

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39523
Docket No. MW-38095
09-3-NRAB-00003-030550
(03-3-550)

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

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employees**
(Delaware and Hudson Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1) The Carrier violated the Agreement when it called and assigned junior employees to overtime service (crossing repair) at Mile Post A 110.1 on June 29, 2002 and failed to call and assign Foreman L. Boulerice for said service (Carrier’s File 8-00299 DHR).
- 2) As a consequence of the violation referred to in Part (1) above, Claimant L. Boulerice shall now each be compensated for nine (9) 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.

The Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement by failing to call the Claimant for certain overtime service and instead calling junior employees to perform this work.

The Organization initially contends that Rule 11.8 clearly and unambiguously provides that employees, if qualified and available, will be given preference for overtime work, in connection with work ordinarily and customarily performed by them, in order of their seniority. The Organization asserts that the Carrier did not question the Claimant's qualifications or availability to perform the overtime service consisting of crossing repair on the date in question.

The Organization points to the Carrier's defense that the Claimant's territory did not include the location where the work in dispute was performed. The Organization argues that it presented the April 22, 2002, assignment bulletin as undisputed proof that the Claimant's assigned territory did include this work location. Citing a number of Awards, the Organization maintains that it is well established that when an employee bids for and is assigned to a regular position, that employee is entitled to all work of that position. The Organization asserts that Rule 11.8 makes clear that the Claimant, as the senior employee who regularly performed maintenance work on the 4th Subdivision, was entitled to preference for the overtime work involved in this dispute. The Carrier violated the Agreement when it assigned that overtime to others.

The Organization emphasizes that there is no support for the Carrier's position that the work in dispute was not ordinarily and customarily performed by the Claimant. The Organization points out that the Carrier offered no explanation for why the Foreman in charge and the senior employee assigned to the territory would not be ordinarily and customarily assigned for such repair work. The Organization maintains that because the Carrier raised an affirmative defense that the Claimant would not customarily perform the claimed work, the Carrier was obligated to present undeniable and credible evidence to support that affirmative defense. The Organization contends that a review of the record demonstrates that the Carrier presented no credible evidence to support its affirmative defense.

The Organization argues that arbitral boards long have recognized that seniority is a valuable property right of employees. In this case, although the Claimant was available for duty and senior to the employees assigned to the overtime service, he was

not afforded the work opportunity to which he was entitled by virtue of his seniority. The Organization insists that the Agreement therefore was violated.

The Organization ultimately contends that the instant claim must be sustained in its entirety.

The Carrier initially contends that there is no dispute that the Claimant is senior to the Track Foreman who was called to work on the date in question, and that the Claimant's bid did, in fact, cover the territory in question. The Carrier does dispute the Claimant's right to the Track Foreman overtime ahead of the Track Foreman who was called.

The Carrier argues that although the Claimant's bid did cover the territory in question, the Claimant did not ordinarily and customarily cover this particular location during his workweek. The Carrier points out that the 4th Sub-Division (Champlain) has more than one Track Foreman assigned to it, and each of these Track Foremen has specific territory within the 4th Sub-Division (Champlain) for which they are ordinarily and customarily responsible during their workweek. The Carrier asserts that the particular work location at issue did not fall within the assigned territory for which the Claimant was ordinarily and customarily responsible during his workweek. The Carrier emphasizes that the Organization never disputed this point.

The Carrier asserts that in full compliance with Rule 11.8, it called the Track Foreman who ordinarily and customarily performed work during his workweek at the location in question, and not the Claimant, to perform the overtime work at issue. The Carrier insists that the Organization failed to meet its burden of proof in this matter in that it has not shown that any Rule violation occurred in connection with the incident at issue.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record in this case and finds that the Organization met its burden of proof that the Carrier violated the Agreement when it called and assigned junior employees to overtime service and failed to call Claimant Boulerville on June 29, 2002. Therefore, the claim must be sustained.

The record reveals that the Claimant established and held seniority as a Foreman, with Saturday and Sunday as his designated rest days. On Saturday, June 29, 2002, the Carrier required overtime services of its section forces for repairs, and the Claimant was the local Section Foreman assigned to that location and the most senior employee available for the overtime. The Carrier violated the parties' Agreement when it called a junior employee to perform that work.

The Agreement states, in part:

"Employees 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 order of their seniority."

The Claimant was the most senior person and he was qualified and available to perform the work. The Carrier violated the Agreement when it failed to call him in this instance.

Because of the particular facts and circumstances in this case, the Board is compelled to sustain the claim in its entirety.

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 2nd day of February 2009.