

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35418
Docket No. MW-32564
01-3-95-3-488

The Third Division consisted of the regular members and in addition Referee Robert M. O'Brien 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 assigned Mr. J. Bossola to perform overtime service (supervising the dumping of rip rap and ballast) at a sinking track at Mile Post 46 on the Monongahela Secondary on February 7, 1994 and continuing, instead of calling and assigning Foreman R. Devore to perform said overtime service (System Docket MW-3407).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Devore shall be compensated for all wage loss suffered as a result of Mr. Bossola or successor being assigned to perform the work in question and he shall be given proper credit for day, month and made whole.”

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.

On February 9, 1994, the Carrier determined that a special project was needed to correct a sinking track at Mile Post 43.5 on its Monongahela Secondary. This project involved the dumping of ballast and rip-rap to shore up the sinking track. A Foreman was required to supervise Track Department employees on the project which involved a significant amount of overtime.

Under Rule 17 on this property employees will be given preference for overtime on work ordinarily and customarily performed by them during the course of their work week or day in the order of their seniority if they are qualified and available for the overtime work.

It is the Organization's contention that the Carrier violated Rule 17 when it did not assign the Claimant as Foreman on the project at Mile Post 43.5 on the Monongahela Secondary. The Organization contends that the Claimant ordinarily and customarily performs Track Foreman's work on the Monongahela Secondary during the course of his normal workweek. Therefore, he should have been assigned as Foreman on this project rather than Foreman Bossola who was junior to the Claimant.

The Carrier maintains that on February 9, 1994, Track Supervisors L. Kubiak and N. J. Busia explained the project to the Claimant and offered the Foreman's position to him. However, he declined stating that he could not work the amount of hours needed for the job at this point in time. The Claimant denied being offered overtime on the job, however.

Unfortunately, the Board is unable to reconcile the statements of Track Supervisors Kubiak and Busia on the one hand and the conflicting statement of the Claimant on the other hand. Naturally, if the overtime work at issue in this dispute was offered to the Claimant, the senior Foreman, there was no violation of Rule 17. Conversely, if it was not offered to the Claimant but rather to a Foreman junior to him Rule 17 was violated.

In the light of this irreconcilable conflict in a fact that is essential to resolve this dispute we have no choice but to dismiss the claim under established precedents of this Board. (See Third Division Awards 29555 and 29546 between these same parties.)

Form 1
Page 3

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AWARD

Claim dismissed.

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.