

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35441  
Docket No. MW-34319  
01-3-97-3-925**

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

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(CP Rail System (former Delaware and Hudson  
( Railway Company)

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned junior employe B. Pearce to perform overtime service (snow removal) on January 13, 1996 instead of Mr. A. Klemash, Jr. who was senior, qualified and available to perform such service (Carrier’s File 8-00023 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. A. Klemash, Jr. shall be compensated for twelve (12) hours’ pay at the trackman-truck driver’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.

Rule 11.8 grants senior employees preference for overtime work if they are qualified and available. There is no dispute that the Claimant was qualified and that he was senior to B. Pearce. The sequence of events in this dispute is of paramount importance regarding the Claimant's availability.

The record establishes that Roadmaster Wydeen called the Claimant to work on January 13, 1996, which was one of the Claimant's rest days. He was assigned to begin work at 1:00 P.M. clearing snow from switches at Mile Post 693. It is undisputed that the Claimant was released at 5:30 P.M.

While the Claimant was clearing switches, the Roadmaster sought additional manpower to assist train movements at Binghamton Yard by removing snow. The Carrier admits that the Roadmaster called the furloughed junior employee between 1:00 P.M. and 5:30 P.M., but did not find him at home. The Roadmaster left a message for the junior employee to call the Roadmaster's home upon his return. At 7:00 P.M., the junior employee returned home and called the Roadmaster. The Roadmaster told the junior employee to go to Binghamton Yard, where he worked 12 hours. There is no evidence that a similar message was left at the Claimant's home. Nor is there any evidence that an attempt was made to ascertain the Claimant's availability at any time between 5:30 P.M. and 7:00 P.M.

The Carrier's allegations of emergency circumstances were refuted by the Organization, thus triggering the Carrier's obligation to provide probative evidence to establish the fact. On this record, no such evidence was proffered. The affirmative defense, therefore, stands unproven.

Given the foregoing facts, the Carrier failed in its obligation to properly administer Rule 11.8. It is also clear that the Claimant lost a valuable overtime opportunity as a result. Accordingly, we must sustain the claim.

**AWARD**

**Claim sustained.**

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**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 26th day of April, 2001.**