

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 33421
Docket No. MW-32465
99-3-95-3-377

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier called and assigned junior Section Laborer J. Gordon from the Dubuque Section Crew to perform overtime service (unloading rip rap) between Mile Posts 60 and 66 on the Guttenberg Section territory on Saturday, March 5 and Sunday, March 6, 1994, instead of calling and assigning Senior Section Laborer R. E. Lang from Guttenberg Section Crew 743 (System File C-06-94-S290-01/8-00196).
- (2) As a consequence of the aforesaid violation, Guttenberg Sectionman R. E. Lang shall be allowed nineteen (19) hours' pay at his applicable time and one-half rate.”

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.

The Carrier assigned the work of unloading rip rap to a junior unassigned employee on March 5 and 6, 1994. The Claimant was the senior available employee and was not assigned the overtime work which took place with his regularly assigned Guttenberg Section Crew on his territory between Mileposts 60 and 66. The Organization alleges violation of the Agreement in that the junior employee was given the overtime even though he was off the Dubuque Section, rather than the Claimant off the crew that regularly performed work on this territory.

The Carrier does not deny that the junior employee performed the overtime work, but holds on property that the Claimant declined weekend overtime on numerous occasions and that the employee assigned was the senior employee on the Dubuque Section who wanted weekend overtime. The Carrier asserts that the work was originally planned for the Dubuque Section on the claim dates, but due to serious problems with track availability a last minute unplanned change to the Guttenberg Section was necessitated.

As a preliminary point, the Carrier has raised several new arguments in its submission which were not raised on property. Neither the quick filing of this claim, nor those arguments which come too late for our consideration are deemed relevant to deciding the issues at bar.

The seniority issue is at the center of this dispute. The assignment of the most senior employee for weekend overtime did not occur in this instance. The record on the property provides a prima facie case that the Claimant was the regularly assigned employee to the Guttenberg Section territory where the work was performed. The Organization provided evidence that the employee assigned the work was regularly assigned to the Dubuque Section Crew.

The Carrier raised an affirmative defense that rested on two points. First, the Carrier argued that the work was changed due to a last minute problem with scheduling trains. In essence the Carrier is arguing that there was an emergency problem that necessitated the utilization of the senior employee off the Dubuque Section. Secondly, the Carrier asserts that it did not use the Claimant in that he "repeatedly turned down weekend overtime work to unload riprap." The Carrier maintains that the Claimant was voluntarily and consistently unavailable for the work. It is axiomatic that the party

asserting an affirmative defense has the obligation to provide support for their position. The Board has searched the record for evidence of either condition that would necessitate the Carrier's actions or proof that the Claimant was avoiding overtime. The Board finds no such proof. On the contrary, the Organization has provided evidence to demonstrate no abnormal Carrier operations for work Train 991, as well as the Claimant's letter indicating that he had worked weekend overtime doing riprap. Therefore, and finding no argument on remedy while on the property, the claim must be sustained as presented.

AWARD

Claim sustained.

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 13th day of July 1999.