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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35962
Docket No. MW-32821
02-3-96-3-143**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(The Atchison, Topeka and Santa Fe Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned junior Machine Operator R. Pollan to perform overtime service in the Kansas City Yards on December 9, 1993, instead of assigning Machine Operator K. L. Riffel who was the senior machine operator, available, qualified and willing to perform such service (System File 30-33-9410/94-11-98).**
- (2) As a consequence of the aforesaid violation, Machine Operator K. L. Riffel shall be allowed five (5) hours' pay at the Group 7, Class 3 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.

On December 9, 1993, Claimant K. L. Riffel and R. Pollan both held seniority as Group 7, Class 3 Machine Operators on the Eastern Region Seniority District 2 in the Track Subdepartment, with the Claimant having greater seniority. Both were regularly assigned that day as Class 3 Machine Operators, working under the overall supervision of Roadmaster D. L. Schibblehut when the gravamen of the instant dispute occurred. On that day, a two-man crew from Section 13 was working on a derailment and Roadmaster Schibblehut determined to supplement their efforts with additional manpower and directed the Foremen under his supervision to canvass employees in the Maintenance Barn to work overtime, pursuant to Rule 33, as follows:

“RULE 33 - OVERTIME SERVICE

* * *

33 - (i) Preference To Overtime Work. Except when employes are utilized as provided in Rule 33 - (f), employes assigned to sections, work districts, specific areas and/or locations shall be given preference in relative seniority order among employes of the gang, work district or location to overtime work to be performed within such section, district, area or location.

Employes assigned to road gangs, such as Track Extra Gangs and B&B Gangs, Machine Operators, etc., shall have preference to overtime work in relative seniority order in connection with work projects to which they are assigned.

When overtime is anticipated and the employee is so informed, the employee will, if he expects to be away from his usual calling place, notify his supervisor that he will be away and the approximate length of time, and, if possible, where he may be reached.

When gangs are divided (working at different locations) and supervision becomes aware that one part of the divided gang will be required to render overtime service, it will not be necessary to utilize the senior members of the other part of the gang, unless all members of the gang are returned to the designated assembly point or assembled at another location before the overtime service commences.”

The record shows that Roadmaster Schibblehut then went to the Maintenance Barn himself and "shouted" that he wanted "volunteers" to work the overtime in question. It is not disputed that Pollan was among the seven employees who heard the Roadmaster's shout, volunteered and worked the overtime that evening; nor is it disputed that several other employees who were within shouting range declined to volunteer and did not work the overtime. Finally, it is not disputed that the Claimant did not come forward to volunteer and work the overtime that night. However, the parties are very much in dispute concerning whether he heard Roadmaster Schibblehut's solicitation in the Maintenance Barn that afternoon. The Claimant asserted throughout the handling of this matter that due to noise in the Maintenance Barn he did not hear the shouted call for overtime volunteers and the Carrier has not effectively rebutted those statements.

The Organization makes a persuasive argument that when the Carrier elected to meet its clear obligation to assign overtime in seniority order by a shouted call for "volunteers" it ran the risk that one or more of the employees entitled to preference by seniority might not hear the call. When such an employee makes out a prima facie case that he was not offered the overtime opportunity in seniority order, as the Claimant has shown in this record, the Carrier must shoulder the burden of proving its affirmative defense that it offered the overtime to the senior bypassed employee and that he refused. Rule 33(i), supra, requires the Carrier to give "preference in relative seniority order among employees of the gang, work district or location to overtime work to be performed within such section, district, area or location."

The Carrier's failure to demonstrate persuasively in this record that Roadmaster Schibblehut ascertained and verified that the Claimant heard his shouted "call" makes this case analogous to bypassing a senior employee for overtime after making a single phone call to his calling number and having no one answer. See Third Division Award 26562 involving these same parties . See also Third Division Awards 2053, 17116, 17182, 17183, 17533, 18425, 18870, 19658, 20109, 20524, 20534, 21396, 21707, 22966, 23561, 27150, 27701, 28656, 28781, 28796 and 29527. As for appropriate remedy, on-property Third Division Award 25601 stands for the proposition that the measure of the Claimant's remedial damages is the amount he would have earned had he performed the overtime service performed by the junior employee.

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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 8th day of March, 2002.