Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37601
Docket No. MW-36570
05-3-01-3-78

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(BNSF Railway Company (former Burlington Northern
(Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed and refused to allow District 11 Group 3 Machine Operator G. D. Sutton to exercise his seniority rights and displace junior employe J. J. Kraljic on a District 11 Group 3 Machine Operator (regulator) position on November 7 and 8, 1998 (System File T-D-1683-H/11-99-0090 BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. D. Sutton shall now receive pay for any and all hours worked by junior employe J. J. Kraljic on November 7 and 8, 1998."

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 facts of this claim are essentially undisputed. At the time of this dispute, the Claimant was assigned to a District 11 Sectionman/Flagman position that was scheduled for abolishment on Friday, November 6, 1998, as of 4:00 P.M. close of shift. Just prior to the close, the Claimant contacted the Manpower Office and requested to displace junior District 11 Group 3 Machine Operator J. J. Kraljic, who was assigned to the regulator machine on the District 11 Surface Crew, effective with the 4:00 P.M. close of Kraljic's shift. The Carrier allowed the Claimant's request as to the position, but did not allow him to occupy it until the next regularly scheduled workday, Monday, November 9, 1998.

The Organization contends that the displacement should have been allowed, as requested. According to the Organization, the Carrier's refusal to allow the displacement until Monday, November 9 violated the Claimant's seniority rights under Rule 2.A and was contrary to the "clear and unambiguous" language of Rule 8.F, regarding displacements.

The Organization further maintains that the Carrier's refusal to allow the displacement resulted in the Claimant's inability to earn 24 hours of overtime, pursuant to Rule 24.I, as the rightful incumbent of the regulator operator's position. Therefore, the Organization maintains that, in light of the Claimant's timely displacement request, the Claimant must be paid the overtime hours worked by J. J. Kraljic as regulator operator on the Surface Crew gang.

In response, the Carrier asserts that J. J. Kraljic occupied and worked the Surface Crew regulator position on Friday, November 6, the workday immediately preceding the unassigned days of that position. Thus, in its view, the Claimant's displacement was properly allowed as of Monday, November 9, and Kraljic was correctly assigned the overtime on the unassigned days of November 7 and 8 pursuant to the Carrier's interpretation of Rules 8.F and 24.I. The Carrier emphasizes that, in its view, Rule 24.I serves as an "exception" to Rule 8, which is silent on "the ability of an employee to exercise seniority for overtime work or work on unassigned rest days."

The Carrier moreover contends that the volume of statements submitted by the Organization in supposed evidence of a Carrier practice of allowing displacements on unassigned workdays carries no probative value, and thus should

be rejected by the Board. According to the Carrier, the statements are clearly "vague and noncommittal," and should be recognized by the Board as such. The Carrier adds that current or former Organization officials submitted several of the statements that, obviously, must be dismissed as "self-serving." With respect to a statement furnished by J. J. Kraljic, the Organization urges the Board to recognize that "Kraljic was paid the 24 hours of overtime on the claim dates, and if the Claimant's displacement had been allowed, Kraljic would be whistling an entirely different tune."

The Carrier argues that the Board instead should credit the six statements submitted by its own Manpower Planners. According to the Carrier, the statements are probative evidence that, consistent with what the Manpower Planners were "taught" during their training, the "consistent practice" has been to refuse displacement requests "for weekends, overtime situations or holidays." It stresses that, in the rare circumstance that such a displacement might have been allowed, such permission to displace would have constituted "an error."

The Board carefully reviewed the record in this specific case and first notes that the following Agreement positions are particularly relevant to the instant dispute:

> "RULE 2. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS
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> A. Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided.
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> * * *
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> RULE 8. FORCE REDUCTION
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> E. Except as otherwise provided for in these rules, when forces are reduced or positions abolished, employes affected will have the right to exercise their seniority rights over junior employes under the following conditions:

1. An employe who is listed on a seniority roster containing relative seniority ranks when affected by force reduction or abolition of positions must exercise seniority rights in the seniority rank in which then employed, either permanent or temporary. If temporary, upon completion or displacement, the employee would again be governed by this rule before displacing employes in the next succeeding lower seniority rank on that seniority roster, or before displacing employes on another seniority roster. Should such an employe's seniority and qualifications not entitle him to hold a position in the seniority rank in which employed when affected by force reduction or abolition of positions, such an employe may exercise seniority in the next succeeding lower seniority rank on such seniority roster or he may exercise seniority in the highest rank over employes on any other seniority roster in which he holds seniority.

* * *

3. Employes affected by force reduction or abolition of positions desiring to exercise their seniority rights will so advise the Bridge and Building Supervisor, Division Roadmaster, or other designated supervisory officer, and employes will be notified as soon as practicable when other employes have exercised their seniority rights to displace them.

* * *

F. Employes affected by force reduction or abolition of positions who are displaced in the exercise of seniority by other employes, must, if they desire to displace junior employes, exercise their seniority rights within ten (10) calendar days

thereafter. If seniority is not so exercised, such employes will forfeit all rights to displace other employes because of such force reduction or abolition of positions, and will then be governed by Rule 9.

NOTE: It is understood that the ten (10) calendar days referred to in this rule is exclusive of any scheduled vacation days.

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24. FORTY HOUR WORK WEEK

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I. Work on Unassigned Days

Where work is required by the Company to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee."

Having closely reviewed the entire record in this case, we find that there is no dispute that the Claimant possessed a legitimate right to displacement, pursuant to Rule 8.E.1, following his notification that his District 11 Sectionman/Flagman position would be abolished effective at the close of his shift, 4:00 P.M. on November 6, 1998. In turn, J. J. Krajlic was entitled to prompt notification of the Claimant's exercise of seniority over him, pursuant to Rule 8.E.3, we further note.

The Claimant's greater seniority to that of J. J. Kraljic furthermore is not in contention, as a copy of the pertinent seniority roster, included in the record, indeed confirmed. The sole issue, therefore, is whether the Claimant's request to displace onto Kraljic's position of Regulator Operator on the District 11 Surface Crew, effective at the close of Kraljic's 4:00 P.M. shift, was properly denied, notwithstanding the fact that the Claimant was allowed to occupy the position on Monday, November 9, 1998.

The Carrier's position that J. J. Kraljic's right to overtime work on his unassigned work days of November 7 and 8, 1998 superseded the Claimant's right to displace Kraljic prior to the unassigned work days is not supported by the record and our reading of Rule 8.F, the Board holds. First, Rule 8.F is silent with respect to the specific displacement request before us, as the Carrier has argued. As written, Rule 8.F by its clear terms, required that the Claimant must exercise his seniority within ten days of the abolishment of his position, or face a loss of seniority, as both parties seemingly agree. Additionally, the only written "exception" to the 10-day displacement period discussed in Rule 8.F is found in the above "Note," which merely provides that the 10-day period will be extended when vacation days are involved, and that clearly was not the situation here. Therefore, there is a gap in the Rule's language as to what happens where overtime work is involved or whether the provisions of Rule 24.I serve as an exception to Rule 8 then.

The plain language of Rule 8.F did not prevent the Claimant from making the instant displacement request, as the Carrier stresses. As noted above, the Claimant was required to displace within ten days or forfeit his seniority, and clearly complied with the Rule by requesting a displacement onto the regulator position on that same day. Rule 8.F's silence with respect to any prohibition against making displacements on the "unassigned days" of a position creates a "gap" between the Rule and practice, as just mentioned. Thus, the Carrier's assertion that a "past practice" exists and accordingly must prevail is logically correct, but places a burden upon the Carrier to demonstrate that it indeed has a practice of consistently disallowing such "bumps," we hold.

As to that specific point, with respect to the quality of the Carrier's proofs as to the "practice," the Board specifically finds from the record that the Carrier's proofs in the form of six employee statements submitted in this specific record do not carry the day. In our view, when compared with the numerous statements submitted by BMWE-represented employees having significant seniority in the craft, that the practice was to allow bumps immediately preceding unassigned days, even if this deprived the then-incumbent employees of overtime opportunities, we hold that the Carrier's statements, prepared by Manpower Planners based on training each one had received, essentially are hearsay proofs of a practice and were not persuasive evidence in support of the Carrier's contention that there was such a practice "in fact."

Again, we stress that the statements of three of the Manpower Planners do not, on their face, convince the Board that a past practice of not allowing "weekend, overtime or holiday bumps" was, in fact, prevailing. This is not because the Board believes that the statements were untrue. Rather, it is again because the employees who prepared them merely stated that it was "the practice" and provided no details as to how they specifically applied the displacement Rule with respect to weekend bumps. What is particularly interesting about each such statement is the common assertion that, during their training, they were "taught" to disallow displacement requests such as that made by the Claimant. None of the Manpower Planners gave details as to how they actually applied that Rule in practice, although we recognize that three of the statements claimed such a practice in their office without going beyond that with specific applications in given factual situations.

In order to have potentially prevailed in its defense, or at least, to have accomplished a shift of the burden back to the Organization, it would have been necessary for the Carrier to have submitted convincing evidence not as to the training, but as to the practice of these Manpower Planners on the property. Alternatively, a statement from a Carrier employee who supposedly had the authority to promulgate such a Rule interpretation might have been helpful to ascertaining the truth regarding "the practice," but only if applied in the field.

Second, in the same vein, we find that none of the detailed statements submitted by the active and retired BMWE-represented employees, most of whom possessed substantial seniority in the Maintenance of Way Department at the time of this dispute (or their retirement) were materially refuted by the Carrier. In their totality, these statements clearly establish that, over the course of many years, the authors of the statements had either actually made such displacements themselves or were affected by them, thereby causing a loss of overtime on unassigned days. Those statements give the historical application of Rules 2, 8 and 24, which is the very definition of a past practice, we emphasize.

Third, we disagree with the Carrier's position that J. J. Kraljic's statement should be rejected simply because he worked and was paid the overtime. Kraljic's statement is detailed, and supports the Organization's contention that the Claimant's displacement was neither improper nor unusual. According to Kraljic, who possessed 24 years of service at the time of this claim, both he and the Claimant had discussed the Claimant's plans to displace him before the weekend, and Kraljic stated, "I was surprised when he was unable to bump me that weekend." Kraljic's

statement was a recognition that he understood that seniority and displacement rights "trumped" any entitlement to rest day overtime set out in Rule 24.I. It is not enough for the Carrier to speculate that Kraljic would have felt differently had he lost the overtime opportunity, although we understand the Carrier to be saying precisely that.

Fourth, we disagree with the Carrier's contention that several of the statements must be rejected by the Board, given their preparation by current and/or former representatives of the Organization. We find that those statements focused on each writer's experience with displacement situations such as this, and were germane to the dispute at hand. "Interest" goes to weight and, in this case, the statements are consistent with many others along those lines.

Also, we disagree that Rule 24.I automatically superseded the Claimant's right to displace Kraljic, given the Claimant's greater seniority and the lack of any assertion that the Claimant was not qualified to operate the regulator. If the Claimant's displacement had been allowed in time for unassigned day overtime, "coverage" under Rule 24.I would have transferred from Kraljic to the Claimant, we reason. From the record before us, and given the language of the Agreement provisions quoted above, we find that Rule 24.I was "subordinate" to Rules 2 and 8 governing seniority and displacement, respectively. Said another way, Rules 2 and 8 determine who may occupy a position; then Rule 24.I comes into play with respect to any allocation of overtime work, we conclude.

For the reasons discussed above, therefore, the Board finds no evidence in this particular case that the Carrier's denial of the Claimant's displacement request was justified under Rule 8 or by a prevailing practice, especially in light of the Claimant's qualifications and superior seniority. Under the factual circumstances before us, we rule that the Claimant's displacement should have been allowed. The Carrier's retention of junior employee Kraljic on the position sought by the Claimant resulted in the Claimant's loss of 24 hours of overtime, the record shows. Thus, the instant claim shall be fully sustained as presented, we hold, including the full monetary remedy requested.

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 22nd day of September 2005.