

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39884
Docket No. MW-38858
09-3-NRAB-00003-050291
(05-3-291)**

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: (
(Soo Line Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier called and assigned junior employe J. Galvan to work away from his headquartered position at Milwaukee, Wisconsin and assist in floor tiling work in the Intermodal Yard Building in Chicago, Illinois on March 8 and 9, 2003 instead of Mr. T. Rueda (System File C-06-03-C060-02/8-00219-102 CMP).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Rueda shall now be compensated for twenty-nine (29) 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 assigned a junior employee, instead of the Claimant, to perform certain floor-tiling work in Chicago, Illinois.

The Organization initially contends that the Carrier did not deny the Claimant was senior to Galvan in the B&B Carpenter class, nor did the Carrier challenge the Claimant's qualifications to perform the work. The Organization asserts that arbitral Boards long have recognized that seniority is a valuable property right of an employee.

The Organization argues that when the Carrier elected to look for additional assistance to perform the work in question, and decided to utilize an employee assigned to the Milwaukee B&B crew, the Claimant was senior, available, qualified, and willing to perform the B&B work on his rest days. The Organization asserts that instead of calling and assigning the Claimant, the Carrier called and assigned a junior B&B employee.

The Organization then maintains that there are several problems with the Carrier's position in this matter. The Organization points out that there is no dispute that the rest day overtime work occurred on territory that was outside of the normal territorial limits of the Claimant and his B&B gang. In addition, the Carrier's failure to assign the Claimant, or to at least attempt to determine his availability to perform the work, was contrary to established and accepted practice. The Organization argues that the Claimant was not obligated to make his intentions to be considered for overtime or extra work to be known beforehand. The

Organization maintains that the basis of seniority is that the Carrier will contact the senior employees first to determine their availability.

As for the Carrier's position that the instant claim somehow was improperly filed, the Organization argues that this is absolutely ridiculous. The Organization emphasizes that Rule 47(c) expressly recognizes that a claim may be presented on behalf of any employee. The Organization suggests that an employee might not be aware that a violation of his or her seniority rights has occurred, and this is why Rule 47(c) exists. The Organization contends that it is obligated to address such issues through the claim and grievance process.

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. The Carrier asserts that the Organization has not provided any evidence of a practice of calling the Foreman of a crew to fill a vacancy on a different crew. The Carrier argues that the position that was filled was that of a Carpenter, not a Foreman. The Carrier points out that the Organization has not pointed to any Agreement provision that requires the Carrier to fill a Carpenter's position first with a Foreman, and then call a Carpenter if additional help is needed.

The Carrier suggests that the Organization is attempting to convince the Board that a Foreman, instead of a Carpenter, can be called to perform the duties of a Carpenter and the Organization would not file a claim on behalf of the Carpenter. The Carrier insists that this is not the position taken by the Organization in classification disputes. The Carrier asserts that had it called a Foreman, the Organization would have filed a claim on behalf of a Carpenter. The Carrier contends that the duties of the Foreman and Carpenter positions are different. The Claimant was filling the position of a Foreman, but a Foreman already was assigned to the crew where the vacancy occurred.

The Carrier asserts that the Organization failed to demonstrate that the Claimant was the regular employee who normally would perform the work during regularly assigned hours, and that the Claimant was, in turn, entitled to the

overtime in dispute. The Carrier emphasizes that the Claimant cannot make this showing because the Claimant was regularly assigned as a Foreman in Milwaukee, and the vacancy was that of a Carpenter on a crew headquartered in Chicago.

The Carrier additionally contends that the Organization has failed to support its assertion that the Carrier was required to fill one vacancy with two employees, and that the Carrier cannot use an available Carpenter from another crew. The Organization has failed to meet its burden of proving that the Carrier was required to fill the position in the manner that the Organization has suggested.

The Carrier submits that because the vacancy in question was that of a Carpenter, it was necessary to utilize another Carpenter to perform the overtime work. The work was that of a Carpenter, and a Carpenter was utilized. The Carrier emphasizes that the Claimant's assigned position was that of Foreman, and a Foreman already was assigned to the job in question. The Carrier further points out that the Claimant worked overtime during the day of March 9, 2003, so he was not available to perform the work in question. The Carrier also asserts that there is no evidence of the Claimant requesting the work at issue. The Carrier asserts that the Organization provided no evidence of the Claimant's availability or desire to work the overtime.

The Carrier also argues that the claim is excessive in that Carpenter Galvan worked a total of 29 hours, not 30 as indicated in the claim. The claim also is excessive in that the Carpenter overtime rate of pay applies, not the Foreman overtime rate. It contends that the Agreement does not obligate it to pay overtime for service not performed. Such a request is for penalty pay, for which the Agreement does not provide.

The Carrier then points out that the instant claim was not brought at the Claimant's request. Instead, this claim was filed by the General Chairman under Rule 47(c). The Carrier suggests that because the Claimant did not ask for a claim to be filed on his behalf, it is obvious that he was not available on either of the dates in question, nor did he desire to perform such work. The Carrier insists that there were no lost work opportunities if the Claimant had no desire to work the overtime on a weekend.

The Carrier emphasizes that there is no requirement to “call” under the Milwaukee Agreement. In addition the work at issue is not work recognized as that which a Foreman regularly performs during the normal workweek. The Carrier also asserts that there is no Rule that obligates the Carrier to call the Foreman to perform work in Chicago. The Carrier therefore contends that the Organization has failed to meet its burden of proving the Claimant’s rights to the overtime. Moreover, there is no evidence of the Claimant requesting this work or being available to perform it.

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 call the Claimant to perform floor tiling work in Chicago, Illinois, rather than a junior employee. Therefore, the claim must be denied.

The record reveals that the position that was required to be filled was that of a Carpenter and not a Foreman, and the Claimant was a Foreman. The Carrier has shown that the duties of the two positions are very different, and the position that was necessary to be filled was that of a Carpenter. The Carrier called in the Carpenter who happened to be junior to the Foreman. The Carrier has shown that there was already a Foreman working where the Carpenter position was necessary to be filled on overtime. The Carrier correctly states that there is nothing in the Agreement that requires the Carrier to call a Foreman from a crew in Milwaukee to fill a Carpenter’s position in Chicago.

The Organization bears the burden of proof in cases of this kind. In this case, the Organization failed to meet that burden. Therefore, the claim must be denied.

AWARD

Claim denied.

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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 31st day of July 2009.