

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39694
Docket No. MW-38357
09-3-NRAB-00003-040305
(04-3-305)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Lake Superior & Ishpeming Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to assign laborer, Light Equipment Operator Mr. T. Freeman to perform overtime service (remove snow from switches) on April 4, 2003 and April 6, 2003 and instead assigned junior employee S. Van Horn (System File C-03-290-033).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Freeman shall ‘. . . now be reimbursed for the equivalent of Eight (8) hours fifteen (15) Minutes at the Light Equipment Operator overtime rate of pay \$27.17 per hour and have all vacation, fringe benefits, and other rights restored which were lost to him as a result of the above violation.”**

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 Organization filed the instant claim on behalf of Claimant T. Freeman, alleging that the Carrier violated the parties' Agreement when it failed to assign the Claimant to perform overtime service (removing snow from switches) and instead assigned a junior employee to perform this work.

The Organization initially contends that there is no merit to the Carrier's position that its actions were justified by the application of a December 1996 Letter of Understanding. The Organization argues that there is no basis in fact for the Carrier's contention that the assignments on the claim dates were made in order of seniority. The Organization asserts that there is no dispute that the Claimant is senior to Van Horn in the Laborer, Light Equipment Operator Classification. The Organization emphasizes that there is no dispute that all routine snow removal work performed by the Claimant and Van Horn on the claim dates was performed only on the Eagle Mills section territory. The Organization therefore maintains that the Carrier's reliance on the Letter of Understanding obviously is misplaced in that it addresses "the movement of trains that travel through territory assigned to more than one Maintenance of Way Section Crew."

Addressing the Carrier's assertion that the Claimant had declined the offered opportunity to work the very assignment for which he now claims, the Organization insists that when the Claimant completed his assignment, he was entitled, by virtue of his seniority, to either displace a junior employee or work with the employees that were doing the additional overtime snow removal work at issue. The Organization argues that there is no dispute that the Claimant was available for duty on the claim dates, was fully qualified, and was willing to perform the additional work, but the Claimant was instructed to suspend work and was sent home by the Carrier on each claim date while a junior employee was retained in service. The Claimant was denied the opportunity to perform the additional overtime to which he was contractually entitled by virtue of his seniority.

The Organization emphasizes that arbitral Boards long have recognized that seniority is a valuable property right of an employee. The Organization points out that the Carrier's decision to intentionally disregard the superior seniority of the Claimant and assign a junior employee to the subject overtime snow removal work unquestionably deprived the Claimant of valuable seniority rights along with the inherent monetary benefits.

The Organization asserts that the Carrier did not dispute the amount of overtime set forth in the initial claim. The Organization points out that because an air compressor was utilized to facilitate the snow removal in question, the proper rate of pay for the disputed work would be the Light Equipment Operator overtime rate of pay.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization failed to meet its burden of proof in this matter. It asserts that the instant claim has been advanced on the basis of speculation and unsupported assertions, but the Organization failed to demonstrate that an Agreement Rule was violated.

The Carrier argues that in pursuing this claim, the Claimant is attempting to have it both ways. It is undisputed that the Claimant was offered, on both claim dates, the opportunity to work the assignment given to Van Horn. The Claimant denied this assignment on both dates. The Claimant has asserted, however, that after working overtime continuous with his own assignment, he had a Rule 5 "displacement" right over Van Horn to complete the overtime that Van Horn was working continuous with Van Horn's own assignment.

The Carrier asserts that Rule 5 does not support such a position. The Carrier points out that Rule 5 does not address overtime, and it obviously was intended to cover regular assignments, and the right to occupy, bid, or displace for such assignments anywhere on the system. The Carrier emphasizes that there is no evidence to support the notion that Rule 5 entitles a senior employee to move from

assignment to assignment to gobble up the overtime remnants on other positions after he has exhausted the overtime opportunities on his own assignment.

The Carrier then argues that the Organization's reference to Rule 23 also is misplaced in that this Rule addresses the recall of forces from furlough. The Claimant was not on furlough in connection with this matter, and Rule 23 simply has no application to this dispute.

The Carrier insists that the Organization bears the burden of showing some Rule or Agreement that gives the Claimant the right he is asserting, or that the Carrier violated some Rule when it assigned overtime work that was continuous with regular assignments to the employees working such regular assignments. The Carrier emphasizes that this is particularly important here because the Claimant had been given his choice of such regular assignments. The Organization failed to meet this burden, and it instead has based the instant claim only upon speculation and unsupported assertion.

The Carrier then points to the parties' 1996 Letter of Understanding that provides that Maintenance of Way employees could be assigned to work with train crews for the purpose of cleaning switches. In this Letter of Understanding, the parties agreed that once an employee has been assigned to such work, the employee "will continue to work with that train unit until released from such assignment." The Carrier insists that Van Horn's duties on both claim dates fell under the terms of this Letter of Understanding, and Van Horn had the right to remain on this assignment even if there were some other Rule giving the Claimant rights to displace junior employees from the remainder of their overtime work. The Carrier further emphasizes that the Organization failed to submit any evidence to support its position that Van Horn's work was not being conducted pursuant to the Letter of Understanding.

The Carrier goes on to contend that there is no Rule, Agreement, practice, or principle that would entitle the Claimant to the handling requested in this case. The Carrier asserts that the Organization failed to identify any Rule that precluded the Carrier from assigning the overtime work as it did, and there has been no showing that such handling violated any Rule or Agreement.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board reviewed the record and finds that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it failed to assign the Claimant to perform certain overtime on April 4 and 6, 2003. Therefore, the claim must be denied.

The Board understands the Organization's concern that seniority should prevail when the assignment of overtime is made. The Board agrees with that concept. However, in the factual situation at issue here, the Carrier was not required by any language in the Agreement to assign the additional overtime that was being performed by junior employee S. Van Horn to the Claimant.

The record reveals that the assignments for the Claimant and Van Horn for the dates of April 4 and 6 were made on the basis of seniority. The Claimant was given the first choice, and he elected to take the position of wing man on a ballast regulator. The junior employee, Van Horn, was to work with train crews during the snowstorm. The Claimant had the first choice because he was most senior.

On April 4, both the Claimant and Van Horn worked their regular assignments; and at the conclusion of those assignments, both employees were instructed to continue to work on their assignments on a continuous overtime basis. The Claimant's job was concluded at 4:00 P.M. and he was sent home. Van Horn continued to perform his snow removal duties until he was sent home at 11:00 P.M. Both men came back to work on Sunday, April 6, 2003. The Claimant worked until 1:30 P.M. and Van Horn worked until 3:00 P.M. on that date. Although both of them were performing snow removal duties, Van Horn, who took the job that the Claimant had refused, was assigned to a train crew. His job went longer.

There is nothing in the Agreement that requires the Carrier to make Van Horn leave his assignment when the Claimant's assignment was over on those two days so that the Claimant could complete the work. As a matter of fact, the Carrier relies on a Memorandum of Understanding entered into in 1996 which deals with

the cleaning of snow from switches and which states, in part, that employees "will continue to work with that train until released from such assignment."

The fact remains that although both of the employees were performing "routine snow removal duties," they were assigned to different jobs that day. The Claimant chose the job that wound up ending earlier on both dates. There is nothing in the Agreement that required the Carrier to switch out the two employees after the Claimant's job ended so that the Claimant would be given the additional overtime.

It is fundamental that the Organization bears the burden of proof in cases of this kind. The Organization failed to meet that burden in this case and, therefore, the claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 26th day of May 2009.