

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40896
Docket No. MW-41026
11-3-NRAB-00003-090378**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**
PARTIES TO DISPUTE: (
**(Union Pacific Railroad Company (former Chicago &
(North Western Transportation 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 foreman/flagman overtime service of providing protection for MCI and Sprint (fiber optics carriers) working in the vicinity of Mile Post 3.8 and Pecos Street in the Denver North Yard on January 5 and 6, 2008 instead of senior Extra Gang Foreman L. Martellaro (System File D-08-05/1500995).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Martellaro shall now be compensated for sixteen (16) hours at his respective time and one-half rate of pay and for five and one-half (5.5) hours at his respective double time 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.

This is a rest day overtime dispute involving the Carrier's use of a junior Extra Gang Foreman to perform Foreman/Flagman duties of providing track protection for fiber optic carriers on Saturday and Sunday, January 5 and 6, 2008. It raises the issue of whether the Claimant's seniority within the classification gives him preference to this rest day overtime assignment, and relies upon Rule 26(h) which provides, in pertinent part:

"Work on unassigned days - Where work is required by the Carrier 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 (40) hours of work that week; in all other cases by the regular employee."

This case involves similar facts and the same employees as were involved in Third Division Award 40893. As noted therein, both were classified as Foremen with a Monday through Friday workweek; the Claimant was working as a Foreman on a surface and lining gang with responsibilities consisting of the tamper and regulator for that gang, and the junior employee was working as an Extra Foreman to cover extra jobs and relieve other Foremen and Track Inspectors when they were not available. According to the Carrier, the Claimant was the Foreman of a surfacing gang with other employees, who worked at a location near MP 52 the prior day, and there was no surfacing gang work performed on the claim dates, while the junior employee was assigned to work at a location near where he had worked the prior day performing similar duties as part of his normal job responsibilities.

The Organization points out that this overtime was worked from January 5 at 6:00 A.M. continuously through January 6 at 3:30 A.M. and involved functions - providing track protection - that are typically performed in connection with whatever assignment a Foreman has, and that both employees were qualified and available for the overtime in question. Because neither employee was the regularly assigned employee to perform this work, as there had been no Relief Foreman position bulletined, the Organization argues that the Claimant had a seniority preference for this assignment, citing Third Division Awards 4531 and 36264. The Organization contends that the Board has upheld the paramount importance of seniority for overtime assignments in similar circumstances, relying on Third Division Awards 19758, 20310, 24480, 27593, 33909, 35572 and 37205; Public Law Board No. 6430, Award 9.

The Carrier contends that this was part of the regular assignment of the junior employee, who relieves Foremen and had done so in this vicinity the prior day, as noted by the written statement of the Manager of Track Maintenance, and points out that this fact was not refuted by the Organization. It asserts that the assignment of work is not based on seniority alone, but also on the type of work being performed, which must be examined in each case, citing Third Division Award 31294. In this case, the Carrier argues that the Claimant's regular assignment involved the tamper and regulator on his surfacing gang, while the junior employee's regular assignment was to fill in for Foremen, as he did in this overtime situation. It submits that, because the regular employee is given preference to the overtime under Rule 26(h) as opposed to the senior employee, the Organization failed to meet its burden of proving a violation, relying on Third Division Awards 23357, 31294, 37052, 37857 and 39300.

After careful review of the record, the Board is of the opinion that the Organization failed to carry its burden in this case for the same reasons as those set forth in Award 40893. As noted therein, in the absence of the availability of the regular employee, when two or more employees are equally qualified and available for a planned rest day overtime assignment, seniority is a factor that should be considered in making the assignment. See Third Division Awards 27593 and 37205. The foundation for the Organization's claim is that the junior employee was not the regular employee contemplated in Rule 26(h) because he does not hold a bulletined Relief Foreman position. However, the Organization did not present any evidence

to rebut the Carrier's assertion that the junior employee relieves the Foreman in this vicinity as part of his regular assignment, and had previously done so, and that the Claimant's regular assignment at that time was with a surfacing gang working at a distant location performing work which was not involved in the overtime. On the basis of this record, 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 10th day of March 2011.