

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42948
Docket No. 43567
18-3-NRAB-00003-160033**

The Third Division consisted of the regular members and in addition Referee Sean J. Rogers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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(Dakota, Minnesota & Eastern Railroad Corporation

STATEMENT OF CLAIM:

- “(1) The Agreement was violated when the Carrier Assigned junior Foreman K. Monroe to perform overtime work on the New Albin Section territory on July 14, 2014 instead of calling and assigning senior foreman J. Jangula thereto (System File B-1415D-103/80028 DME).
- (2) As a consequence of the violation referred to Part (1) above, Claimant J. Jangula shall be compensated for four (4) hours at the applicable overtime rate.”

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 an overtime dispute concerning the Carrier's failure to assign the Claimant to overtime service involving the inspection, adjustment and alignment of a switch on July 14, 2014 on the New Albin section.

There is no dispute that the Claimant regularly performed work on the New Albin section. There is no dispute that the Claimant was available, willing and fully qualified to perform the work. The Carrier assigned the overtime service to K. Monroe, who did not regularly perform work on the New Albin section and who was less senior than the Claimant. The record establishes that Monroe performed four hours of overtime service inspecting, adjusting and aligning the switch after having received the assignment from Assistant Roadmaster J. Drenth.

The dispute at its core involves whether Drenth called the Claimant to offer him the overtime work before calling Monroe.

The claim asserts that the Carrier violated Rule 15 – Overtime, which states:

“When operating requirements or other business needs cannot be met during regular working hours, employees will be given the opportunity to volunteer for overtime work assignments. Employees must receive their manager's prior authorization for all overtime work. Overtime will be distributed first to the employees who regularly perform the work and, thereafter, as equitably as practical to all employees qualified and reasonably available to perform the required work.”

The Organization asserts that the Claimant, as the senior available and qualified employee, was entitled to preference over Monroe, the junior employee. Therefore, the Organization argues the Carrier violated the Claimant's established superior seniority rights when it failed to assign the overtime work. Moreover, the Organization asserts that because the Claimant regularly performs track maintenance and repairs on the New Albin section territory, he had a preferential right to be assigned the overtime work over Monroe who was not regularly assigned to perform track maintenance work the section.

The Organization challenges the Carrier's defense that Assistant Roadmaster J. Drenth made a telephone call to the Claimant for the assignment, but there was no answer. The Organization asserts that the on property record lacks any proof that Drenth actually attempted to contact the Claimant to offer him the overtime work. The Organization argues that when the Claimant confronted Drenth about not being called for the work, Drenth said he called the Claimant and there was no answer. However, when the Claimant then asked Drenth what telephone number he had called, Drenth

responded with the wrong telephone number.¹ The Organization argues that it repeatedly requested that the Carrier have Drenth produce the actual telephone record during the on property handling of the claim. The record establishes that, while Drenth submitted an email purporting to show the telephone call he made to the Claimant, no actual phone records were produced by the Carrier. For this reason, the Organization says Drenth's reconstructed record is unreliable.

The Organization also challenges the Carrier's defense that the work was emergent in nature. The Organization argues the Carrier made a mere assertion of an emergency and failed to prove an emergency or provide any evidence which would have prevented assigning work to the Claimant.

As remedy for violation Rule 15, the Organization requests that the Claimant receive four hours of overtime pay.

The Carrier asserts that on July 14, 2014 when this overtime work arose, consistent with Rule 15, the Claimant, as crew who regularly performs the work, was called and was not available. The Carrier asserts that thereafter, Monroe, the next employee reasonably available and closest to the territory was assigned the overtime. The Carrier argues that Rule 15 contains no reference to seniority as a basis for overtime assignment. The Carrier refutes the Organization's argument that seniority is the determinative of overtime assignments in the industry or a Carrier past practice. The Carrier says flatly that seniority does not apply to assignments in the parties' collective agreement.

Next, the Carrier asserts that it had to assign the closest employee to the repair to prevent ceasing operation resulting in an emergent condition. In support of this assertion, the Carrier cites the collective agreement Preamble:

"The BMWED affirms the long-standing principle that the Company retains the authority to assign work and manage its business according to

¹ The on-property record includes the Claimant's written statement address to the Organization's representative Brain Rumler, BMW Vice Chairman, in pertinent part:

I was not called for the work. I talked to management after you sent the claim in and they asked me why I would claim when they called me. They went over my number and then I told them thanks for making the claim because Drenth said he called 507-428-6352[.] I have had the same phone number for over 30 years 507-482-6352 and they called the wrong number. I know that the letter from Drenth says the right number but that is because they talked to me and changed it for the letter. Ask for the original phone record. That will show the right number he called which is the wrong number for me.

its best judgment so long as its actions are not specifically restricted or in direct violation of this Agreement.”

The Carrier also asserts the disputed overtime assignment was a temporary assignment not controlled by seniority. In support of this assertion, the Carrier cites Rule 1 – Scope:

“3. Other employees may perform work on “as needed” temporary basis as long as it does not cause or result in the abolishment of one or more positions under this agreement.”

In this regard, the Carrier argues the work was as-needed-work and a one time project which, when the employee regularly assigned to the work was unavailable, then the work could be assigned to the closest employee to the work location. The Carrier asserts that no positions were abolished and the repair was not a matter of normal and routine operations.

The Carrier argues, based on the manager’s information at the time, that Drenth chose the employee closest to the work, only three miles away. The Carrier argues the manger’s decision was consistent with Preamble which also states:

“3. The parties to this agreement understand that the fundamental mission of the DM&E and its employees is to provide service to its customers in the most safe and efficient manner.”

The Carrier argues as well that the assignment was consistent with Rule 15 – Overtime which states:

“Overtime will be distributed first to the employees who regularly perform the work and thereafter, as equitably as practical to all employees qualifies and reasonably available to perform the required work.”

The Carrier says that the Organization offers no evidence of an industry or past practice, particularly regarding seniority, that shows that the overtime assignment was not made “equitably as practical” under the circumstances.

Regarding the Organization’s claim that Drenth had the wrong telephone number for the Claimant, the Carrier argues that this claim was not asserted until Grievance Step 2, two months after the initial claim was filed. For this reason the Carrier argues the issue concerning the telephone number is not relative to the claim.

The Carrier concludes that the Organization's claim and appeal do not meet the burden of proof.

As a threshold issue, there is no record evidence that the overtime work at the New Albin section was emergent work. The mere assertion of an emergency is insufficient to meet the burden of proof for an affirmative defense. The Carrier advances this assertion and cites the collective agreement without material evidence of an emergency. For this reason, the overtime assignment was subject to Rule 15 which constrains the Carrier to distribute overtime assignments "first to the employees who regularly perform the work."

In this regard, the Organization bears the burden of proof to show that the Carrier's violated Rule 15. The undisputed facts support the *prima facie* claim that the Claimant was entitled to the overtime assignment because he was available for work, willing to work and the employee who regularly performed the work.

However, the Carrier raised several affirmative defenses to the claim and bears the burden to prove those affirmative defenses. The most significant Carrier defense asserts that, consistent with Rule 15, Assistant Roadmaster Drenth, properly called the Claimant to offer the overtime assignment to him first, but there was no answer. There after, the Carrier insists that Drenth properly assigned the overtime work to the closest available employee, Monroe.

However, during the on property handling, when the Claimant asked Drenth what telephone number he called, Drenth responded with the wrong number. Later, as the on property processing of the claim evolved, Drenth submitted an email detailing the calls he made on July 14, 2014 showing the Claimant's correct telephone number.

However, when the Organization rightfully requested the actual telephone record, the Carrier did not provide the actual telephone record.

Numerous Third Division Awards hold that the Carrier must present competent support for its affirmative defenses and must provide the information the Organization has requested as well. In the instant claim, such competent supporting evidence would have been the actual telephone record. Drenth's email is only a reconstructed record which is both insufficient and unreliable as evidence to show that he called the Claimant but received no answer.

For this reason, the Carrier has not met its burden of proof to support its affirmative defense that Drenth called the Claimant and there was no answer. (See:

Third Division Awards 36396, 39320, 39670 and 40871). This record supports the conclusion that Drenth called the wrong number. Pursuant to Rule 15, the Carrier was required to offer the overtime assignment to the Claimant as the employee who regularly performed the work, but it did not.

For this reason alone, the Board finds that the Carrier violated Rule 15 and the claim is sustained.² The Claimant shall be compensated for four hours at the applicable overtime rate.

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 14th day of February 2018.

² Having found that the Carrier could not prove Drenth called the Claimant, the Board need not address the Organization's assertion that overtime assignment must be made in seniority order except to note that Rule 15 does not include seniority as the basis for the assignment of overtime work thereunder.