

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36264
Docket No. MW-35679
02-3-99-3-616**

The Third Division consisted of the regular members and in addition Referee Ann S. Kenis when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Burlington Northern Santa Fe Railway
((former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior B&B Sub-department employee G. W. Franka to perform planned overtime service in the vicinity of Mitchell, South Dakota on April 12 and 13, 1997 to the exclusion of senior and available B&B Sub-department employee R. J. Hillestad (System File T-D-1356-B/MWB 97-09-10AC BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. J. Hillestad shall now be compensated for twenty-four (24) 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 were given due notice of hearing thereon.

In April 1997, the Mitchell, South Dakota, area experienced a flood that impacted Carrier operations. Track was washed out and, after the flood waters receded, track forces were assigned to make the necessary repairs to the bridge at MP 370.4. B&B forces were used to man lifeboats as a precautionary measure in case a track employee slipped or fell into the water. One of the B&B employees so assigned on April 12 and 13, 1997 was Blacksmith G. W. Franka.

On June 10, 1997, the Organization filed a claim on behalf of First Class Carpenter R. J. Hillestad. The claim asserted that Claimant Hillestad was available but was not called to perform the work on April 12 and 13, 1997 and that the Carrier violated the Agreement when it directed a B&B Blacksmith to perform overtime work customarily assigned to First Class Carpenters on the South Dakota Division. Among the numerous Rules cited was Rule 2, which provides employees with rights in accordance with their seniority.

The Carrier denied the claim on the basis that the work had been performed under emergency repair conditions. In addition, the Carrier contended that the Claimant was assigned to another gang and was working in Garretson, South Dakota. The Carrier stated that, because the Claimant chose not to work with his regular crew on the dates claimed, he was not available for the overtime work.

The Organization progressed the claim to the Carrier's Assistant Director Labor Relations. In its appeal, the Organization denied that an emergency existed and maintained that the Carrier was mistaken when it stated that the Claimant had been working with a different gang. According to the Organization, the Claimant and G. W. Franka were both assigned to B&B Crew No. 1 at the time in question. The Organization further stated that the "claimed work that was performed was First Class Carpenter work." Moreover, the Organization contended that the Claimant had informed the Carrier he would not be available on Friday, April 10, a rest day for the crew, but that he would be available on Saturday and Sunday. The Organization reiterated that the Claimant should have been called in accordance with his greater seniority under Rule 2 of the Agreement.

The Carrier declined the Organization's appeal and stated that the Organization had not met its burden of proof in this intra-craft dispute. The Carrier further noted

that the Organization had not even specified what work was being performed or why that work was reserved to First Class Carpenters. Additionally, the Carrier pointed out that the Organization had listed incorrect claim dates on its initial claim.

The parties conferenced the claim on October 14 and again on December 7, 1998. It appears from the record that the Carrier took the position that the manning of lifeboats was not work reserved exclusively to First Class Carpenters on a system-wide basis. The Carrier also presented a statement and photos from the Manager of Structures that purported to depict the emergency nature of the work in question.

In its confirmation-of-conference letter dated March 5, 1999, the Organization stated that its position was that "Carrier violated the Agreement when it offered a work opportunity to an employee junior to Claimant. The Carrier offered a total of twenty-five (25) hours overtime work on week-end rest days to an employee that possessed less seniority than that possessed by Claimant."

The Carrier wrote a reply letter to the Organization dated March 19, 1999, contending that the Organization had attempted to belatedly switch the entire theory of its claim to that of a seniority issue. The Carrier noted that the Organization had heretofore progressed this claim as an intra-craft dispute.

The Board devoted considerable attention to the progression of this claim and the arguments raised by the parties on the property. The Carrier's threshold argument is that the Organization's statement of claim as presented to the Board varies substantially from the initial claim. On that point, we carefully reviewed the precedent Awards cited by the Carrier. In Third Division Awards 20456 and 20472, the Board dismissed claims that were significantly different from the claims filed and handled on the property. We agree with the reasoning in those decisions. This industry has well-developed procedures for the claims handling process. That process fails if the Board is asked to deal with an issue not previously raised or considered by the parties in the steps below. We need no citation for the well-established proposition that the Board is not authorized to consider evidence and/or argument de novo.

We believe that this case does not run afoul of that fundamental proposition, however. Unlike the cases cited by the Carrier, the Organization in the instant matter did not cite a new provision of the Agreement for the first time in its Submission. It relied throughout the claims handling process on Rule 2, the seniority provision of the

Agreement, as one of the bases for its claim. There is no doubt that the Organization shifted its emphasis during the claims handling process, but the Rules relied upon and the facts supporting the alleged violation were unchanged. Equally important, no claim of prejudice has been shown by the Carrier. While we do not enthusiastically endorse the shift in the Organization's claim as it progressed, we must conclude that because the Carrier had the opportunity to respond to the seniority argument on the property, the claim is properly before the Board. See Third Division Award 27569.

That being the case, we find that the claim must be sustained. Stripped to its essence, this is a relatively straightforward case in which B&B Crew No. 1 employees were pressed into service to perform overtime work in what the Carrier claims was an emergency situation. The Organization contends that failure to notify the Claimant of the overtime opportunity violated his seniority rights. The Carrier's emergency defense, even if fully credited, does not explain why there was sufficient time to call and assign a junior employee rather than the Claimant. It must be remembered that when the Carrier asserts an emergency as an affirmative defense, it has the burden to show how the circumstances prevented assignments in accordance with the Agreement. See Third Division Awards 21222 and 31358. That necessary proof is lacking on this record.

The Carrier also argued that the work of manning lifeboats does not belong exclusively to the Carpenter classification. That may be true, but the Organization is not required to meet that evidentiary burden in cases involving overtime work on unassigned days. In this context, Third Division Award 20556 has stated the principle as follows:

"The issue of work on unassigned days has been before this Board on many occasions and the Awards have clearly established the regular incumbent's right to the work without the necessity of proving exclusivity. . . ."

Also see Third Division Awards 26318 and 27569.

The Carrier raised additional defenses on the property which, in our view, were adequately refuted by the Organization. The Carrier argued, for example, that the Claimant was working on another crew at the time and was unavailable to perform the

overtime work, but that assertion was not supported by the evidence of record. The claim will be sustained as presented.

AWARD

Claim sustained.

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 28th day of October 2002.

**Carrier Members' Dissent
to Award 36264 (Docket MW-35679)
(Referee Kenis)**

The Organization, from its initial claim in June 1997 through March 1999 was claiming that "First Class Carpenter work" had been improperly performed by an employee in the "Blacksmith" classification on April 12 and 13, 1997. The claim was advanced on the basis that carpenter work had been performed by an employee not in the carpenter classification. While the Majority acknowledges, "...that the Organization shifted its emphasis..." it concludes that "the Rules relied upon.... were unchanged" puts form over substance in deciding this matter. The Organization never identified what First Class Carpenter work was performed. Further as the Carrier noted, in intra-craft disputes, it is the burden of the Organization to substantiate the exclusive performance of the work to the classification; note PLB 2206 Award 55, PLB 3460 Awards 17 and 63 and Third Division Award 18441 involving the same parties. Manning a life boat is work that is reserved to neither classification. So there was no violation of B&B classifications in this matter.

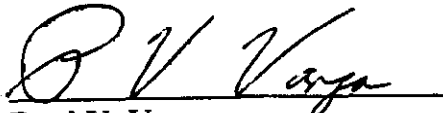
The Majority's reference to the unassigned day rule at page 4 of the Award is misplaced and ignores the fact that the Carrier's response concerning the responsibility of the Organization in intra-craft disputes to show exclusivity was in specific response to the Organization's claim of using the wrong classification. In such matters it is the Organization that must substantiate exclusive reservation of the work to the classification claimed.

After almost two years of contending that there was a classification mis-assignment, it was substantially more than a shift in emphasis to assert that the matter was an alleged use of a junior employee that violated the Claimant's seniority. Apparently, despite the Organization's specific statement of the violation - "...when it directed a B&B Blacksmith to perform overtime work customarily assigned to First Class Carpenters..." (initial claim); "in this case, Mr. Franka was improperly called to work as a First Class Carpenter..." (Appeal to Assistant Director Labor Relations) the Carrier must also respond to other material included in the claim. The Majority is correct that the Organization did cite Rule 2 in its initial claim. This Organization often cites a multitude of rules in its claims most of which have no bearing on the specific dispute. However, it is not valid to state that the Organization relied on the seniority argument "throughout the claims handling process." It did not!

Finally, that the bridge at MP370.4 near Mitchell, South Dakota had washed out is not challenged. B&B crew No. 1 was being used to make repairs to the washed out bridge. Possibly, there could have been a better claim made for the Claimant but such

was not made in 1997 or 1998. We do know that on the basis of the work assigned that this claim was not a violation of craft classification.

We Dissent.


Paul V. Varga


Martin W. Fingerhut


Michael C. Lesnik