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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36623
Docket No. SG-36369
03-3-00-3-617

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Port Authority Trans-Hudson Corporation

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Port Authority Trans-Hudson Corporation:

Claim on behalf of L. Vernace-McColgan, for payment of eight hours at the time and one-half rate; for Bulletin No. 87-13 to be rescinded; and for the Claimant to be allowed the option of accepting any future overtime assignments, which she is physically able to perform within the guidelines of her medical restriction, account Carrier violated the current Signalmen's Agreement, particularly Article VII-A, when on September 11, 1999, it denied the Claimant the opportunity to work an overtime assignment as a Signal Test 1. BRS File Case No. 11363-PATH.”

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.

At all times pertinent to this case, L. Vernace-McColgan ("Claimant") was employed by PATH as a Signal Tester I. As such, she was covered by the terms of the governing Memorandum Agreement between PATH and the Brotherhood of Railroad Signalmen; specifically including the following:

"Article VII VACANCIES

- A. All vacancies (including those for only part of a basic work day), such as those caused by vacation, sick leave, sickness, death, retirement, excused absence, leave of absence and any other form of absence, or by the need for scheduling at a given time more than the usual amount of employment in any class of employment covered by this agreement, may be filled if necessary (as determined by PATH) by any regularly assigned employee (with priority being given to an employee in the same class of employment or job title as the work to be performed) covered by this agreement (subject to Articles V and VIV-H hereof); by any employees of PATH or its owner not covered by this agreement (subject to Article XIV-1 hereto; or by temporary employees (subject to Article XIII hereto."

(Although the above-quoted language does not specify priority for overtime assignment by seniority, the record shows that seniority and "overtime equalization" are, by mutually recognized practice, the benchmarks for determining overtime preference.)

In this case, the Claimant maintains that her seniority rights were violated on September 11, 1999 when the Carrier called and assigned a junior Signal Tester I employee to perform certain overtime work, described as "searching out an apparent grounded energy circuit found on a cable between Hoban Relay Room in Journal Square and uptown 33rd Street." The Claimant and the Organization made out a prima facie case by demonstrating that the Carrier by-passed her in calling a junior employee for the overtime. A legion of Awards by the Board stand for the principle that, absent compelling reasons, e.g. illegality, disability, unavailability, impossibility or bona fide emergency, the senior employee

presumptively is entitled to right of first refusal for overtime assignments. See Third Division Awards 30833, 33909, 19758 and 5346.

That presumption is rebuttable, however, and in the facts and circumstances of this case we find that the Carrier made out a persuasive affirmative defense to the claimed violation. It is not disputed that the Claimant was absent from work due to illness for three months from March to May 1999. Her return to "light duty" work on May 6, 1999 was conditioned on specified medical restrictions i.e., no lifting heavier than 25 pounds, no overhead work and no climbing except by ladder. Those medical restrictions on her ability to perform the full range of Signal Tester I duties were still in effect on September 11, 1999 when she stood for the overtime call which is the genesis of this claim. Indeed, the record shows that the Claimant had expressed concerns to her supervisors on September 2, 1999 that, due to medical restrictions, she should not be expected to perform certain tasks that would otherwise be required of a Signal Tester I, including lifting heavy objects.

With the benefit of hindsight, the Claimant asserts that the duties actually performed by the junior employee on the night of September 11, 1999 were within the limits of her medical restrictions. Assuming, arguendo, that the Carrier could have determined with a reasonable degree of certainty before the fact that the overtime work necessary on September 11, 1999 was within the Claimant's medically limited performance capacity, her seniority should have been determinative. But clairvoyance is not required in such matters and the Carrier persuasively demonstrated in this record that climbing and testing relays, energy busses, cables, wires, terminals and other devices located above the head were reasonably anticipated tasks in the performance of the overtime assignment for which the Claimant was by-passed on September 11, 1999.

In the particular facts and circumstances presented on this record, we find no violation of the Claimant's seniority rights under the Agreement. Accordingly, we must deny this claim.

AWARD

Claim denied.

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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 29th day of July 2003.