

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 42407
Docket No. SG-42654
16-3-NRAB-00003-140198

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company)

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:

Claim on behalf of K. Nakao, for 40 hours’ pay at his overtime rate, account Carrier violated the Signalmen’s Agreement, particularly Rule 7, when on October 17-21, 2012, it utilized a junior employee for overtime service instead of the Claimant and thereby caused him a loss of work opportunity. Carrier’s File No. 35-13-0011. General Chairman’s File No. 12-061-BNSF-188-SP. BRS File Case No. 14996-BNSF.”

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.

A Maintenance of Way (MOW) gang needed the assistance of a Signalman to protect signal apparatus as that gang was performing work on the track. Signal Supervisor Jeffery Pankey instructed Foreman Nakao to offer this work to the Signalmen on his crew, and then assign the senior-most Signalman who wished to work with the MOW gang. Signalman Kevin Agarpao was assigned this task and worked with the MOW gang between 5:30 P.M. and 11:30 P.M. or midnight from October 17 through October 21, 2012. Claimant Nakao filed a claim alleging that since he had greater seniority than Agarpao, he should have been offered the work.

The Organization protested the denial of overtime, which the Carrier rejected on appeal. The claim was duly processed without resolution. As a result, the Organization presented the dispute to the Board for hearing and decision.

The Carrier notes that the Claimant delayed his protest of the assignment until after the work was completed. In its view, the claim should be denied on that basis alone. Though the Claimant contends he informed Supervisor Pankey of his claim before the work began, Pankey denies this assertion. Because of this divergence in testimony, there is an irreconcilable dispute in facts and the Carrier believes the claim must be denied. It notes that the Organization did not dispute that Rule 45(M) supersedes Rule 7 during the on-property handling. It maintains that if the Carrier makes an argument on the property and it is not refuted at the time, it stands as fact.

The Claimant, as Foreman, was a monthly rated employee. The Carrier explains that in order to ensure that a monthly-rated Foreman could receive overtime, Rule 45(M) was drafted. The provision establishes the qualifications for this employee to receive overtime, and those qualifications are based solely on the hours his crew works. The Carrier argues that since the Claimant is the Foreman, the fundamental duties of his job require that he remain with his crew. It points out that the overtime service needed was for a Signalman, not a Foreman. The Carrier argues that Rule 45M does not permit Foremen to go chase Signalmen's overtime, and Rule 47(M), not Rule 7, governs overtime for a monthly-rated Foreman such as the Claimant. In its view, acceptance of the Organization's interpretation would leave the crew with no leadership while the Foreman goes off to gather overtime.

The Organization notes that Claimant Nakao was the senior man on the crew. It reads what it deems to be the plain language of Rule 7, and concludes the assignment of the overtime to Signalman Agarpao constituted a violation. Rule 7 does not exclude Foremen, it points out.

The Organization also contests the assertion that the Claimant delayed his protest of the assignment; he was told that as a Signal Foreman, he could not do this work, it argues, and had to remain with his crew during regular working hours.

The Organization contends that the Claimant did not supervise more than eight hours a day for the first five days of that work week, concluding that Rule 45 is inapposite. It was the Carrier's affirmative defense to prove that Rule 45(M) applies, it maintains, asserting they have not provided the work records of the crew Claimant supervised. It insists that Rule 45(M) is not applicable because Rule 7 controls, without exception.

Rule 45 states as follows in pertinent part:

“M. If a Construction Crew Foreman supervises a crew which is required to work more than eight (8) hours per day for three (3) or more days in the first five days of the work week, such foreman shall be paid overtime at his hourly rate for actual time worked in excess of 8 hours per day by the crew he is supervising that week.”

Rule 7 states as follows in pertinent part:

“When a signal crew or employees in a signal shop are needed for work outside regular working hours and such work does not require all the members of that crew or shop, the senior qualified employee(s) will be given preference to the overtime, with the obligation to work such overtime being applied in reverse seniority order.”

On January 7, 2013 Pankey wrote an email stating as follows:

“I instructed Mr Nakao to chose [sic] the senior guys on his crew to work the switch tender job. I told Mr Nakao that I needed him to work with the crew. I was informed by Mr Nakao after the fact that he thought he should have made the overtime. Mr Nakao should have brought this up as soon as it was started. Not wait until overtime stops.”

On March 1, 2013, Claimant provided the following statement:

“I, Kendall Nakao, Everett Signal Foreman, on Oct. 17, 2012, was instructed by Signal Supervisor, Jeff Pankey, to select a Signalman off the crew to work extended hours with the work train. When I asked why the foreman couldn’t do it I was told that the foreman needed to run the crew during the day. As the senior employee I should have been eligible for the overtime work. Enclosed are the dates and the overtime hours worked by Signalman Kevin Agarpo.”

Claimant asserts he asked why he was not given the overtime. This does not equate to a protest that he disagreed with the decision. There is no indication here that Claimant advised Pankey that he considered the assignment to be wrongful. It follows that the Carrier was denied an opportunity to avoid the claim. However, given the Carrier’s position in this case, the Board is not persuaded that the Carrier would have altered its designation of overtime. It follows that the Carrier has not been prejudiced.

The Board is not persuaded that the Organization is precluded from disputing the applicability of Rule 45(M) on the grounds that they failed to do so during the on-property handling. To the extent a failure to rebut an assertion on site is preclusive, the assertion must be factual in nature; evidence cannot be added to the record after the hearing. The argument of concern however, involves the interpretation of contract provisions; no additional factual evidence is required and the Organization’s argument is not precluded.

The Carrier’s argument that Rule 45(M) is more specific than Rule 7 is found persuasive. It is well accepted that specific provisions control over more general ones in the event of a conflict between contractual terms. Accepted principles of contract interpretation require that specific provisions control because the parties’ intent is more clearly seen when they mutually agree on a specific provision. The parties’ intent is less perceptible in a general provision that could be applied in a number of different contexts. “Unless a contrary intention appears from the contract construed as a whole, the meaning of a general provision should be restricted by more specific provisions.”¹

¹ ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 5th Ed., (BNA Books, 1997) 498.

Rule 45(M) is specific to the situation of the construction foreman whose job is to supervise his crew. As a monthly-rated employee, Claimant had no right to overtime except as specified by the terms of the Agreement. The sole provision addressing foreman overtime is Rule 45(M). By contrast, Rule 7 by its terms, applies to both crews and employees generally. The provision is not specific to foremen but has wider and more general application. It follows that the Board is persuaded by the Carrier's argument that Rule 45(M) is the controlling provision regarding foreman overtime.

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 31st day of October 2016.