

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37472
Docket No. MW-36527
05-3-01-3-15

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign regular Machine Operator S. Woods for overtime service (operate loader) on the Keenan Section territory on August 8, 1999 and instead assigned said machine operator service to Foreman P. Bergman (Claim No. 43-99).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Woods shall now be compensated for thirteen (13) hours at his respective 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 Claimant held a regularly assigned position of B-Machine Operator headquartered at Keenan, located on the Missabe Division, Keenan Section. His regularly assigned workdays were Monday through Friday, with Saturday and Sunday designated as rest days, the record shows. At issue in this claim is whether Iron Section Foreman P. Bergman's operation of the front end loader at various locations on the Missabe Division, including the Claimant's territory, violated Rule 20 of the Agreement.

The Organization asserted that on Sunday, August 8, 1999, the Carrier required the services of a Machine Operator to run a front end loader in order to remove rail and ties from various locations on the Keenan Section, including the Highway 101 crossing, where the Claimant allegedly saw Bergman operating the end loader. The Organization stated that the Carrier's failure to contact the Claimant regarding the overtime, and its use of Foreman Bergman, instead, violated Rule 20 of the Agreement because such rest day work accrued to the Claimant. Rule 20 reads as follows:

"RULE 20

Division of Overtime

(a) During the regular assigned workweek, an employee assigned to a particular job during the workday at a point where overtime is required continuous with his shift will be given all the overtime connected with that job.

(b) All other overtime will be given to the senior qualified available employee working in the classification at the headquarters point where the overtime is to be performed. . . ."

Exception: Machine operators, assigned by bulletin to specific machines utilized in track department operations, shall be entitled to the overtime connected with the operation of such machine.

Note: In the application of paragraph (b), a senior employee may waive his right to overtime providing a junior qualified employee working in the classification at the headquarters point is available to work such overtime. In the event it is necessary to force an

employee to work overtime, the most junior qualified employee in the classification at the headquarters point will be required to work such overtime.”

According to the Organization, Rule 20(a) is not applicable because it addresses overtime work continuous with a regular workday assignment. Instead, Rule 20(b) is of specific relevance because it covers the present situation involving “other overtime,” i.e., overtime work on a rest day. Here, the work that the Carrier needed to have done at overtime necessitated the operation of a front end loader on the Claimant’s assigned territory on what was the Claimant’s rest day. Given the fact that the Claimant was the senior, qualified, available employee holding a regular assignment in the required classification at the headquarters point where the overtime was to be performed, the Carrier should have contacted the Claimant, and not the Foreman, to operate the front end loader on the Keenan Section, the Organization stresses.

In response, the Carrier asserts that the Organization failed to substantiate its claim and thus has not met its burden of proof. For example, asserts the Carrier, the Organization has not proven that the Claimant had an exclusive right to operate the front end loader or that, conversely, as a higher-rated employee, Foreman Bergman could not operate the loader pursuant to Rule 24. The Carrier also contends that while some of the work was performed on the Claimant’s seniority territory, most of it was not. Rule 24, Composite Service, reads as follows:

“An employee working on more than one class of work four hours or more on any shift will be allowed the higher rate of pay for the entire shift. When temporarily assigned by the Foreman or Supervisor to a lower rated position, his rate of pay will not be reduced.”

With regard to the compensation requested herein, the Carrier argues that the Organization failed to prove that Foreman Bergman operated a front end loader for 13 hours. Rather, the Carrier’s payroll records confirm that Bergman ran the machine for approximately two and one-half hours, which the Organization has not refuted, the Carrier points out.

The Board carefully reviewed the correspondence concerning this claim, the respective positions of the parties and the precedent Awards cited herein. We find

that given the factual circumstances involved in this case, the Organization satisfied its burden of proving that, pursuant to Rule 20(b) the rest day overtime work consisting of operating the front end loader at various locations within the Keenen Section should have been offered to the Claimant. Indeed, the Exception to Rule 20 plainly states that Machine Operators assigned to specific machines shall be entitled to the overtime connected with the operation of such machine. In light of the Claimant's regular assignment of B-Machine Operator at Keenan, he was entitled to be called for the Sunday overtime work consisting of operating the front end loader within the Keenan Section territory, we rule.

We disagree with the Carrier's contention that Rule 24, quoted above, allowed the Foreman Bergman to operate the front end loader instead of the Claimant. Rule 20(b) is a specific Rule governing the assignment of overtime which, under the particular circumstances of this case, entitled the Claimant, the senior Machine Operator at the Keenen headquarters, to be called for rest day overtime work in his classification. Under the clear language of Rule 20(b) and in light of the factual record before us, the Claimant's contractual right to the overtime was violated when the Foreman performed Machine Operator work on the Claimant's rest day and on territory covered by the Claimant during his normal workweek. Rule 24, Composite Service, is predominately a pay Rule which does not govern the assignment of overtime work; therefore, it cannot "trump" the specific provisions regarding the allocation of overtime found in Rule 20. See Third Division Award 19816.

With particular reference to on-property Third Division Awards 28614 and 29997, cited by the Carrier, we find that the facts and circumstances underlying those cases are distinguishable from those present in the current claim. Specifically, Award 28614 addressed a complicated scenario involving the Carrier's assignment of B&B Mechanics at the Duluth Ore Dock. Award 29997 involved a controversy over snow removal work, adjudicated under the parties' Classification of Work, Rule 26. In light of the different issues involved in those cases, we hold that they carry no precedent value insofar as the instant case is concerned.

Turning to the monetary penalty requested herein, however, we find that the Organization's request for 13 hours at the overtime rate is not supported by the record. Indeed, the correspondence and other documentation comprising the on-property record in this case lacks any evidence of probative value to substantiate the claim for 13 hours of pay.

Thus, from our review of the record, it is apparent that there is nothing to contradict the Carrier's position that Foreman Bergman operated the front end loader on the Claimant's territory for approximately two and one-half hours. However, based on our reasoning as explained above, the Claimant was entitled to be called for that work, in accordance with the provisions of Rule 20(b); therefore, the Board will sustain the claim for two and one-half hours at the Claimant's applicable overtime rate of pay.

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 19th day of April 2005.