

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 24240
Docket Number MW-23827

Carlton R. Sickles, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ Southern Pacific Transportation Company (T&L Lines)

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

(1) The Carrier violated the Agreement when it assigned junior Extra Gang Laborer Manuel Cedillo to perform overtime service on October 13, 14 and 24, 1979 instead of calling and using Extra Gang Laborer L. Z. McQueien who was senior, available and willing to perform that service (System File MW-80-11).

(2) Extra Gang Laborer L. Z. McQueien shall be allowed thirty-one (31) hours of pay at his time and one-half rate and seven and one-half rate and seven and one-half (7-1/2) hours of pay at his double time rate because of the aforesaid violation."

OPINION OF BOARD: We are concerned here with the applicability of the seniority provisions of the Agreement in effect. There appears to be no dispute between the parties that, under ordinary circumstances, the applicable rules would have required the Claimant to be awarded the overtime in question. The issue is whether the Carrier was justified in not using the incumbent, but rather using an employe with lesser seniority. It alleges to have so done because of the age and physical condition of the Claimant as well as the inconvenience, in one instance, because of the location of the Claimant away from the location of the work to be performed.

The Carrier alleges that the age of the Claimant, sixty-three, and his medical history, which included two injuries to his back, and their concern of possible damage to his legs was the cause for not having given him the assignment in question. The allegation is that the assignment of working on a rail-grinding train involves the necessity of jumping up and down incessantly which would possibly be injurious to the Claimant. The decision of the Carrier was based upon the day-to-day observance of the Claimant in the performance of his normal duties.

In a separate instance, the rationale of the Carrier was that the Claimant was not trained to be a welder's helper, and the need for the overtime was at a position away from the location of the Claimant which would have necessitated extended travel back and forth which would have delayed the entire process.

At issue then is whether there are extenuating circumstances which would authorize the Carrier to ignore the clear language of the seniority provisions in the Agreement and, if so, whether these alleged factors are sufficient. A complete review of the factual situation indicates to this Board that, in this instance, there is not sufficient factual basis for ignoring the

language of the Agreement for the reasons that the Claimant was not as spry as the person who was utilized for the jobs. The medical evidence does not in itself establish that the Claimant was not adequate to perform the job properly. By its very nature, a seniority provision will give preference to those persons who are older and recognizes that the aging process may indeed take some toll on the vigor of the individual and such provisions are designed, in part, to prevent such persons from being affected negatively. This is not to say that, under some circumstances, it may be abundantly clear and established by clear evidence that a person, because of his age, may not be equipped to perform some functions. However, the Board does not feel that this has been established on this record.

The Board feels, in analyzing the work performed as a helper to the track welder, the Carrier may have been justified, under the circumstances, to use a person other than the Claimant who was not readily available to perform the overtime. On the basis of the need for the Claimant to be available, it is reasonable under the circumstances that the Carrier would use the helper who was indeed available and working at the time. A review of the record does not show that the Organization overcame the presumption that the assignment of the person other than the Claimant was not clearly based upon the lack of availability of the Claimant at the time and place and, therefore, justified. For these reasons, the Board will allow the claim of the Claimant for the reimbursement of the wages lost on the first two days involved at the straight-time rate and will deny the claim for the third day.

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 violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By


Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 14th day of March 1983.