

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42432
Docket No. MW-41949
16-3-NRAB-00003-120277**

The Third Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call Mr. D. Schwed for overtime service (clean snow from platforms) in the vicinity of Mile Post 35 around Elburn, Illinois on December 21 and 27, 2010 and instead called junior employee J. Slivka (System File J-1131C-355/1550802 CNW).**
- (2) As a consequence of the violation referred to in Parts (1) above, Claimant D. Schwed shall now be compensated for a total of fifteen (15) hours at the applicable overtime 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 has established and holds seniority within various classifications, including foreman, in the Bridge and Building (B&B) Subdepartment and has a service date of May 17, 1978. Employee Slivka has established and holds seniority as a Bridge and Building carpenter in the B&B Subdepartment and has a service date of August 3, 1981. Based on their respective service dates, the Parties are in agreement that Claimant possesses greater seniority than Slivka.

At the time this claim arose, the Claimant was regularly assigned to Gang 3188 with a work week consisting of Monday through Friday with Saturday and Sunday designated as rest days. Gang 3188's assigned work territory covers the DeKalb and Elburn, Illinois, area which includes Mile Post 35. At the time this claim arose, Slivka was regularly assigned to Gang 3224 with a work week consisting of Monday through Friday with Saturday and Sunday designated as rest days. Gang 3224's assigned work week territory covers the DeKalb area but does not include Mile Post 35. At the time the claim arose, both Claimant and employee Slivka were observing scheduled vacation day(s).

On the two claim dates of December 21 and 27, 2010, a Tuesday and Monday respectively, snow was required to be removed from the platform near Mile Post 35 around Elburn, Illinois in order to ensure passengers safety. Manager of Bridge Maintenance (MBM) S. Thompson arranged for and allowed employee Slivka, junior in seniority to Claimant, to perform the work in question of clearing the snow; work that was performed on overtime between the hours of 12:00 A.M. and 7:30 A.M. on each of the two claim dates, amounting to a total of 15 hours of overtime. Carrier explained the clearing of the snow needed to be performed prior to the Metra Trains beginning to run and that employee Slivka was called out to clear the snow over Claimant with greater seniority because Slivka lived 20 miles from the location near Mile Post 35 as opposed to Claimant who lived over 50 miles from the location near Mile Post 35.

The Organization argues that Claimant, with greater seniority over employee Slivka and given that his regular assignment in the territory included Mile Post 35 whereas Slivka's regular territory assignment did not include Mile Post 35, should have been called by Carrier to perform the overtime work in question. In not calling Claimant to perform the overtime work in question, the Organization asserts Carrier violated applicable provisions of the Controlling Agreement, specifically Rule 4-Seniority, Rule 23-Work Week and Rule 31-Calls. As a result of these multiple rules violations, Claimant was deprived of the overtime work opportunity of clearing the snow from platforms that instead was performed by the junior employee, Slivka.

Carrier argues the Organization is mistaken as to who assigned the work in question to employee Slivka asserting it was not Manager Thompson but rather an Organization employee. Contrary to the Organization's position that Claimant was available to perform the work in question, Carrier argues that Claimant was unavailable due to the fact of his being on vacation on the two dates identified by the claim. Carrier also disputes the Organization's position that Claimant was the regular employee of the gang as well as the senior employee of the gang to perform the work in question, asserting this argument only has validity had Claimant and Slivka both been members of the same gang which they were not. Carrier asserts the Organization failed to meet its burden of proving by a preponderance of the evidence any of the various rules violations it allegedly had committed. As there is no evidence that the work performed by employee Slivka was reserved to Claimant as maintained by the Organization, Carrier requests the Board to summarily deny the instant claim.

Upon a comprehensive review of all argument and past Awards cited, the Board holds the Organization's position to be the most persuasive. We find Carrier's central argument that Claimant was unavailable to perform the overtime work in question because he was on vacation to be disingenuous since employee Slivka was also on vacation at the time the work assignment arose. Additionally, Carrier's position that Slivka was closer in proximity geographically to the work of clearing the snow than was Claimant, an important factor in light of the safety consideration in having the work performed in time before the trains began running certainly has a rational appeal, unfortunately in the absence of any asserted emergency, this consideration does not trump the clear and unambiguous contractual provisions cited that obligated Carrier to honor Claimant's seniority to call him first before calling any other employee less senior than Claimant to perform the overtime work in question. We do not know what to make of Carrier's argument the call out of Slivka was not made by a Carrier manager but rather was made by an Organization employee, but even if this were proven to have been what happened, Carrier nevertheless possesses the ultimate responsibility for directing the working forces and therefore must bear the consequences of the decision not to have called out Claimant instead.

Accordingly, the Board rules to sustain the claim in its entirety.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 31st day of October 2016.