carrier says that because the Claimant, at that same time, was regularly assigned to operate a hi-rail vehicle, as opposed to a log loader, that he did not have a preferential seniority right to be called for the work at issue.

The Organization disputes the Carrier contention, urging that Rule 17 was violated when the Carrier failed to give preference to the Claimant as the more senior, qualified, and available Vehicle Operator of the two employees on the Philadelphia Seniority District roster.

In consideration of argument on this issue of qualifications, the Board finds noteworthy that during the handling of the claim on the property that the Carrier sought to defend its use of Wilson in a contention that he was assigned to a hi-rail log loader that required a Class "A" license. However, the Carrier is not shown to have denied rebuttal argument made on the property that the Claimant "also had the required CDL license; if not, he would never received the bid position to operate such a vehicle." In this same connection, the record shows that the Organization had, at the same time, placed into evidence copy of the Claimant's Maintenance of Way Department Form 200A Machine Operator certification card in support of its position that the Claimant is a qualified operator of both log loaders and rail/highway trucks.

The Board also finds it significant that a work history exhibit introduced to the Board by the Carrier as part of its Submission to show current positions held by both the Claimant and Wilson, reveals the Claimant to have previously held a position that was listed as a "VO Log Loader (Class 'A' License)." The Claimant held that position from April 4 through December 15, 1994, and thereafter held another VO Log Loader position from December 19, 1994 to April 2, 1995.

In this latter regard, the Carrier argues to the Board that although the Claimant may have been qualified to operate the hi-rail log loader that he normally operated an off-track log loader during his workweek and that it did, therefore, have the right to utilize Wilson because, at the time, he normally operated the hi-rail log loader. The Board finds no merit in this and the other arguments of the Carrier.

In light of the above considerations and overall study of the record, the Board finds that the Claimant and the Organization on his behalf have met a necessary burden of proof to establish that the Claimant was contractually entitled by virtue or his superior seniority to have been called for the rest day overtime work at issue.

As concerns the remedy for the violation, the Carrier says that should the claim be sustained, compensation should be limited to payment at the straight time rate of pay because the Claimant performed no work whatsoever on the dates of claim. On the other hand, the Organization maintains that the Claimant is entitled to compensation on the basis of the loss of the opportunity to have worked at the overtime rate of pay. Both parties submitted Awards involving this subject matter.

In consideration of argument on this issue, the Board finds it proper to follow the better-reasoned Awards that have held that an employee is entitled to that loss of compensation that he or she sustained as a result of not having been properly called for overtime work. The Board will, therefore, hold that the Claimant be compensated for the 50 hours of work that he would have earned at the time and one-half rate of pay had he been properly called for the rest day overtime work at issue.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 24th day of July, 2001.