

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40988
Docket No. MW-41239
11-3-NRAB-00003-100091**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn 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 failed to call and assign Mr. C. Jones for planned overtime service on September 1, 2, 3, 4, 5, 6, 7 and 8, 2008 and instead assigned junior employe A. Niemeyer (System File R-0831C-304/1510784 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Jones shall now be compensated for seventy-seven (77) hours at the applicable overtime 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.

At the time this dispute arose, the Claimant was a Welder scheduled to work from 7:30 A.M. to- 6:00 P.M., Monday through Friday; A. J. Niemeyer was a Machine Operator with daytime hours; both held their respective positions at Des Moines, Iowa; both also held Trackman seniority; and the Claimant was senior to Niemeyer in the Trackman classification (as well as service date).

From Monday, September 1 through Monday, September 8, 2008, night overtime was available to provide track maintenance work. On August 28, 2008, Manager Track Maintenance O. Steil sought volunteers for that overtime work. MTM Steil was able to get volunteers to work on the Foreman and Machine Operator positions from employees working in those classifications. However, no assigned Trackman volunteered for the overtime. Although the Claimant and Niemeyer both expressed interest in the overtime opportunity, the Trackman's overtime work was assigned to junior Machine Operator Niemeyer rather than the Claimant. The Carrier's stated reason from MTM Steil for assigning the Trackman overtime work to Niemeyer rather than the Claimant was because, as a Welder, the Claimant "... could not be released ... because at the time he was the only qualified welder working the territory and the backlog of welder work prohibited his release to this assignment." The Claimant asserts that there were other employees with welding rights and that backlogs of welding work have existed for a long time. The Organization asserts that five other employees under MTM Steil's supervision had Welder seniority.

This claim has merit.

First, this was not an emergency. On the contrary, it involved pre-planned overtime. While the night overtime work was performed during the period of September 1 through September 8, 2008, the record shows that MTM Steil sought to fill the positions on August 28. Therefore, the greater flexibility given the Carrier for work assignments in emergencies, which could allow the Carrier to avoid any seniority requirements in those assignments, is not present in this case.

Second, it is evident from the Carrier's position that but for the fact that there was an asserted "... backlog of welder work [which] prohibited his release to this assignment . . . ,” the Claimant would have been assigned to the overtime due to his greater Trackman's seniority. The Carrier's position is, therefore, taken as an

affirmative defense. Simply stated, the Carrier's position is that because of the backlog of Welder work, the Claimant could not be spared.

However, as part of that backlog, what specifically prevented the Carrier from assigning this particular overtime work to the Claimant when, as shown by the Organization and the Claimant, backlogs in Welder work have long existed and other employees held Welder seniority? The Carrier has not shown specifically why the Claimant could not be assigned the overtime work in this case — it only generally asserts the existence of a backlog. Because the Carrier asserted its position as an affirmative defense, it was obligated to make that kind of specific showing. Because the Carrier failed to do so, the claim has merit.

As a remedy, the Claimant shall be made whole for the lost overtime opportunity during the period set forth in the claim.

AWARD

Claim sustained in accordance with the Findings.

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 20th day of July 2011.