

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40893
Docket No. MW-41020
11-3-NRAB-00003-090313**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference**
PARTIES TO DISPUTE: (
**(Union Pacific Railroad Company (former Chicago &
(North Western Transportation Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior Extra Gang Foreman F. Casados to perform rest day overtime service of inspecting track on the Wyoming Division between Mile Post 5.0 and Mile Post 1.0 in the vicinity of Denver, Colorado on September 22, 2007 instead of senior Extra Gang Foreman L. Martellaro (System File D-07-56/1497315).**
- (2) The Agreement was violated when the Carrier assigned junior Extra Gang Foreman F. Casados to perform rest day overtime service of inspecting track on the Wyoming Division between Mile Post 0.0 and Mile Post 3.0, Beltline and Mile Post 0.0 to Mile Post 17.3 on the West Main Line in the vicinity of Denver, Colorado on September 23, 2007 instead of senior Extra Gang Foreman L. Martellaro (System File D-07-57/1497316).**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant L. Martellaro shall now be compensated for nine and one-half (9.5) hours at his respective time and one-half rate of pay.**

- (4) As a consequence of the violation referred to in Part (2) above, Claimant L. Martellaro shall now be compensated for ten and one-half (10.5) 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.

This is a rest day overtime dispute involving the Carrier's use of a junior Extra Gang Foreman to perform general track inspection work on Saturday and Sunday, September 22 and 23, 2007. It raises the issue of whether the Claimant's seniority within the classification gives him preference to this rest day overtime assignment, and relies upon Rule 26(h) which provides, in pertinent part:

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

The Claimant and the junior employee assigned to the disputed work are both classified as Foremen with a Monday through Friday workweek. At the relevant time, the Claimant was working as a Foreman on a surface and lining gang with responsibilities consisting of the tamper and regulator for that gang. According to the statement of the Manager of Track Maintenance, the junior

employee was working as an Extra Foreman to cover extra jobs and relieve other Foremen and Track Inspectors when they were not available, and on the claim dates, he was relieving the regular Track Inspector as part of his normal job responsibilities. There was no need for a surfacing gang during the disputed overtime assignment.

The Organization argues that this was pre-planned overtime at the location where both the Claimant and the junior employee were assigned, and that it involved functions - general track inspection - that are typically performed in connection with whatever assignment a Foreman has. It notes that because both employees were qualified and available for the overtime at issue, and the junior employee was not the regularly assigned employee to perform this work because there had been no Relief Foreman position bulletined, the Claimant had a seniority preference for this assignment, citing Third Division Awards 4531 and 36264. The Organization contends that the Board upheld the paramount importance of seniority for overtime assignments in similar circumstances, relying on Third Division Awards 19758, 20310, 24480, 27593, 33909, 35572 and 37205; Public Law Board No. 6430, Award 9.

The Carrier contends that this was part of the regular assignment of the junior employee, who relieves the Track Inspector, pointing out that this fact was not refuted by the Organization. It asserts that under Rule 26(h) the regular employee is given preference to the overtime, noting that the Rule says nothing about seniority, citing Third Division Awards 31294 and 37052. The Carrier argues that the Organization failed to meet its burden of proving a violation, relying on Third Division Awards 23357, 37857 and 39300.

After careful review of the record, the Board is of the opinion that the Organization failed to carry its burden of proof in this case. There is no doubt that, in the absence of the availability of the regular employee, when two or more employees are equally qualified and available for a planned rest day overtime assignment, seniority is a factor that should be considered in making the assignment. See Third Division Awards 27593 and 37205. The basis of the Organization's claim is that the junior employee was not the regular employee contemplated in Rule 26(h) because he does not hold a bulletined Relief Foreman position. However, the Organization did not present any evidence to rebut the

Carrier's assertion that the junior employee relieves the Track Inspector in question as part of his regular assignment, and that the Claimant's regular assignment at that time was with a surfacing gang which was not involved in the overtime. On the basis of this record, 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 10th day of March 2011.