

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35302
Docket No. MW-34281
01-3-97-3-865**

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 Employes
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned a junior machine operator to operate a ballast regulator for overtime service on August 22, 23, and 24, 1996 instead of assigning senior Machine Operator R. Llanes (Carrier’s File 8365-1-572).**
- (2) As a consequence of the afore-stated violation, Machine Operator R. Llanes shall be allowed thirty-one (31) hours of pay at the machine operator’s 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 Claimant and D. Dilno are Machine Operators holding ballast regulator positions on Smoothing Unit #3. The Claimant was senior to Dilno. On the dates set forth in the claim, the Carrier assigned Dilno overtime work moving the ballast regulator from Richmond to Waterford, Michigan, on the Holly Subdivision where Dilno worked on various tracks brooming and regulating switches within the subdivision and then returned to Richmond. The claim followed asserting that the Claimant was entitled to perform the overtime work given to Dilno.

The September 27, 1971 Side Letter to the January 1, 1966 Agreement cited by the Organization provides, in pertinent part:

“... [I]t was agreed that the following procedure would be followed in calling Track Department employees for work outside of the regular (sic) assigned working hours:

* * *

2. When the work involved is of a specialized nature, such as program work, rail laying, patrolling, etc., the gang ordinarily doing this type of work during the regularly assigned work period would be given preference for the continuation of this work outside of the regularly assigned work period with the employees in the gang being called in the order of their seniority, if available.”

The Claimant, who was available, was senior to Dilno on this gang. Under this provision of the September 27, 1971 Side Letter, the Claimant was entitled to the work over the junior employee Dilno.

The Carrier asserts that Dilno was assigned the work over the Claimant because the Claimant “... was not qualified to perform the duties required on this overtime” and the Claimant:

“... was asked by the Surface Unit #3 Foreman, Robert Mata, if he knew how to broom and regulate switches. His reply to Foreman Mata was, “I’ve never done them before,” followed by an unsure shrug of his shoulders.”

Further, according to the Carrier, Dilno “. . . ordinarily and customarily performs the finish work on the Surfacing Unit #3, which includes the brooming.” The Claimant states that after he learned that Dilno was assigned the work he spoke with Foreman Mata who told the Claimant that Dilno was selected for the work because he “. . . was taking the most experienced operator. . . .”

However, the Claimant was qualified and assigned as a ballast regulator operator on this smoothing unit. If the Carrier had any problems with the Claimant’s work, one would expect that it would have taken steps to disqualify him as a ballast regulator operator on this gang. There is no evidence that was done.

The fact that the Claimant stated to his Foreman that “I’ve never done them before,” followed by an unsure shrug of his shoulders at most means that the Claimant did not previously perform that specific work. It does not mean that the Claimant - a qualified Ballast Regulator Operator assigned to this smoothing unit - was unqualified to do the work. It may be that Dilno was better and even more experienced at the particular brooming work. However, the relevant Rule does not permit assignment to the “most qualified” employee. Under the Side Letter of Agreement, the work was to be assigned “. . . with the employees in the gang being called in the order of their seniority, if available.” The Claimant was a qualified Ballast Regulator Operator on the gang; he was senior to Dilno; he was available; and, by Rule, he should have been given the work.

We do not view the Organization’s additional reference to Rule 4(a) on the property as an abandonment of its reliance upon the September 27, 1971 Side Letter. However, even if the claim is considered under Rule 4(a) (which in agreement, with the Carrier, we do not believe is appropriate because that Rule addresses the bulletining of “[n]ew positions and permanent positions” and this is an overtime assignment), the Organization would still prevail. That Rule requires positions to be “. . . filled by the senior qualified applicant.” The Claimant was a qualified Ballast Regulator Operator and he was senior to Dilno. Again, the Claimant should have been given the overtime work assigned to Dilno.

The claim will be sustained. The Claimant shall be compensated for the lost overtime work opportunity for the number of hours Dilno performed the disputed work.

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 24th day of January, 2001.