NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19758
THIRD DIVISION Docket Number MW-19687

Benjamin Rubenstein, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern, Inc.

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

(1) The Carrier violated the Agreement when it assigned Mechanic I. Larsen instead of Mechanic C. Hagey to perform overtime service on January 5, 1971 (System File 347 F/MW-6 (d) - 2, 3-5-71).

(2) Mechanic C. Hagey be allowed three hours of pay at his time and one-half rate because of the violation referred to in Part (1).

OPINION OF BOARD: There is no dispute as to the facts involved. On January 5, 1971, Messrs. Larsen and Hagey were employed as mechanics at the same garage. Hagey had greater seniority than Larsen. At about 4 P.M. a call came in for help to a disabled truck. Mr. Larsen, the junior employee, was sent out and worked till 7 P.M.

Hagey claims that the seniority Rule was violated, and asks payment for three hours at overtime rate.

The carrier denied the request on the following grounds;

1. Rule 2 of the Agreement does not apply to overtime work;

2. It has been its practice to assign overtime work not on seniority basis; and

3. Employee Larsen was better qualified to do the job required.

The basic issue here is whether Rule 2 applies to overtime work.

The rule, being part of the Article on Seniority, reads:

> "Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad, as hereinafter provided."

Seniority provisions are included in labor relations agreements for the benefit of the senior employees. They seek to protect and give preference in jobs, promotions and other opportunities to employees with greater seniority.

In this respect, they are a limitation of the employer's right to operate and manage its business. As such, they must be interpreted in favor of their beneficiaries, and applied wherever the issue arises, unless there are definite limitations of the Rule in the contract. Exceptions to the seniority provisions, if any, should be listed in the agreement. Otherwise the term is widely applied. Thus, the instant agreement limits seniority to ability in event of promotions (Rule 16); Promoted employees (Rule 4); Departments (Rule 5), etc.

Although the Rule does not specifically include overtime, it does not exclude it.

We have consistently held, that unless overtime is specifically excluded from the seniority provisions of an agreement, it is subject to them (Award Nos. 2716; 2994; 4531; 6136; 15640).

In 15640 (Ives) we said, that a carrier "has an obligation to make a reasonable effort to call the senior available employee to do overtime work, before using a junior employee to do such work."

The cases cited by carrier are differentiated from the instant case: in 10320, the junior employee was working on a certain task which he had to complete; in 11587, the seniority provisions were specifically circumscribed; in 13023, we found that the work was of an emergency character, we cited Award 4531, where we said: "we find that claimants had the senior right to this work and, being available and the work not being of an emergency character, should have been called," (underlining in original); 13566 was decided on the basis of an existing emergency; 14500 does not deal with overtime; 14975 does not recite any overtime agreement provisions.

In 15829 (Ives) the claim was denied because claimant would not have been available to perform the extra work; 15943 involved an application of the scope rule rather than overtime; 16667, while finding that the seniority provisions of the agreement do not apply to overtime, based the award on an emergency situation; in 18091 the junior employee was assigned to a different class of work, and we held that carrier was not obligated "to also assign claimants to that class of work"; in 18302, there is a finding that the parties were aware that the seniority provisions excluded overtime; 18686 compares a rule on overtime in one instance with other rules of overtime in the same agreement; 8073 holds that the agreement does not require the carrier "to observe seniority in making daily assignments to jobs that will accrue overtime."

The instant case does not contain any of the above circumstances or exceptions.

Of course, seniority rights, as any other, may be circumscribed by inability to perform, unavailability, and comparative efficiency between the junior and senior employees, or by established practice. But such defenses to seniority provisions must not only be alleged, but proven.

The carrier has not proven either an existing practice to disregard seniority in overtime, where all other elements are equal. Nor has it proven that overtime is excluded from the seniority provisions.

There is no dispute here, either, as to the ability of the employees involved, or their willingness and availability to do the job, or their seniority status. Nor is there any claim of an emergency situation.

Overtime work is a condition of employment and unless specifically excluded, it is to be deemed as part of the benefits of seniority.

Under the circumstances, the claim is justified.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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 seniority provision of the Agreement.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 11th day of May 1973.