Award No. 6136
Docket No. MW-6083

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Curtis G. Shake, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

BOSTON AND MAINE RAILROAD

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood:

(1) The Carrier violated the effective agreement when they failed to call the senior available Chauffeur, for service on July 14 and 15, 1951, and in lieu thereof, assigned the work to an employe holding no seniority in the Chauffeur's class;

(2) That Chauffeur J. Mahoney be paid at his respective time and one-half rate of pay for sixteen (16) hours account of the violation referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: William Casey was a regularly assigned chauffeur, assigned to operate Truck No. 608. Chauffeur Casey started his annual ten-day vacation on June 25, 1951, and during his absence the Carrier assigned Edward Abate, a trackman holding no chauffeur's seniority, to operate truck No. 608.

Upon the termination of Chauffeur Casey's annual vacation, he was assigned to relieve Assistant Foremen at emergency headquarters, while such Assistant Foremen were on their annual vacations. Trackman Abate continued to operate truck No. 608, although he neither held nor acquired any chauffeur's seniority as a result of this assignment.

On Saturday, July 14, 1951, and on Sunday, July 15, 1951, Trackman Abate was permitted to operate truck No. 608 for which he was compensated at the time and one-half rate, account of Saturdays and Sundays being his regularly assigned rest days.

In the meantime, Mr. J. Mahoney, a regularly assigned chauffeur, who held and acquired seniority as such by bulletin assignment, was deprived of the opportunity of working in his regular assigned class of chauffeur on Saturday, July 14, 1951, and Sunday, July 15, 1951, both days being his regularly assigned rest days. Chauffeur Mahoney was available and willing to perform the necessary overtime service as a chauffeur on July 14 and 15, but the Carrier made no effort to call or notify him and in lieu thereof, assigned the overtime work to an employe who held no seniority in the Chauffeur's class.

It became necessary to use truck No. 608 on Saturday and Sunday, July 14 and 15, 1951. Mr. Abate, as chauffeur assigned to that truck, was used on those days to operate truck No. 608.

Claim was made in favor of Chauffeur J. D. Mahoney as "the senior available employe not working on his rest days" and declined.

POSITION OF CARRIER: Since Carrier has not received a copy of Petitioner's ex parte submission, no knowledge is available upon which a defense can be predicated.

Carrier can merely guess at the rules which Petitioner will invoke. Carrier reserves the right to reply more fully upon receipt of Petitioner's submission.

It is an established practice, generally speaking, to use the regular owner of a piece of heavy equipment when said equipment is to be operated on overtime basis. Seniority, as such, is not, and never has been, a controlling factor under such circumstances; in fact, it is definitely **not** a factor.

It is Carrier's position that nothing in the controlling agreement provides that the senior employe of a given class shall be given the overtime work in that class. In fact, the practice is decidedly to the contrary. Carrier asserts that Mr. Abate became the regular assignee of truck No. 608 on June 25, 1951. As such, he was used for overtime service, to operate truck No. 608 on his rest days, July 14 and 15, 1951. Carrier offers, as Carrier's Exhibit A, a copy of the 1951 roster of Chauffeurs, Terminal Division. It will be noted that Claimant J. D. Mahoney ranks thirteenth in a total of seventeen. Petitioner alleges Carrier "failed to call the senior available chauffeur" but offered no proof whatsoever that Mahoney (No. 13) was the senior available chauffeur. Carrier asserts he was not. Petitioner submits the claim here and the burden of proof rests with him to offer evidence of probative value in support of his statements and/or allegations. He did not do so on the property and Carrier doubts that he can do so before the Third Division.

The claim here is merely an effort by Petitioner to obtain a gratuity for Claimant Mahoney who is far from being the senior chauffeur.

What Petitioner is actually demanding here is that a rule be written for him; a rule stipulating that vacation relief workers shall **not** be entitled to any overtime even though said overtime stems directly from the assignment of the vacationing employe. Such a rule would be directly contrary to the established customary practice. Carrier would then be literally required to provide a replacement chauffeur (the senior available chauffeur) in the middle of a trip being made by a vacation relief chauffeur, if the trip could not be completed during regular hours or face a claim for the overtime by some other employe (senior available chauffeur).

Mr. Abate was regularly assigned as vacation relief chauffeur on truck No. 608. He was entitled to any overtime worked by his truck. Overtime work on July 14 and 15, 1951 was performed by the truck to which he was assigned and he was properly used to perform the work of operating truck No. 608 on those dates.

There is no merit in the claim in this docket and it should be denied.

All data and factual argument used herein has been brought to Petitioner's attention.

(Exhibits not reproduced).

OPINION OF BOARD: William Casey was regularly assigned as a chauffeur to operate Truck No. 608 used by the Maintenance of Way Department at Charlestown, Massachusetts. On June 25, 1951, Casey went on his

ten-day annual vacation and Edward Abate was assigned by the Carrier to operate Truck No. 608 in Casey's absence. Abate was a trackman and held no seniority as a chauffeur.

At the termination of Casey's leave he was assigned to relieve an assistant foreman who went on vacation and Abate continued to operate Truck No. 608. He did so on Saturday, July 14, and Sunday, July 15, 1951, which were his rest days and for which service he was paid at his time and one-half rate.

The Claimant, J. Mahoney, was regularly assigned as a chauffeur to operate Truck No. 602 used by the Carrier's Bridge and Building Department at East Cambridge, Massachusetts, which is less than a mile from Charlestown. Saturday and Sunday, July 14 and 15, were his rest days and he has made claim for 16 hours' compensation at his time and one-half rate because he was not called to operate Truck No. 608 on said days. Disposition of the Claim turns upon the respective rights of Abate and Mahoney to operate Truck No. 608 on the two days involved.

The Carrier rejected the Claim on the property on the ground that since Mahoney was employed in the Bridge and Building Department on a regularly assigned truck he had no right to fill a position in another sub-department during vacation periods, citing Rule 3-A of the Agreement. Said rule provides, among other things, as follows:

> "Seniority rights of all employes are confined to the class in the sub-department in which employed, except employes in each of the following groups in a seniority district will be considered in the same seniority class irrespective of the sub-department in which employed:
>
> * * *
>
> Chauffeurs
>
> * * *"

We think the Carrier misconstrued the above rule. It will be noted that chauffeurs are expressly excepted from that part of the rule that confines employes' seniority to the sub-departments in which they are employed. The effect of the exception appears to be to permit chauffeurs to exercise their seniority rights throughout their seniority districts, irrespective of the sub-department in which employed. Operators of Trucks 608 and 602, though in different sub-departments, are in the same seniority district. That being true Rule 3-A lends no support to Carrier's contention.

It is also urged on behalf of the Carrier that on July 14 and 15, Abate was the "regular employe" in respect to the operation of Truck No. 608, within the meaning of Rule 30-C, which reads:

> "Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

If the Carrier's interpretation and application of Rule 30-C is correct, then Abate was the "regular employe" operating Truck No. 608 on the two days in question and the Claim should be denied. On the other hand, if, as is urged by the Employes, Casey was the "regular employe", though he was temporarily assigned to other work, the Carrier's contention must be rejected.

The Carrier has directed our attention to Award No. 5532 but we do not find it helpful, either from the standpoint of the facts or the rules involved.

The Agreement provides in Rule 2 that "rights accruing to employes under their seniority entitle them to consideration for positions in accordance with their relative length of service," and this Board has held that seniority applies alike to regularly bulletined positions, temporary positions and those required to be performed only with overtime work. Awards Nos. 2716 and 4200. It would appear, therefore, that the Claimant, being an available chauffeur with seniority in the Boston Terminal Seniority District, was entitled to the work in question over Abate, who had no seniority as a chauffeur. It is immaterial that some other person may have had a right to the work in preference to the Claimant. The Claim is for the violation of the Agreement, rather than for the benefit of a particular employe. Award No. 4022.

Finally, the Carrier asserts that the work in question belonged to Abate because of the established principle that when an employe is assigned to operate a specific piece of equipment he is entitled to the overtime arising from its use. Awards Nos. 5346 and 5954 are cited in support of this proposition.

Award No. 5346 involved a question as to which of two cranes should have been used on a job. The crane used was operated by the employe regularly assigned to it by bulletin and accepted bid. Award No. 5954 sustained a claim for the failure of the Carrier to call a crane operator who was regularly assigned to it as a result of a bid. We do not construe either of said awards as supporting the proposition that a temporarily assigned employe, in the situation of Abate, should be regarded as the "regular employe" within the meaning of Rule 30-C. As already pointed out, Abate had no seniority as a chauffeur. We cannot accept the Carrier's conclusion that both Casey and Abate were on July 14 and 15 "regular employes" assigned to Truck No. 608.

We conclude that the Claim should be sustained for 16 hours at the pro rata rate. Award No. 4571.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Carrier violated the Agreement.

AWARD

Claim sustained to the extent indicated in the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: (Sgd.) A. Ivan Tummon
Secretary

Dated at Chicago, Illinois, this 17th day of March, 1953.