

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36848
Docket No. MW-36846
04-3-01-3-420

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

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Machine Operator J. F. McMahon, Jr. to perform machine operator overtime service (operate backhoe to install and unload ties and track panels) on March 18, 25, April 15, 29, May 6, 13 and 27, 2000 and instead called and assigned junior employee S. Dickey [Carrier's Files 12(00-0537), 12(00-0538), 12(00-0539) and 12(00-0726) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. F. McMahon, Jr. shall now be compensated for seventy-three (73) hours' pay at the respective machine operator'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.

The operative facts are not in dispute. A Backhoe Operator was needed to perform Saturday rest day overtime work on each of the claim dates. The backhoe falls within the Machine Operator A job class. Both the Claimant and the junior employee who was called for the work, S. B. Dickey, held seniority on the New England Seniority District in the Machine Operator A job class. However, the Claimant held the greater seniority in the job class in the district. Neither employee held a Machine Operator A assignment during the claim dates; both were apparently working in the Track Foreman classification performing other duties.

Although both the Claimant and Dickey were assigned within the New England Seniority District, they had different headquarters. The Claimant was headquartered at Worcester, Maine, and Dickey was headquartered at Framingham, Maine.

The overtime work was performed in an area called the Fall River Secondary. According to the Carrier, the Claimant's headquarters is not within the territory that encompasses the Fall River Secondary. Dickey's headquarters is within the territory. The nature of this territorial arrangement is not precisely developed in the on-property record.

The Organization asserts the assignments violated Rule 17, which reads as follows:

"RULE 17 - PREFERENCE FOR OVERTIME WORK

Section 1 - Non-mobile gangs:

- (a) When work is to be performed outside the normal tour of duty in continuation of the day's work, the senior employee in the required job class will be given preference for overtime work ordinarily and customarily performed by them. When work is to be performed outside the normal tour of duty that is not a continuation of the day's work, the senior employee in the

required job class will be given preference for overtime work ordinarily and customarily performed by them.

- (b) If additional employees are needed to assist in the work, other employees located within the seniority district will be offered\called in the order of their seniority, in the required job class." (Emphasis added.)

The Carrier cited more than 20 Third Division Awards in support of its position that Dickey was properly offered the overtime work. However, all of the cited Awards involve the Conrail Agreement. A review of the Awards readily shows that Conrail Rule 17 is significantly different from the operative Rule here. The Conrail Rule differs markedly from the text of subparagraph 17(a) of the instant Rule. More importantly, none of the Awards show the Conrail Rule to contain a subparagraph 17(b) like the operative Rule here. Therefore, they must be considered essentially irrelevant.

On the facts of this dispute, we find Rule 17 to be clear and unambiguous. Paragraph (a) does not apply because neither the Claimant nor Dickey were assigned in the required job class during the claim period. That means Rule 17(b) governed the distribution of the overtime opportunities. As written, Rule 17(b) does not discriminate based on maintenance territories or headquarters points. It clearly requires offering the work within the overall seniority district based on district seniority in the job class. Despite the likely difficulty of administering such a call system in geographically large seniority districts, that is what the Carrier has agreed to do until the Rule is appropriately modified by proper means. In this dispute, as between the Claimant and Dickey, the Claimant had the requisite seniority to be offered the work ahead of Dickey. Thus, the Carrier violated the Agreement when the Claimant was not offered the overtime opportunities.

Another matter warrants some commentary. The Carrier questioned whether the Organization had properly raised its Rule 17(b) argument on the property. Our review of the record shows that it did. In its first appeal of the Carrier's initial denial on all four claims, the Organization observed that neither the Claimant nor Dickey were working in the Machine Operator A class on the claim dates. The Organization also quoted the full text of Rule 17, including subparagraph (b) and attached a copy of the Machine Operator A seniority roster

for the entire New England Seniority District to show the relative standing between the Claimant and Dickey. The thrust of these assertions and information is obvious. Moreover, at no time did the Carrier assert that the claims were vague or unclear.

Regarding remedy, the Carrier asserted that the Claimant admitted he would not have worked the overtime opportunities for the final three claim dates, which total 33 hours. This assertion was never effectively refuted on the property. Thus, as to the last three claim dates, the claims are found to have been waived. Therefore, the Claimant shall be compensated for only 40 hours at his overtime rate applicable at the time for the first four claim dates.

AWARD

Claim sustained in accordance with the Findings.

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 28th day of January 2004.