

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42806  
Docket No. MW-43057  
17-3-NRAB-00003-150277**

**The Third Division consisted of the regular members and in addition Referee Dennis J. Campagna when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division –  
IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(National Railroad Passenger Corporation (AMTRAK)**

**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 S. Chaput to perform overtime work operating a front-end loader on July 26, 2013 and instead utilized Manager R. Lembo (Carrier's File NEC-BMWE-SD-5268 AMT).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Chaput shall now be compensated for all hours worked by Manager R. Lembo on July 26, 2013 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.**

S. Chaput, the Claimant herein, was assigned as an Engineer Work Equipment (EWE) "B" (front end loader) in Gang S-I 62, a TLS West Class Staging Gang, headquartered at Variable, Groton, CT, with a tour of duty from 6:00 A.M. to 4:30 P.M. Monday through Thursday, and rest days of Friday, Saturday, and Sunday. The Claimant was regularly assigned as an engineer work equipment assigned to operate an end loader on Gang S162. Raymond Lembo, Manager — Production, was a management employee responsible for roadway machinery maintenance and repairs and holds no seniority or work rights under the Agreement. The basic facts giving rise to this dispute are as follows.

On Friday, July 26, 2013, which happened to be the Claimant's rest day, Mr. Lembo assisted International Association of Machinists and Aerospace Workers (IAM)-represented Road Mechanics who worked under his supervision, by using a front-end loader to lift and place a center plow under a ballast regulator. The record reflects that this task took approximately three minutes to accomplish.

By letter dated September 8, 2013, the Claimant submitted a claim on his own behalf for all time made by Mr. Lembo operating a front-end loader in Davisville Yard on July 26, 2013, alleging violations of the Scope Rule and Rule 55 of the parties' Collective Bargaining Agreement. By letter dated November 8, 2013, A.J. Keefe, Superintendent Engineering Production at that time, denied the claim. Thereafter, the Organization appealed the denial by letter dated December 15, 2013. The Carrier denied the appeal by letter dated January 29, 2014. The Organization then appealed to the Director of Labor Relations by letter dated March 22, 2014. Following a conference which occurred on May 16, 2014, the time limit for the Carrier's response was extended to August 14, 2014. Subsequently, by letter dated July 31, 2014, the Director of Labor Relations denied the appeal. Attached to the denial was a statement from Mr. Lembo, in which he stated that the front-end loader is a Carrier tool used by BMW and IAM employees, that in this case he used the tool for no more than three minutes to do a roadway machinery repair, and that BMW employees have not performed this type of work with this tool in the past. The Organization submitted a rebuttal dated August 29, 2014, to which the Organization attached an email from BMW-represented employee David O'Connor listing dates between 2001 and 2010 on which he operated equipment in roadway machinery repairs. The Carrier responded, indicating that the appeal remained denied, by letter dated January 23, 2015. The Organization submitted its rebuttal dated February 28, 2015.

The Carrier granted an extension of the time limit for the Organization to appeal to the National Railroad Adjustment Board to March 29, 2015, and on March 26, 2015, the Organization filed its notice of intent to file a submission with the Third Division. By letter dated April 1, 2015, the National Railroad Adjustment Board advised the Carrier that the Organization had filed its notice of intent.

Following the Board's careful review of the record, and based on this unique set of facts, the instant claim should be denied. In this regard, the facts reveal that there was an immediate need for a qualified employee to operate an end loader in connection with an IAM Mechanic replacing a center plow on a ballast regulator. This left the Carrier with two options: It could have avoided this replacement, or it could have delayed the performance of such work until the Claimant could be called and reported for the assignment, a task that took approximately three minutes to accomplish. Neither option makes sense, particularly since a qualified employee (Lembo) was already on duty and could temporarily perform the incidental task of operating the front-end loader. Accordingly, given these unique set of facts with emphasis on the *de minimus* nature of this operation, and in the absence of any bad faith on the Carrier's part, the Board finds and concludes that Mr. Lembo's operation of the front-end loader on the date and time at issue did not violate the Agreement. By stressing the uniqueness of this situation, the Board reminds the Parties that cases of this nature are judged by their own set of facts and are therefore determined on a case-by-case basis with a presumption that the applicable provisions of the Agreement apply.

**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 28th day of November 2017.