

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 36981
Docket No. MW-35985
04-3-00-3-78

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 employee J. Kudlack to perform overtime trackman service (track work related to straight railing switches) in Voorhesville on February 7, 1998 and at Railroad Avenue, Voorhesville, New York on February 14 and 21, 1998 instead of calling and assigning Mr. R. E. Irwin (System Docket MW-5338).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. E. Irwin shall now be compensated for twenty-eight (28) 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.

On the dates in dispute, the Claimant was a Welder and J. M. Kudlack was an I&R Foreman on the Selkirk Subdivision, Mohawk Hudson Seniority District, Albany Division. The Claimant and Kudlack also held Trackman seniority, with the Claimant being senior to Kudlack.

On February 7, 14 and 21, 1998, Selkirk Subdivision employees were assigned weekend overtime of straight railing switches working under Foreman M. L. Benacquisto. Kudlack was called for the overtime work. The Claimant was not called for the work. This claim followed, with the Organization asserting that the overtime work performed by Kudlack was Trackman work and because the Claimant had greater Trackman seniority than Kudlack, the Claimant should have been called for that work.

The Carrier defended against the claim asserting in its May 22, 1998 letter that while Kudlack did perform work on the three dates, "... he performed I&R Foremans[']s duties not trackman duties" and "[a]ny trackman duties performed would have been diminimus in nature." In its October 6, 1998 letter, the Carrier asserted that "... Kudlack ... did inspect track in order to ensure the safe passage of trains over the new switches."

Statements from Foreman Benacquisto are not consistent with the Carrier's position that Kudlack performed I&R Foreman's duties and not Trackman's work on the dates in dispute. According to Benacquisto in a March 3, 1998 statement, "Kudlack was laboring." In a July 15, 1998 statement, Benacquisto also stated that "... Kudlack ... did not do any I&R work during these hours..."

The record therefore sufficiently shows that on the three dates in question, the Carrier assigned Kudlack to perform Trackman duties instead of calling the Claimant whose Trackman seniority was greater than Kudlack's and that Kudlack did not perform I&R Foreman's duties as the Carrier contends. The Carrier's contentions that Kudlack did not perform Trackman work were contradicted by Foreman Benacquisto. Given the direct first hand evidence offered through Foreman Benacquisto which is not refuted by a similar quality of evidence, we do not find the facts to be in conflict. Third Division Award 31048 cited by the Carrier which dismissed a claim due to an irreconcilable conflict of facts is therefore distinguishable.

Because of the Claimant's greater Trackman seniority over Kudlack, Rule 17 ("[e]mployees 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") entitled the Claimant to the overtime opportunities before Kudlack. The claim therefore has merit.

As a remedy, the Claimant shall be made whole for the lost overtime opportunities and compensated at the overtime rate for the number of hours worked by Kudlack on the three dates in dispute.

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 12th day of May 2004.