

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40405
Docket No. MW-40085
10-3-NRAB-00003-070339
(07-3-339)**

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 failed to call and assign System Brandt Truck Operator M. McCarthy for overtime service (operate his regularly assigned truck in transporting employes) beginning on April 16 and continuing through April 22, 2006 and instead called and assigned junior employee S. Serna (Carrier’s File 1449894).**
- 2) As a consequence of the violation referred to in Part (1) above, Claimant M. McCarthy shall now be compensated one hundred ten and one-half (110.5) 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 behalf of the Claimant, alleging that the Carrier violated the parties' Agreement when it failed to call the Claimant to perform certain overtime work, and instead called and assigned a junior employee to perform the work.

The Organization initially contends that pursuant to bulletin, the Claimant was assigned to System Gang 8561 to operate Brandt Truck No. 70155. Citing several prior Awards, the Organization asserts that it is well established that when an employee bids for and is assigned to a regular position, the employee is entitled to all work of that position. Pointing to Rule 26(h) the Organization also argues that there is no evidence of an available or extra unassigned employee. The Organization emphasizes that as the employee regularly assigned to operate Brandt Truck No. 70155, the Claimant was entitled to the rest day overtime service at issue, and the Carrier violated the Agreement when it made no attempt to assign him thereto.

The Organization points out that the Carrier presented no valid defense to the claim. Addressing the Carrier's position that System Gang 8561 was not working anywhere near the Lakeside Subdivision on the claim dates, the Organization maintains that it is undisputed that the Claimant and his truck actually were on loan to do work on or near the Lakeside Subdivision.

The Organization also argues that, contrary to the Carrier's position, the log reports clearly establish that it was the Claimant's Power Unit being used to perform the work in question, and not an alleged Brandt Power Unit belonging to the Utah Service Unit. The Organization emphasizes that the Carrier failed to produce any log reports to defeat the claim. The Organization contends that the Board consistently has held that when a party fails to produce records that contain material and relevant evidence, the party does so at its own peril. The Carrier's failure/refusal to present any material evidence in support of its defense requires a sustaining award.

According to the Organization, there is no support for any argument that the instant claim for a loss of work opportunity at the overtime rate on the Claimant's rest days is excessive. The Organization insists that if the Carrier had assigned the work at issue to the Claimant as he requested, then the Claimant would have earned his overtime rate. Moreover, the number of hours claimed are established by the log reports for Brandt Truck No. 70155. The Organization submits that a legion of Awards have fashioned make-whole remedies, and the remedy sought in the instant case is nothing more than what the Claimant would have earned had he been properly assigned to the work.

The Carrier initially contends that because Serna, the junior employee, performed the type of service in question as his regular assignment, Serna was the correct employee to operate the Brandt Power Unit on the claim dates. Pointing to Rule 18(k), the Carrier asserts that it is well established that an employee who performs the duties of a position during his regular straight-time hours has the Agreement right to perform those same duties during overtime hours.

The Carrier argues that the record demonstrates that Serna operates the Utah Service Brandt Power Unit during his regular assigned hours with Gang 6229. The Carrier contends that under the provisions of Rule 18(k) the Claimant would not be considered the regular employee; instead, Serna would be considered the regularly assigned employee. Pointing to prior Third Division Awards addressing the issue of the regular employee, the Carrier contends that its decision was proper and not arbitrary because the member who performed the overtime work also performed those same duties during regular working hours. These Awards establish that overtime work is not assigned according to strict seniority guidelines, but rather to the employee who regularly performs the work, on a regular basis, as part of the employee's regular assignment.

The Carrier emphasizes that under the circumstances, Serna was the appropriate employee to be assigned the work at issue on the Lakeside Subdivision on the claim dates. The Claimant was not the "regularly assigned employee," so the claim should be denied.

The Carrier goes on to contend that the Claimant was not deprived of his 40-hour workweek. The Organization, in fact, never denied that the Claimant was fully employed during the time period at issue. The Carrier asserts that because the

Claimant was not deprived of his 40-hour workweek, the Claimant was not eligible to be assigned to the overtime ahead of everyone else.

The Carrier insists that it complied with the Agreement, and the Organization failed to meet its burden of proof in this matter. The Carrier points out that although the Organization listed other Rules in the initial claim, it failed to show that these Rules were applicable or that they had been violated. The Carrier emphasizes that the mere listing of a Rule does not demonstrate support, and the Organization failed to cite specific Agreement language that supports the claim. Absent such support, the Organization failed to prove a violation of the Agreement.

The Carrier contends that because the Organization has been unable to show a legitimate violation of an Agreement Rule, the claim must be denied.

The Board concludes that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it did not call the Claimant for overtime service beginning on April 16 and continuing through April 22, 2006, and instead called and assigned a junior employee to perform the work. Therefore, the claim must be denied.

The Carrier cites Rule 18(k) which states:

“Where work is required by the Company to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty hours of work that week; in all other cases, by the regular employee.”

The Carrier points out that the junior employee who performed the overtime work at issue performed the same type of service on his regular assignment. The Carrier points out that the junior employee was the proper employee to operate the Brandt Power Unit on the claim dates. The Claimant, although the senior employee, did not have the right to the work in question because the regularly assigned employee was available to perform the work.

There have been numerous Awards which have held that overtime is properly assigned to the individual who is regularly assigned the work rather than following

strict seniority provisions. Under Rule 18(k) the Carrier had the right to assign the overtime work to the junior employee because he was the regularly assigned employee for that type of work. See Third Division Awards 29052, 32646 and 37052.

It is also important to note that the Claimant was fully employed during this period and did work his 40-hour workweek.

For all of the above reasons, 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 25th day of March 2010.