

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35741  
Docket No. MW-35234  
01-3-99-3-86**

**The Third Division consisted of the regular members and in addition Referee Ann S. Kenis 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 D. M. Foley, instead of calling and assigning senior employe R. Goosby to perform overtime service on July 19, 1997 (System Docket MW-5043).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Goosby shall be compensated for ten (10) hours pay at his respective machine 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.**

On July 31, 1997, the Organization filed the instant claim on behalf of Claimant Goosby. The claim alleged that, on July 19, 1997, the Carrier assigned D. M. Foley, an employee junior to the Claimant, to perform overtime work which involved the greasing of certain equipment headquartered at Bridgewater, Pennsylvania. The Organization contended that Foley, who worked the overtime with his brother, a Repairman, was junior to the Claimant and was not entitled to the overtime under the provisions of Rule 17 which provides:

**"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."**

The Organization contends that both the Claimant and employee Foley ordinarily and customarily perform work as Machine Operators. All other things being equal, the Claimant's seniority entitled him to preference over employee Foley, the Organization argues.

The Carrier asserts that the Claimant and employee Foley were not equally qualified to perform the disputed overtime work and therefore the Claimant's greater seniority was not controlling under Rule 17. In its September 23, 1997 response to the claim, the Carrier maintained that the work required a qualified Torsion Beam Operator to assist in finding an electrical problem and to operate the switch lifter controls. The Claimant was not qualified to operate the equipment, the Carrier submits, and therefore the claim was properly denied.

During the on-property handling of the dispute, the Organization requested evidence showing that Foley was qualified on the equipment. An August 28, 1997 memo from Supervisor D. Lamont responded to the request as follows:

**"Mr. Goosby was not asked to work with repairman at Bridgewater because he is not qualified on torsion beam. Repairman was not greasing the machine as alleged in claim. He was trouble shooting electrical problem with switch lifter portion of machine. This job required someone inside cab of machine that was qualified to work switch lifter. The**

assigned operator R. McCauley was not available to work and the only other operator working at Conway that was qualified on this machine was Dennis Foley.”

Nearly a year later, on July 21, 1998, the Claimant submitted a statement alleging that the equipment being repaired was a junior tamper and not a torsion beam tamper as the Carrier had asserted. Moreover, the Claimant stated that Foley did not have a bid position, having been bumped off his position as Yard Sweeper by the Claimant. Under these circumstances, Foley should not have been permitted to work the disputed overtime, the Organization contends.

The Carrier objected to the acceptance of the Claimant’s statement as part of the record of correspondence from the Organization because it was not submitted until after the Senior Director’s denial letter following conference, contending that the record was closed when the letter was issued. That position has been rejected in prior Awards. The generally accepted view is that the Board may properly consider any document presented on the property prior to the date of the Notice of Intent to file a dispute with the Board. Third Division Awards 20773 and 33998.

The Carrier also asserted that the burden of proof in this case was on the Organization to show a violation of the applicable schedule Agreement, and inasmuch as there is no factual support for the asserted violation, the Carrier submits that the claim must be denied.

The Carrier’s position with respect to the deficiency of the claim is well-taken. The key to this dispute are the facts with respect to the qualifications of the Claimant and the junior employee, Foley. Under the provisions of Rule 17, seniority does not play a factor unless both employees are qualified and available to perform the overtime. The Carrier insists that the Claimant’s seniority was not determinative because he was not qualified on the torsion beam tamper, and in support thereof, it provided a signed statement. The Organization argues that the Carrier is incorrect and that the Claimant was qualified to do the work. As we view the record, however, the evidence in support of the Organization’s position is insufficient and contradictory at best. The Claimant’s belated assertion that a junior tamper had been utilized, the failure of the Organization to provide more than mere assertion that the Claimant was qualified to perform the work, the unsupported claim that favoritism or bias played a factor in the selection, and the inconsistent position taken by the Organization with respect to whether junior

employee Foley held a position or not, all contribute to the conclusion that the Organization has not met its burden of proof. The Board has no alternative on the basis of this record but to 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 24th day of October, 2001.**