

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40512
Docket No. MW-39423
10-3-NRAB-00003-060020
(06-3-20)**

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
(
(BNSF Railway Company (former Burlington
(Northern Railroad 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 Machine Operator D. Biggs to perform machine operator overtime service (operate front end loader) at Hobson Yards in Lincoln, Nebraska on January 3, 2004 and instead assigned Truck Driver R. Frerking [System File C-04-J010-30/10-04-0209(MW) BNR].
2. As a consequence of the violation referred to in Part (1) above, Claimant D. Biggs shall now be compensated for ten (10) 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 seniority in various classes within the Maintenance of Way and Structures Department, including as a Group 2 Machine Operator in the Roadway Equipment Sub-department. On the date involved here, he was regularly assigned as a Group 2 Machine Operator to operate a front end loader. He was headquartered at Hobson Yard in Lincoln, Nebraska. The Claimant worked Monday through Friday with Saturday and Sunday rest days. R. L. Frerking held seniority as a Truck Driver in the Track Sub-department and was regularly assigned to the Lincoln Hump Section Gang.

A snowstorm occurred on Saturday, January 3, 2004 and the Carrier assigned Truck Driver Frerking to work ten hours of overtime using a front end loader to remove snow from tracks and roads in Hobson Yard. On January 4, 2004, the Claimant was assigned to work 16 hours of overtime using a front end loader to remove snow in Hobson Yard.

The Carrier's stated reasons for assigning a Track Sub-department employee were that this was an "emergency" and the type of work at issue is not reserved by Agreement to any Sub-department and has not been historically and customarily performed system-wide by the Claimant's Sub-department or even to Maintenance of Way employees.

The Carrier offered documentation from the National Weather Service as evidence of the snow emergency. The Organization asserted, but provided no written statements or other evidence indicating that Roadway Equipment Sub-department employees had in the past performed this type of work for the Carrier on a customary or historic basis to the exclusion of other classifications. On August 9, 2005, the parties held a conference, but failed to resolve their differences.

The involved Rules read, in relevant part, as follows:

"RULE 1. SCOPE

These rules govern the hours of service, rates of pay and working conditions of all employees not above the rank of track inspector, track supervisor and foreman, in the Maintenance of Way and Structures Department, including . . . the Track Sub-Department, the Bridge and

Building Sub-department, the Welding Sub-department, the Roadway Equipment Sub-department and the Roadway Machinery Equipment and Automotive Repair Sub-department. . . .

* * *

Rule 2B. SENIORITY RIGHTS AND SUB-DEPARTMENT LIMITS

Seniority rights of all employes are confined to the sub-department in which employed. . . .

* * *

RULE 5. SENIORITY ROSTERS

A. Seniority rosters of employes of each sub-department by seniority districts and rank will be compiled. . . .

* * *

G.

* * *

Group Two Machines

* * *

Front End Loader. . . .

* * *

RULE 55 CLASSIFICATION OF WORK

* * *

N. Machine Operator.

An employee qualified and assigned to the operation of machines classified as groups 1, 2, 3, and 4 in Rule 5.

* * *

P. Truck Driver.

An employee assigned to primary duties of operating dump trucks, stake trucks and school bus type busses. . . . When vehicles equipped with snowplow blades are used for plowing snow or moving dirt, the truck driver rate will apply. . . . Truck Driver will perform such other work as may be assigned to him when not engaged in driving a truck.”

The Carrier asserts that the Organization failed to meet its burden of proving that, by assigning the work at issue, the Carrier violated Rules 1, 2, 5, 55 or any other provision of the Agreement.

The Carrier points out that the evidence it introduced into the record confirms a heavy snowfall occurred and that this created a need to clear the yard on an “emergency” basis.

The Carrier contends that the Organization’s Submission provides no evidence that the work at issue here had historically, traditionally and customarily been assigned to employees of the Roadway Equipment Sub-department, that it had historically, traditionally and customarily been assigned to Carrier forces to the exclusion of others, or that this work is covered within the parameters of the Scope Rule.

The Carrier contends that the Organization failed to meet its burden of demonstrating a system-wide exclusive practice whereby Roadway Equipment Sub-department employees were assigned to perform the work in question. It points to the principle enunciated in on-property Public Law Board No. 2206, Award 55:

“ . . . to prevail under a theory of reservation through practice the Organization is required by principles, not of our own making but imposed by the great weight of precedent in this industry, to show exclusive performance on a system-wide basis.”

The Carrier further directed the Board's attention to on-property Public Law Board No. 3460, Award 65 which stated:

"The Board is constrained to note the Organization is taking the position that not only is snow removal work reserved exclusively for employees of the Maintenance of Way category, but also within that group exclusively to the Roadway Equipment Sub-department only by historical system-wide exclusivity. Such evidence, however, is not in the record. Petitioner has failed to indicate that the work of snow removal belongs exclusively to any class of employee, much less the Roadway Equipment Sub-department group. Further, there is no rule support for the position that the work in question belongs to the Claimant herein."

The Organization argues that assignment of this Roadway Equipment Sub-department work to a Truck Driver from another Maintenance of Way sub-department violated the Agreement.

The Organization argues that the Claimant should be compensated for his loss of work opportunities while he was at home and available for work on the claim date. It asserts that such payments are required in order to police the Carrier's compliance with the Agreement.

As the moving party in this rules case, the Organization bore the initial burden of establishing material facts necessary to make out a prima facie violation of the Agreement. The Organization argues that the work at issue here had historically, traditionally and customarily been assigned to employees of the Roadway Equipment Sub-department to the exclusion of others. A thorough review reveals that the record contains no evidence to establish this assertion. There are no statements from other employees, or even from the Claimant himself to establish system-wide exclusivity.

The fact that the employee who worked on Saturday was normally assigned to drive a truck and that the Claimant, who worked on Sunday, was normally assigned to operate a front end loader is not adequate to establish a system-wide practice of exclusivity. Without such threshold evidence, the Board is unable to conclude that the exclusivity rule applies to snow removal work as asserted in the claim. The Board is compelled to deny the claim due to the Organization's failure to even establish a prima facie case. Consequently, the Carrier need not state or prove an affirmative defense.

In light of the conclusion above, the Board need not resolve the scope of the Carrier's increased latitude in assigning its forces based on a snow emergency, except to say that the evidence indicates that the Carrier made the business judgment that it needed one employee to remove snow for ten hours of overtime pay on one day and another employee – the Claimant – to remove snow for an additional 16 hours of overtime pay the next day. The Carrier is to be afforded reasonable discretion in making such judgements without needing to establish an emergency.

The Board is convinced that the record contains no evidence to indicate that the Carrier violated the Agreement. The claim is denied for failure to establish a prima facie case.

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 15th day of June 2010.