

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35075
Docket No. SG-34446
00-3-98-3-69**

The Third Division consisted of the regular members and in addition Referee Donald W. Cohen when award was rendered.

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Long Island Rail Road Company**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signal men, on the Long Island Rail Road:

Claim on behalf of L. J. Delia for payment of 36 hours at the time and one-half rate and 13 hours at the double time rate, R. A. Waidler for payment of 12 hours at the time and one-half rate, S. F. Gagliano for payment of 28 hours at the time and one-half rate, E. C. Wylie for payment of 20 hours at the time and one-half rate and 30 hours at the double time rate, A.G. Meyer for payment of 20 hours at the time and one-half rate and 30 hours at the double time rate, J. C. D'Aries for payment of 32 hours at the time and one-half rate and 28.5 hours at the double time rate, A. W. Klein for payment of 12 hours at the time and one-half rate and R. E. Poor for payment of 32 hours at the time and one-half rate and 28.5 hours at the double time rate, account Carrier violated the current Signalmen's Agreement, particularly Rule 40, when it used other employees instead of the Claimant for overtime assignments from Oct. 28 to November 16, 1996. Carriers file No. SG-27-96.BRS File Case No. 10566-LI.”

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 issue in this case is the application of Rule 40 (g) relating to overtime, which provides in part:

“(g) When it becomes necessary to assign an employee to an overtime assignment, such employee shall be selected based on the following considerations:

- (1) Incumbent of the position for which the overtime is required.**
- (2) Senior qualified available employee working in the class of the overtime assignment as set out in Rule 12 at the section, subdivision, or gang. In the event no such employee is available to cover the overtime assignment, employees in an adjacent section, subdivision, or gang will then be considered on the same basis.”**

The claim flows from the action of the Carrier in utilizing two BRS employees assigned to the Construction section, headquartered at Mineola, New York, to work in the Maintenance section headquartered in Ronkonkama, New York. When overtime arose on the job it was assigned to these employees. The Organization contends that this was a violation of past practice and that the two employees could not be considered incumbents in the job. The Organization argues that under the Rule, the Carrier had to first attempt to fill the positions with an employee from the adjacent section, subdivision, or gang.

The Carrier contends that it has long been the practice to utilize both Maintenance and Construction employees on the same gang. It contends that the Organization failed to cite any contractual Agreement as to why Construction section employees could not be temporarily transferred to a Maintenance section position, pointing out that Signal employees of construction gangs have been assigned to Maintenance Gangs, and vice versa, on the property in the past without complaint from the Organization.

The Carrier points out the acknowledged burden upon the Organization to sustain its position and emphasizes that the Organization has not contradicted the Carrier's position that it has a freehand in commingling employees from both classifications. The logical progression from this right is a determination that the Construction employees, having been assigned to the job for an extended period of time, have thereupon become the incumbents.

The Organization also claims that the named Claimants could have performed the overtime work. In response the Carrier demonstrated that the Claimants were working full-time and in many instances, overtime during the period in question. The Carrier also states that it did not anticipate the overtime in advance. The Organization also argues that the use of the word "gang" relates solely to Maintenance employees and that such reference precludes utilization of Construction employees. There is nothing in the record however to sustain its position.

The Organization failed to carry its burden of establishing exclusive right to the job, and the fact that the construction employees were utilized over an extended period of time confirms their position as incumbents. The claim is denied.

AWARD

Claim denied.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of November, 2000.

Labor Members Dissent
To
Docket No. SG-34446
Third Division Award 35075
Referee Donald W. Cohen

The majority erred in the factual basis in denying this dispute. As noted in Third Division Award 35075 it incorrectly held that *"The carrier contends that it has long been the practice to utilize both Maintenance and Construction employees, on the same gang. ... Signal employees of construction gangs have been assigned to Maintenance Gangs, and vice versa, on the property in the past without complaint from the Organization."* It must be noted Carrier's affirmative defense was not based on any evidence or support.

The record of handling on the property indicates that Carrier never made this argument on the property. It was not until it filed its Submission to the Board that this new contention arose. The actual record does indicate that the Organization provided an un-rebutted interpretation of the controlling Rule 40 (G), wherein, Carrier was advised as follows:

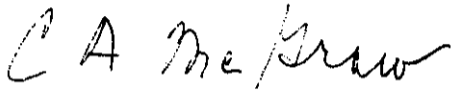
" When a Rule is written and agreed to between two parties there also has to be an interpretation of the Rule if there is going to be an understanding on the Rules implementation. The understanding on this particular Rule has been in place for the past 20 years. The reasoning behind the interpretation was logical to both parties until now. When the authors of the Rule listed in order 'section, subdivision or gang' the intent and interpretation was to separate and keep distinct work in the maintenance area and the gang. In maintenance there are sections and subdivisions. These defined areas do not exist in the construction gangs. When a position is advertised in the maintenance area it is defined by section or subdivision. When a position is advertised in the gang it is listed as entire LIRR.

Considering this when it is necessary to assign overtime in the maintenance area within a particular subdivision the Rule states section man to be asked first and then men who are working in the subdivision second. If there is no one available at this point the carrier would not have gone to the gang but to the next sentence of the Rule and went to the adjacent section or subdivision.

When overtime is available in the gang the Carrier and the Organization have agreed that if there was not sufficient members in said gang for the assignment, they would not have to go to the employees in the maintenance area where the work was being performed, but to the other construction gangs."

It is the Organization's position that the Organization's interpretation of Rule 40 (G) was the only interpretation properly before the Board. Therefore, Third Division Award 35075 should be considered palpably erroneous.

Therefore, I must dissent.

A handwritten signature in cursive script that reads "C A McGraw".

C.A. McGraw, Labor Member

Date: December 7, 2000