

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32915
Docket No. MW-31874
98-3-94-3-70**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul & Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier abolished the crane operator and assistant crane operator positions held by R. Hoover and K. Samplaski, advertised the same positions with a work week of Friday through Monday with Tuesday, Wednesday and Thursday designated as rest days and thereafter required them to work said positions beginning May 22, 1992 and continuing (System File C-25-92-H290-01/8-00096 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Hoover and K. Samplaski shall each be allowed the differential in pay between that which they received and the rate of pay to which they were entitled, beginning May 22, 1992 and continuing, until such time as they were released and allowed to exercise their seniority."**

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 the dispute arose, Claimants held five day per week Crane or Assistant Crane Operator positions. On April 2, 1992, the parties reached oral agreement for Crane Operator and Assistant Crane Operator positions with a four day workweek. That oral agreement was not reduced to writing until April 27 and was not signed by the Organization until May 1, 1992.

The four day per week positions were bulletined on May 21, 1992 as temporary positions (for approximately two months' duration). According to the Carrier, Claimants' five day positions were also abolished. The Carrier then held Claimant Samplaski in the four day position through June 22 and Claimant Hoover in that position through July 13, 1992, at which times Claimants were then allowed to exercise their seniority rights to other positions. In this claim, the Organization asserts that Claimants were improperly held in the four day positions and seeks an overtime differential on Claimants' behalf for hours Claimants worked on days after May 21, 1992 which otherwise were after eight hours in a workday and overtime for days Claimants had to work which otherwise would have been their days off based upon their five day positions.

The relevant Rules provide as follows:

"RULE 3
CONSIDERATION FOR POSITIONS

Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the Railroad as hereinafter provided.

* * *

RULE 8
BULLETINS - NEW POSITIONS OR VACANCIES

* * *

- (c) New positions or vacancies of thirty (30) days or less duration shall be considered temporary and may be filled without bulletining, except that senior, available, qualified employees, on proper request to the Division Engineer, will be given preference, with the understanding they will not be paid for time lost nor for time consumed traveling to and from such position.

Emergency services may be performed without regard to seniority."

On May 21, 1992 the Carrier bulletined the four day positions, abolished Claimants' five day positions and at the same time held Claimants in the four day positions and did not permit Claimants to exercise their seniority until June 22, 1992 (Samplaski) and July 13, 1992 (Hoover). On the property, it was not disputed that Claimants did not desire to hold the four day positions, but desired to exercise their seniority to displace into other positions. As stated by the Organization on the property "[t]he claimants did not desire to become assigned to the crew in question . . . At no time did they offer a request to fill the assignments pending bulletin award" [emphasis added]. The Carrier cannot now contest those assertions. By requiring that Claimants take the four day positions, the Carrier acted inconsistent with Rule 3 which allowed Claimants to exercise their seniority, particularly when the Carrier had abolished their positions.

Contrary to the Carrier's arguments, Rule 8(c) did not permit the Carrier to hold Claimants in the positions. Even if applicable to this case as the Carrier views the positions force assigned to Claimants as temporary until filled by bulletin, the Rule permits the Carrier to force assign employees without bulletin, provided the "senior, available, qualified employees, on proper request to the Division Engineer, will be given preference." As developed from the positions taken on the property, Claimants expressed no such request for preference. The record does not show that the Carrier

even attempted to get more junior employees to accept the positions before force assigning Claimants.

The Carrier's reliance upon Rule 8(e) also does not change the result in this case. The position on the property argued by the Carrier was that its actions were permitted by Rule 8(c). As stated by the Carrier on the property "[t]he claimants positions were abolished and were then filled in accordance with Rule 8(c)" [emphasis added]. Rule 8(e) was not specifically raised on the property. The Board cannot now consider new arguments not raised on the property.

On the merits, the Organization has therefore demonstrated a violation of the relevant Rules.

With respect to the remedy, based on what is before us, we are unable at this time to award the overtime relief sought by the Organization. As the Carrier points out, it is undisputed that Claimants did not suffer loss of hours as a result of being held in the positions after May 21, 1992. Claimants worked basic 40 hour weeks until they were permitted to exercise their seniority. What is not before us are the parties' specific overtime provisions. We do not have in this record whether overtime is paid after eight hours in a day or if paid for hours worked on scheduled off days irrespective of whether a 40 hour week has been worked. The existence of those provisions would be the only basis upon which the Organization's overtime remedy could be imposed. In accord with our discretion, the matter shall be remanded to the parties to compute Claimants' overtime entitlements, if any, based upon the appropriate language of the relevant Rules. The basis for the computation shall be that after May 21, 1992, Claimants were required to work four, ten hour days (Friday through Monday) when they should have been working five, eight hour days (Monday through Friday). Claimants' overtime entitlements, if any, shall be based on those Rules. The measuring period for compensation under this Award shall be from May 22, 1992 through the dates Claimants were permitted to exercise their seniority.

The other relief sought by the Organization is denied for lack of Rule support.

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 23rd day of November 1998.