

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39356
Docket No. MW-37934
08-3-NRAB-00003-030293
(03-3-293)

The Third Division consisted of the regular members and in addition Referee Susan R. Brown when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(BNSF Railway Company (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to assign Mr. G. O. Nikstad as the traveling equipment maintainer (mechanic) to work with Gang TP-01 beginning on June 20, 2001 and continuing and instead assigned junior employee A. A. Frison (System File T-D-2366-B/11-01-0358 BNR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. O. Nikstad shall now be compensated at the applicable rates of pay for all straight time and all overtime hours worked by Mr. A. A. Frison, or other junior employee who may have displaced him on Gang TP-01, beginning June 20, 2001 and continuing.”

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.

G. O. Nikstad bid on and was assigned a bulletined position of Rank B Traveling Equipment Maintainer (Mechanic) on Fargo Consolidated Seniority District No. 300. He was headquartered in Minneapolis, Minnesota. Gang TP-01 began work in Superior, Wisconsin, on June 20, 2001. It is undisputed that the Claimant requested both orally and in writing that he be assigned to that gang.

Gang TP-01 had no permanent Equipment Maintainer on its roster and a supervisor assigned Traveling Equipment Maintainer A. A. Frison, who was junior to the Claimant on the applicable seniority roster, to work on Gang TP-01. The Claimant thereupon filed the instant claim.

The Organization maintains that seniority governs assignment to all positions, including those required to be bulletined, temporary ones, and those requiring only overtime. The Claimant fulfilled the requirement under Rule 19A, which governs the filling of temporary vacancies, by expressing his preference to be assigned to Gang TP-01. The Carrier's violation of his seniority rights resulted in loss of income, because overtime opportunities were much greater on Gang TP-01 than in Minneapolis, where he was assigned.

The Carrier asserts that the work on Gang TP-01 constituted a daily assignment for a Traveling Maintainer and was not a position to which seniority applies. Nothing in the Agreement requires the application of seniority to such assignments; a system of that nature would cause chaos. Traveling Maintainers by definition are not linked to a specific gang, but may be assigned as needed. In this case, it was the supervisor's judgment that the Claimant was better utilized in Minneapolis and he assigned another employee who could more easily be freed up.

A close reading of the record establishes that the quintessential characteristic of Traveling or Roving Mechanics is that they hold positions that are not linked to a particular gang, but are intended to be assigned as needed. When looked at in this light, it becomes clear that such assignments are not “positions” of the sort designated by the Organization in its description of positions requiring the application of seniority. There is no dispute that the assignment was not required to be bulletined and the facts demonstrate that it required both straight time and overtime. Moreover, there is no indication that it was a temporary position within the meaning of Rule 19; rather, the record establishes only that it was the routine assignment of an employee whose job entails being assigned anywhere in the district to perform work as needed. If there is any evidence that some circumstance served to transform the Gang TP-01 assignment at issue into a “position,” temporary or otherwise, it does not appear in the record.

Once the nature of the work has been established as a daily assignment, Award 8073 becomes dispositive. In that Award, the Board considered two employees who were assigned to groups of workers belonging to the same gang working at different locations about three miles apart. One group of employees ran into trouble during the course of the day and was kept on overtime to complete the work; the other group’s tasks went smoothly and the employees were released at the end of the regular work day. A senior employee in the second group claimed that he should have been assigned the overtime in the first group worked by a junior employee. The Board stated:

“The Brotherhood interprets its agreement to require the Carrier to observe seniority in making daily assignments to jobs that will accrue overtime. Their agreement with this Carrier has no such provision in it. There was no violation of the agreement in the case at hand.”

Although this case is with another craft, it is cited by the Board in Third Division Award 19758, which was on the property and is heavily relied upon by the Organization here. In that Award, the Board ruled that seniority rights must be broadly applied, including to the assignment of overtime, but lists some exceptions, including that detailed in Award 8073 which, according to the Board in Award 19758, “holds that the agreement does not require the carrier ‘to observe seniority in making

daily assignments to jobs that will accrue overtime.” Award 19758 concluded that the case then before the Board did not contain any of the exceptions and granted the Organization’s claim.

Here, however, the issue is indeed one of daily assignment. Award 8073 excluded the application of seniority to such assignments in 1957 and the Organization provided no Awards from the intervening 50 years that have held otherwise. In keeping with Board precedent, the claim must be denied.

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 21st day of October 2008.

LABOR MEMBER'S DISSENT
TO
Award 39356, Docket MW-37934
Referee Brown

The Majority totally misconstrued the thrust of this dispute and a Dissent is thereby in order. This case involved the Carrier's decision to assign a junior mechanic to work with TP-01 instead of the Claimant. There is no dispute but that the Claimant notified his supervisor that he desired to be assigned to work with TP-01 prior to the time that the gang arrived on the territory. Instead of honoring the Claimant's valid request to be assigned to work with TP-01, the Carrier instead assigned a junior employee.

This dispute did not involve a one day assignment, wherein the Carrier temporarily assigned the junior employee for only one day. This assignment was to last until the TP-01 left the territory, which could have been months. Because the Claimant knew that TP-01 would be assigned to the territory for such a length of time and because he knew that such assignment would involve overtime in excess to what he would have earned if he had not be assigned thereto he notified his supervisor of his desire to be assigned.

Rule 2A provides that rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Company. During the handling of this dispute on the property, the General Chairman relied on Third Division Award 19758 involving the parties to this dispute throughout the handling of this case. Clearly, that award involved the interpretation of Rule 2 and a circumstance nearly identical to the circumstances here. The Board held:

"Seniority provisions are included in labor relations agreements for the benefit of the senior employees. They seek to protect and give preference in jobs, promotions and other opportunities to employees with greater seniority. In this respect, they are a limitation of the employer's right to operate and manage its business. As such, they must be interpreted in favor of their beneficiaries, and applied wherever the issue arises, unless there are definite limitations of the Rule in the contract. Exceptions to the seniority provisions, if any, should be listed in the agreement. Otherwise the term is widely applied. Thus, the instant agreement limits seniority to ability in event of promotions (Rule 16); Promoted employees (Rule 4); Departments (Rule 5), etc.

Although the Rule does not specifically include overtime, it does not exclude it.

We have consistently held, that unless overtime is specifically excluded from the seniority provisions of an agreement, it is subject to them (Award Nos. 2716; 2994; 4531; 6136; 15640).

Labor Member's Dissent

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"In 15640 (Ives) we said, that a carrier 'has an obligation to make a reasonable effort to call the senior available employee to do overtime work, before using a junior employee to do such work.'

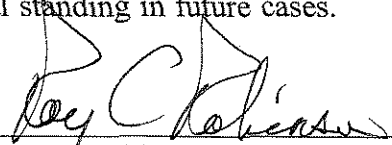
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The carrier has not proven either an existing practice to disregard seniority in overtime, where all other elements are equal. Nor has it proven that overtime is excluded from the seniority provisions.

There is no dispute here, either, as to the ability of the employees involved, or their willingness and availability to do the job, or their seniority status. Nor is there any claim of an emergency situation.

Overtime work is a condition of employment and unless specifically excluded, it is to be deemed as part of the benefits of seniority."

As can be seen in the above-cited on-property Award, the Board supported its position throughout its findings with prior precedent. Such critical analysis is completely absent in this case. The Majority completely ignored the on-property precedent cited above. Such cavalier handling of a cornerstone principle, i.e., seniority, cannot be condoned nor left without comment and Dissent. The Majority's nonchalant handling of such a bedrock principle can do nothing but violence to the Agreement. Because the Majority failed to show that the above-cited on-property interpretation of the very rules and issues that were present in this case was in palpable error and renders this award as meaningless. If the Board were to embrace this action in future cases, such would only erode the seniority provisions of the Agreement. The Majority's decision to deny this claim was wrongly decided and shall provide no precedential standing in future cases.



Roy C. Robinson
Labor Member