

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35402
Docket No. MW-32768
01-3-96-3-78**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- 1. The Agreement was violated when the Carrier allowed Mr. T. Daum to be displaced from his assigned position without actual physical displacement being made and thereby deprived him of the right to perform the work of that position on July 1, 2, 3 and 4, 1994 or until the actual displacement occurred as contemplated by Rule 4, Section 2(a) 2 (System Docket MW-3630).**
- 2. As a consequence of the violation referred to in Part (1) above, Mr. T. Daum shall be compensated for sixty-four (64) hours at the applicable C1-2 Scrap Picker's time and one-half rate of pay.”**

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.

Agreement Rule 4, Section 2 and Rule 17, deemed pertinent to this dispute, state:

"RULE 4 - SENIORITY

Section 2. Exercise of seniority.

- (a) Except as otherwise provided, an employee may exercise seniority to a position for which he is qualified:
1. when his position is abolished;
 2. when the senior employee displacing him physically assumes the duties of the position;

RULE 17 - PREFERENCE FOR OVERTIME WORK

Employees will, if qualified and available, be given preference for overtime work, including calls on work ordinarily and customarily performed by them during the course of their work week or day in the order of their seniority."

During the first week of July 1994, the Carrier posted a notice for employees holding Track Department seniority on the Pittsburgh Seniority District who were interested in working overtime on the former Monongahela Railroad. Employees interested in working said overtime were directed to call the Waynesburg Maintenance of Way Office for authorization and instructions. Mr. T. Daum (Claimant) submitted a request for the overtime assignment, however, the Carrier denied the Claimant's request maintaining that he held no rights on the Pittsburgh Seniority District Roster.

In a July 26, 1994 letter, the Organization submitted a claim to the Division Engineer alleging that the Carrier had violated Rules 2 and 17 of the Conrail-BMWE Agreement, alleging that because the Claimant was not "physically displaced" from his position pursuant to the provisions of Rule 4, Section 2(a)2, he was entitled to work overtime on July 1, 2, 3 and 4, 1994, with other members of this gang on the Pittsburgh Seniority District Roster. The claim requested payment for 16 hours at the applicable time and one-half rate for July 1, 2, 3 and 4, 1994.

The Carrier denied the claim maintaining at the outset that the Claimant was not refused the July 1 - 4, 1994 overtime opportunity because of displacement. Rather, according to the Carrier, the Claimant was denied the work opportunity because he did not have seniority on the Pittsburgh District, and therefore did not have the contractual right to perform the work. Finally, the Carrier asserted that:

"The claim fails to identify what work was performed at Waynesburg and by whom. Thus, it is impossible to conclude that the Claimant had a right to perform overtime work, on another seniority district, simply because others did."

In subsequent correspondence the Organization submitted statements from two additional zone gang employees who did not possess seniority on the Pittsburgh District, but maintained they were offered the overtime opportunity nonetheless.

A review of the record reveals that the Claimant has a Trackman seniority date of May 1976 on the Youngstown Seniority District. On June 13, 1994, the Claimant was awarded a Trackman (Tie Support) position in the Pittsburgh Production Zone, operating between Cleveland, Youngstown and Pittsburgh Seniority Districts. The Claimant was displaced from the position when a fellow employee exercised his seniority rights and began performing work on the Trackman (Tie Support) position on June 27, 1994. On June 27, 1994, the Claimant was assigned to work as a non-incumbent on a temporary vacancy on a Trackman/Casual Driver (Scrap Picker) position in Gang TO-402 in the Pittsburgh Production Zone, with rest days of Friday, Saturday and Sunday, pending advertisement and award of the position in accordance with the provisions of Rule 3, Section 4. The Claimant worked the temporary vacancy until he was awarded a Trackman position on July 11, 1994 on a System Rail Gang.

The Organization asserts that the Claimant was not "physically" displaced, and was therefore, not "properly" displaced. For its part, the Carrier maintains that the Claimant was properly displaced, but did not base its refusal to allow the Claimant to work the July 1994 overtime now in dispute on that premiss alone. Rather, the Carrier maintains that the Claimant was not allowed to work the overtime because he did not possess seniority on the appropriate district. Given the state of this record, we find that the Organization has failed to meet its burden of proving a violation of the Agreement. In the final analysis, there is no evidence entered into the record on the property which proves that the Claimant had seniority entitlement to the overtime work allegedly performed by a junior employee who allegedly bumped but did not physically displace him. Therefore, this claim must be denied.

AWARD

Claim denied.

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 26th day of April, 2001.