

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40337
Docket No. MW-40260
10-3-NRAB-00003-080024

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior Extra Gang Foreman F. Casados to perform rest day overtime service of inspecting track from Mile Post 5.0 to Mile Post 16.0 and Mile Post 0.0 to Mile Post 3.5 on the Belt Line, Wyoming Division on June 18, 2006, instead of senior Extra Gang Foreman L. Martellaro (System File D-06-21/1457545).
- (2) The Agreement was violated when the Carrier assigned junior Extra Gang Foreman F. Casados to perform rest day overtime service of inspecting track from Mile Post 16.0 to Mile Post 57.0, Denver to Winter Park, Colorado on July 8 and 9, 2006, instead of senior Extra Gang Foreman L. Martellaro (System File D-06-24/1457546).
- (3) As a consequence of the violation referred to in Part (1) above, Claimant L. Martellaro shall now be compensated for six (6) hours at his respective time and one-half rate of pay.
- (4) As a consequence of the violation referred to in Part (2) above, Claimant L. Martellaro shall now be compensated for twenty (20) hours 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 the Claimant's behalf, alleging that the Carrier violated the parties' Agreement on two occasions when it assigned a junior Extra Gang Foreman to perform overtime service, instead of the Claimant.

The Organization initially contends that there is no dispute that the Claimant and Casados both were fully qualified, regularly assigned Extra Gang Track Sub-Department Foremen at the location involved here. Both employees typically perform general inspection of track structure, roadway, and other incidental track work daily. The Organization asserts that instead of calling and assigning the pre-planned rest day overtime work at issue to the Claimant, who was the senior available employee of the group and class at the location, the Carrier called/assigned the more junior Casados.

The Organization argues that Rule 26(h) does not apply here because this situation did not involve an employee who otherwise would not have 40 hours of work for the weeks in question. The Organization emphasizes that the record shows that the Claimant was the regular employee who had a clear contractual preference to the rest day overtime by virtue of his superior seniority in the Foreman class, compared to Casados. The Organization submits that the Carrier's disregard of the Claimant's seniority in this instance plainly violated the Agreement and resulted in the Claimant's loss of valuable rest day overtime work opportunities.

The Organization disputes the Carrier's position that this case involved a temporary vacancy, rather than an improper assignment of overtime. The Organization nevertheless maintains that even if this is true, the application of Rule 20 to this matter constitutes another violation, not a cure for the aforementioned violation of Rule 26. Citing a number of prior Awards, the Organization argues that it is well established that an employee's seniority entitles the employee to all work of a position, and that overtime must be assigned based on the general principle of seniority. The Organization contends that based on these principles, the overtime at issue should have been assigned to the senior qualified Foreman, the Claimant.

Addressing the Carrier's position that there is no evidence that the Claimant was entitled to the work of inspecting track, the Organization emphasizes that Casados was not the regularly assigned employee performing such work. The Organization asserts that the Carrier failed to address the central issue in this matter, which is seniority. Moreover, if the Carrier is contending that Casados held the position of Relief Foreman/Track Inspector, then the Carrier would be in violation of Rule 20.

The Organization insists that because Track Inspector is a higher-rated position than Extra Gang Foreman, the subject overtime assignments were an upgrade, albeit temporary. The Organization asserts that under the circumstances Rule 19 offers further support for the instant claim. The Organization argues that its consistent position has been that while both the Claimant and Casados were fully qualified Extra Gang Foremen regularly assigned at the location involved, the Claimant was entitled to the overtime assignments at issue based upon his earlier seniority date, even if the assignments are considered as temporary upgrades. The Organization emphasizes that the Carrier's argument that Relief Foreman/Track Inspector was Casados' regular assignment is factually wrong, because no such position ever has been advertised by bulletin.

The Organization submits that there is no dispute that Casados was assigned as an Extra Gang Foreman and was paid as such. Pointing out that the Carrier was in sole possession of bulletin and payroll records, the Organization contends that the Carrier's failure to present such pertinent evidence to support its assertions invites application of the negative inference rule. The inexorable conclusion is that the

Carrier failed/refused to produce this evidence because it would not support its asserted defense. The Organization argues that the Carrier's defense collapses for lack of support.

The Organization asserts that a number of Awards on the issue of seniority support its position in this matter. The Organization contends that there is no factual support for any argument that the Claimant was not qualified to perform the work in question. Instead, the record shows that the Claimant customarily and routinely performed general inspection of track structure, roadway, and other incidental track work on a daily basis in connection with his regular duties.

Addressing the Carrier's position that any additional compensation to the Claimant would constitute a windfall and an assessment of a penalty upon the Carrier, the Organization argues that prior Awards serve as sound precedent for rejecting this contention. The Organization emphasizes that this situation involved pre-planned rest day overtime service that was not afforded to the Claimant, despite the fact he was senior to Casados and that the claim dates were designated rest days for both the Claimant and Casados. The Organization suggests that the requested remedy is not a penalty, but appropriate compensation for the undisputed rest day overtime opportunity to which the Claimant was entitled and would have performed except for the Carrier's violations of the Agreement.

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

The Carrier initially contends that the Organization failed to substantiate how or to what extent the Carrier's actions violated the Agreement. The Carrier therefore asserts that the instant claim should be denied for lack of proof.

The Carrier argues that the Organization based its position on the presumption that the Claimant has an exclusive right to the grieved work solely on the basis that he was the senior employee assigned to a position of the same class, notwithstanding the employees' current work group. The Carrier contends that the Claimant was assigned to Gang 5675, and the duties in dispute were not associated with the surfacing work of Gang 5675. The Claimant, accordingly, was not afforded the overtime opportunity. The Carrier emphasizes that the duties that Casados

performed were a continuation of the same duties that he was required to perform during his regular hours on Gang 5354. The Carrier points out that a number of Awards supports its position on this issue.

The Carrier insists that the overtime work at issue was not encompassed within the Claimant's regular assignment. It asserts that it is not required to take a regularly assigned employee away from his duties and then replace that employee with a senior employee just because overtime becomes applicable. The Carrier points out that this would violate the Agreement rights of the junior employee who was performing the same duties during his regular assignment.

The Carrier contends that Casados' regular assignment as an Extra Foreman on Gang 5354 included duties such as relieving other Foremen on Gang 5354 as needed and conducting track inspections as required. As for the Organization's contention that the Extra Foreman position never was bulletined as a "relief" assignment, the Carrier asserts that whatever "weak" arguments the Organization may advance, the unrefuted fact is that Casados performed the same work on overtime that he performed during his normal straight-time week on Gang 5354. The Claimant, a Foreman on Surfacing Gang 5675, has no exclusive rights to the overtime as issue, regardless of his relative standing on the seniority roster.

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

The Board finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it called and assigned the junior Extra Gang Foreman to perform overtime service instead of the more senior Claimant. Therefore, the claim must be denied.

The Board recognizes the importance of seniority and how it is protected by the language of the Agreement. However, the record reveals that Extra Gang Foreman Casados was regularly assigned to a Foreman's position and he was to perform all work associated with that classification. The overtime work at issue was incidental to his work and not similar to the work that was being performed by the Claimant, who was a Foreman on a Surfacing Gang. Casados performed the overtime work which was a continuation of the same duties that he was being

required to perform during his regular hours on Gang 5354. The Carrier selected Casados to perform the work because of that fact.

The Board has held on several occasions in the past that the Carrier may make its selection for overtime based not on strict seniority, but based upon who was performing the work on a regular basis on the assigned work days. (See Third Division Awards 28500, 29097, 29795 and 31294.) This Board finds that it is reasonable for the Carrier to use a junior employee when the work is a continuation of the work that is regularly being performed by that employee and when the senior employee is performing other types of work.

For all of the above reasons, this 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 1st day of March 2010.