

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39727
Docket No. MW-38697
09-3-NRAB-00003-050077
(05-3-77)**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation

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 A. DeVivo to work overtime on September 21, 2003 at Oak Island Yard and instead called and assigned junior employee S. Almeida (Carrier’s File MW-0063).

(2) As a consequence of the violation referred to in Part (1) above, Claimant A. DeVivo shall now be compensated for twelve (12) 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 Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it failed to call and assign the Claimant to perform certain overtime work at Oak Island Yard, and instead assigned the work to a more junior employee.

The Organization initially contends that the Carrier decided to disregard the Claimant's superior seniority on September 21, 2003, when it called and assigned a junior employee, instead of the Claimant, to perform overtime duties. The Organization asserts that there is no dispute that the Claimant was senior to Almeida and that the Carrier made no effort whatsoever to contact the Claimant and offer him the opportunity to work the disputed overtime.

The Organization argues that there is no merit to the Carrier's defenses in this matter. The Organization disputes the Carrier's contention regarding the alleged use of the crane, and Almeida affirmatively stated that he did not operate the crane. As for Track Supervisor Martins' statement on this issue, the Organization emphasizes that his statement was based on an alleged conversation that occurred more than four months after the violation occurred, and it contains absolutely no factual support. The Organization asserts that this statement containing hearsay and vague references does not discredit Almeida's clear and personal avowal that he did not operate the crane on the claim date.

As for the Carrier's contention that the Claimant was not qualified to operate the crane that it alleges was used on the claim date, the Organization emphasizes that the crane was not used on the claim date, so this defense is moot. The Organization points out that the Carrier was required to call and assign employees to perform the disputed overtime on the claim date in the order of their seniority, as provided by Rule 17, but the Carrier failed to do this. The Organization argues that there is no dispute that the Claimant was available and willing to perform all of the subject work, and that he would have performed it had the Carrier afforded him the opportunity to do so.

The Organization maintains that arbitral Boards long have recognized that seniority is a valuable property right. The Organization asserts that the Carrier's decision to ignore the Claimant's superior seniority in connection with the assignment of the disputed overtime duties clearly deprived the Claimant of his valuable seniority rights, along with the inherent monetary benefits.

The Organization then insists that because the Carrier failed to dispute the number of hours claimed, the Claimant is entitled to the amount that he would have received, at the proper contractual rate of pay, had he been assigned to perform the subject work.

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

The Carrier initially contends that there is no dispute that Almeida is regularly assigned as a Crane Operator in the Oak Island area, and that he "ordinarily and customarily" operates the crane during the course of his normal workweek. The Carrier asserts that there also is no dispute that the Claimant is regularly assigned as a Tamper Operator, and that he does not operate a crane during his workweek. The Carrier argues that because the disputed work involved the operation of a crane, there can be no doubt that under Rule 17, Almeida was the proper employee to be called for the overtime assignment, even though he was junior to the Claimant on the Machine Operator seniority roster. The Carrier points to a number of Awards that support its position.

The Carrier asserts that the Organization never refuted the fact that Almeida is the senior employee who customarily and ordinarily operates the crane during his normal workweek. The Carrier argues that its use of Almeida for the disputed overtime assignment, which involved the operation of the crane, was entirely proper and in accordance with the clear language of Rule 17.

The Carrier further asserts that the Organization never refuted its contention that the Claimant is not qualified to operate the crane. The Carrier points out that, as has been held in a number of prior Awards on the property, Rule 17 specifically requires that overtime will be assigned only to the employee who is qualified to

perform all the work necessary to complete the overtime assignment. The Carrier contends that because the overtime assignment at issue required the operation of a crane, the Claimant had no right to the work under any circumstances because he was not qualified on the crane. The Carrier insists that Almeida was the only employee in the area who was qualified to operate the crane, and Almeida therefore was utilized for the disputed overtime work.

The Carrier emphasizes that because the Organization never refuted the undeniable fact that the Claimant was not qualified to operate the crane, and in accordance with Rule 17 and prior Awards, the Claimant had no right to the disputed overtime assignment.

The Carrier then addresses the Organization's position that Almeida was not used to operate the crane on the claim date. Contrary to the statement supposedly prepared and signed by Almeida that he did not operate the crane on the subject date, the Carrier points to the statement from Track Supervisor Martins, who unequivocally stated that Almeida did operate the crane at the derailment site. Martins further stated that Almeida described to him the circumstances surrounding his initial statement, that the Claimant approached Almeida and asked him to sign a "statement" even though Almeida did not even remember the date. The Carrier insists that in order to clear the derailment and return the track to service, it was necessary to transport track material and a frog to the derailment site, and Almeida did this by using a crane.

The Carrier asserts that the Organization's position, viewed in its best light, amounts only to an irreconcilable conflict. Pointing to a number of Awards on the property, the Carrier asserts that the Board has no standing to resolve irreconcilable fact disputes.

The Carrier ultimately contends that the Organization failed to meet its burden of proof, and the instant claim therefore 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 call the Claimant to work overtime and instead called a junior employee. The record

reveals that the work that was necessary on the date in question involved the operation of a crane. The junior employee (Almeida) was qualified to operate a crane, but the Claimant was not. Although there is a statement in the file wherein Almeida indicates that he did not operate the crane when he worked the derailment, there is other evidence in the file suggesting that Almeida was not certain as to what date was being referenced when he signed his statement three months later. Moreover, there is evidence in the file that Almeida did indeed operate the crane on the date in question.

It is fundamental that the Carrier has a right to call in employees for overtime who are qualified to perform the necessary work. In this case, the Claimant was not qualified to perform the required work and, therefore, the Carrier did not violate the Agreement.

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 June 2009.