

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 38964  
Docket No. MW-37229  
08-3-NRAB-00003-020218  
(02-3-218)

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

(Brotherhood of Maintenance of Way Employes  
PARTIES TO DISPUTE: (  
(Soo Line Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Valley City Section Laborer D. H. Heise to perform overtime service (handle a report of cattle on the right of way) in the vicinity of Mile Post 284 on the Valley City Section territory on July 10, 2000 and instead called and assigned Hankinson Maintenance Crew Foreman D. Syverson (System File R1.626/8-00413).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. E. Heise shall now be compensated for two (2) hours and forty (40) minutes' 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.

Although the initial claim was for two Claimants, one of them withdrew during the handling on the property.

The basic facts surrounding the surviving portion of the claim are undisputed. The Claimant was not called for the overtime service by the Carrier because he did not possess a Commercial Drivers License (CDL) which was required to operate the gang truck located at the gang's Valley City headquarters. After the Carrier's denial of the claim on that basis, the parties devoted the remaining handling of the on-property record to discussions about whether transportation alternatives existed that did not require the Claimant to have a CDL. In substance, the Organization and the Claimant maintained such alternatives did exist. Indeed, the Claimant's statement asserted that he was asked to use his personal vehicle to perform the same cattle-clearing work less than two weeks after the event in question. According to the Carrier, the only vehicle available at Valley City on the claim date required a CDL for its operation.

After careful review of the record herein, we find the claim to suffer from a fatal flaw, i.e., a word-by-word, line-by-line examination of the record confirms that nowhere in the claim or any of the appeal correspondence does the Organization, and/or the Claimant, explicitly assert that the Claimant had a right to be called for the disputed assignment based on some provision of the applicable Agreement. The only Rule cited anywhere in the record is Rule 29. But this Rule clearly confines itself to the subject of how an employee is to be paid when called for service outside of regular working hours. Nowhere does Rule 29 mandate any priority order about who is to be called in the circumstances of this claim.

Seniority rights such as priority order rights to overtime opportunities are created by collectively bargaining, and if such rights have been so created, they are customarily spelled out in the language of the applicable Agreement. It is the sole

burden of proof of the party asserting such rights to establish the specifics of the language and how it applies to any given set of facts. The Board has no proper authority to speculate or make assumptions about the existence or content of such Agreement language when it is neither cited in nor made a part of the on-property record.

Given that the record herein does not establish that the Claimant had a right to be called for the overtime assignment in question if qualified, we have no proper basis for concluding that the facts of this incident demonstrate a violation of the Agreement. Accordingly, we must deny the claim without addressing any other issues involving the Claimant's qualifications for the assignment.

**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 29th day of February 2008.