Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42949
Docket No. MW-43568
18-3-NRAB-00003-160034

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

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

STATEMENT OF CLAIM:

"(1) The Agreement was violated when the Carrier assigned junior Foreman K. Luensmann to perform overtime work in connection with the repair of a broken rail in the Marquette Yard Track Number 2 in Marquette, Iowa Section territory on June 14, 2014 instead of calling and assigning senior foreman J. Jangula thereto (System File B-1415D-102/8-0027 DME)

(2) As a consequence of the violation referred to Part (1) above, the 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 a broken rail at the Marquette Yard Track Number 2, Marquette, Iowa on June 14, 2014. The regularly assigned crew, the Guttenberg section crew, was called and was not available. The Carrier assigned the overtime work to Foreman K. Luensmann and Welder Helper Jeff Kinley.

The facts are not in dispute. It is the application of Rule 15 to the facts which is disputed between the Carrier and the Organization.

The material and undisputed facts as follows:

> **"The Claimant is senior to Luensmann and Kinley. He was available, willing and fully qualified to perform the work. The Claimant is assigned to the New Albin section which is an adjoining territory to the Guttenberg section. The Claimant was not called for the overtime assignment. The Claimant lives 53 miles from the Marquette Yard while Luensmann lives 36 miles and Kinley lives 3 miles from the Marquette Yard."**

The grievance claim asserts that the Carrier violated Rule 15 – Overtime, which states in pertinent part:

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

Pursuant to Rule 15 and based on the facts, the Organization asserts that the Claimant, as the senior available and qualified employee from an adjoining territory, was entitled to the overtime assignment because he held seniority preference over Luensmann and Kinley, both junior employes.

The Organization asserts that seniority is a recognized and valuable property right of an employee. The Organization cites awards of the First, Second and Third Divisions to support its assertion. Therefore, the Organization argues that the Carrier violated the Claimant's established superior seniority rights when it failed to assign him the overtime work. The Organization further argues the seniority in the assignment of overtime work is a recognized industry-wide practice and a Carrier past practice. The Organization says that seniority as the basis of overtime assignment satisfies the Rule 15 requirement that overtime work must be assigned "as equitably as practical to all employes qualified and reasonably available to perform the required work."

The Organization argues extensively that the record does not support the Carrier contention that it attempted to call the Claimant. However, the Organization says that the Carrier contends that it called the Claimant yet the facts establish that no call was made.

The Organization refutes the Carrier's defense against the claim that the situation at the Marquette Yard was emergent. The Organization argues that the Carrier has the burden of proof to prove any affirmative defense including this one that an emergency existed. The Organization argues the record and Third Division precedent does not support that there was a genuine emergency that would have prevented the Carrier from assigning the overtime work to the Claimant.

The Organization concludes that the remedy for the Carrier's violation of the collective agreement is for the Claimant to receive the proper rate of pay for the lost work opportunity.

The Carrier asserts that on June 14, 2014 when this overtime work arose, consistent with Rule 15, the crew who regularly performs the work was called and was not available. The Carrier asserts that thereafter the employes, Luensmann and Kinley, were reasonably available and closest to the territory and were 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 insists that seniority does not apply to overtime assignments in the parties' collective agreement.

Next, the Carrier asserts that it had to assign the closest employee to the Marquette Yard broken rail repair which would have ceased operations then 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 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 employes 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, could be assigned to the closest employee to the broken rail. The Carrier asserts that no positions were abolished and the broken rail was not a matter of normal and routine operations.

The Carrier argues, based on the manager's information at the time, that he reasonably chose Luensmann and Kinley for the work and who were closest to the work, only 36 and 3 miles away, respectively. The Carrier argues the manager'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 employes 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 employes who regularly perform the work and thereafter, as equitably as practical to all employes qualifies and reasonably available to perform the required work."**

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

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

The gravamen of the Organization's claim is that the Carrier violated Rule 15 by assigning Luensmann and Kinley to the overtime repair of the Marquette Yard broken rail instead of the Claimant. The Organization maintains the Claimant was entitled to the overtime work because he is the more senior employee from an adjoining territory, yet he was not called.

Rule 15 constrains the Carrier to distribute overtime work "first to the employes who regularly perform the work." The record establishes that the crew that regularly performed work at Marquette Yard was not available. Therefore, Rule 15 then permits the Carrier to distribute overtime work "as equitably as practical to all employes qualified and reasonably available to perform the required work."

"Rule 15 is silent as regard seniority and does not mention employes assigned to adjoining territories. In this regard, based on the clear, plain and unambiguous language of Rule 15, the Carrier's distribution of overtime work is not constrained by seniority or an employee's assignment to adjoining territories."

Despite Rule 15's silence regarding seniority, the Organization argues distribution of overtime by seniority is the industry standard and the Carrier's past practice.

The assertion that distribution of overtime work by seniority is the industry standard is essentially an argument that the application of seniority to the distribution of overtime work is an implied condition of the collective agreement. There is no evidence that the parties adopted seniority distribution of overtime work as an implied condition of their collective agreement. This is particularly the case since the parties specifically negotiated seniority rights in Rule 6 and 7 which renders complete absence of seniority as the basis for overtime work distribution all the more conspicuous. When the parties wanted to use seniority as a term or condition in the collective agreement, they knew how to do it. The absence of seniority as a term or condition in Rule 15 must be construed as the intent of parties to exclude seniority in the distribution of overtime assignments.

Regarding the Organization's assertion of a past practice of seniority-based distribution of overtime work, such a past practice must be clear and consistent, endure over a reasonable time, and be the accepted conduct in the workplace. Past practice evidence tends to show a consistent prior course of conduct not covered by the collective agreement. During the on property handling, the Organization presented no evidence supporting a Carrier past practice of distributing overtime work based on seniority.

Rule 15 does limit the Carrier's distribution of overtime work. The Carrier must distribute overtime work "as equitably as practical to all employes qualified and reasonably available to perform the required work." There is no dispute that Luensmann and Kinley were qualified to repair the Marquette Yard broken rail. Based on how close they lived to the Marquette Yard, they were reasonably available. Finally, the distribution of the overtime work based on the distance a qualified employee lives from the overtime work site is both equitable and reasonable under the circumstances because such distribution, much like seniority, is free from discrimination, favoritism or nepotism. (See, Second Division Award 2910).

The Board finds that the Organization has not presented sufficient evidence

to support either argument of an industry standard, an implied condition of the collective agreement, or a past practice limiting the Carrier's distribution of overtime work to seniority or an employee's assignment to an adjoining territory.

For all the reasons discussed above, 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 14th day of February 2018.