

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 22771
Docket Number MW-22228

Rolf Valtin, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(The Denver and Rio Grande Western Railroad Company

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

(1) The Agreement was violated when it used an employee junior to Extra Gang Laborer Art Bogard for 7-1/2 hours of overtime service on August 19, 1976 (System File D-11-76/MW-14-76).

(2) Claimant Bogard shall now be allowed 7-1/2 hours' pay at his time and one-half rate."

OPINION OF BOARD: This case is concerned with an overtime assignment for one employee from among a group of employees who were members of a particular extra gang -- Extra Gang 6501. The assignment covered the period from 4:30 PM to midnight on August 19, 1976. Both the claimant and the employee selected for the assignment were members of the Extra Gang. The claimant's seniority dates from May 16, 1973. The selectee's seniority dates from June 24, 1975. To be determined is whether the claimant's non-selection for the assignment violated his seniority rights.

Had the assignment involved the performance of one or another piece of the Gang's regular work, we would unhesitatingly uphold the Organization. For, despite all that the Carrier here seeks to argue, prior Awards involving these two parties have settled the question of whether the Carrier is bound to the application of seniority in assigning a particular gang's overtime work to some members of that gang. It suffices to quote one paragraph from Award 22324 (which was not in the parties' hands when the instant dispute arose and was being processed by the parties but which had been issued by the time it was under Board consideration):

"The question of whether seniority is to govern in the assignment of overtime work has been decided in three recent Awards of this Division involving the same parties,

"the same agreement, and a similar issue. Consistent with the findings in these Awards (Nos. 21421, 21545, and 21757), it is the opinion of this Board that once Carrier decided to use B & B carpenters assigned to B & B Gang No. 6021 to perform overtime service, Carrier was required to assign said overtime to Carpenters in Gang No. 6021 on the basis of their seniority. Said Board findings in the cases listed supra were based upon a violation of the Parties' Agreement Rule 4."

We add, again contrary to arguments advanced by the Carrier, that we would not be deterred from a ruling in favor of the claimant by the fact that Extra Gang 6501 at the time included three employees who were senior to the claimant (and thus, obviously, were senior to the selectee). The answer would be that the failure by these employees to claim the particular piece of work -- which failure is left unexplained and is potentially attributable to all sorts of reasons -- cannot be accepted as grounds for defeating the claimant's claim for that piece of work.

In the present case, however, the assignment was not one involving the performance of the Gang's regular work. What happened, rather, was that the Gang's supervisor decided that the work-train equipment should be protected in the ensuing off-duty hours against vandalism and theft. The assignment, in short, was a watchman assignment. And in that circumstance, we think that some leeway for suitability -- some room for allowing suitability to override seniority -- should be granted.

We are so proceeding and we view the evidence as justifying the non-selection of the claimant. In contrast to what was true of the employee who was selected for the assignment, the claimant:

- 1) was not familiar with the operation of the message-transmitting equipment which was to be used in the event difficulties arose;
- 2) had not passed a motor-car examination (and, though true that the motor car was not used on the night in question, its potential operation was legitimately seen as a requirement for the watchman assignment);
- 3) had worked such an extraordinarily large number of hours in the immediately preceding period as to legitimately make him viewable as a poor risk in the light of the nature of the

assignment -- he had worked 25 consecutive hours, been off for 8 hours, and then worked the 8 hours which preceded the hours for the watchman stint.

We are denying the claim on the narrow basis of the facts and circumstances presented by the case.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 29th day of February 1980.