

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42969
Docket No. MW-42700
18-3-NRAB-00003-140357**

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employees Division -
IBT Rail Conference
BNSF Railway Company (former Burlington Northern
Railroad Company)**

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 Truck Driver R. Betting to perform overtime work repairing track at one and two switch west lead in the Grand Forks Yard in Grand Forks, North Dakota on January 20, 2013 (System File T-D-4222-M/11-13-0187 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Betting shall be allowed eleven (11) hours’ pay at his 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 claim concerns the assignment of overtime. The Claimant R. Betting established and holds seniority in various classifications, including Truck Driver, within the Track Sub-department, and, at the time of this dispute, he was assigned as a section gang Truck Driver at Grand Forks, North Dakota.

The Organization alleges that on January 19, 2013, a train derailment occurred at Grand Forks Yard, and the Carrier called in junior forces headquartered at Grafton and Larimore, North Dakota, to work on track repair instead of assigning the Claimant. The Organization submitted a claim on behalf of the Claimant because it contends that it was a violation of the Agreement to assign Welding Sub-department employees and Machine Operators Grinder Operators to do this work. Specifically, the Organization alleges that the Carrier violated Scope, Rule 2 Seniority Rights and Sub-Department Limits, Rule 5 Seniority Rosters, Rule 6 Basic Seniority Districts, Rule 29 Overtime, and Rule 55 Classification of Work. As a remedy, the Organization seeks that the Claimant be paid for 11 hours at his overtime rate.

The Carrier submits that the Rules cited by the Organization do not reserve the work in question to Organization-represented employees, and to prevail on its claim, the Organization must establish that the disputed work has been exclusively performed by those in the Claimant's classification on a system-wide basis. The Carrier argues that the Organization has failed to meet its burden of proof by not providing any evidence (1) of the work performed, (2) of the damages allegedly suffered by the Claimant, or (3) to establish system-wide exclusivity of the work in question.

The Carrier argues that Rule 55 and the other rules cited by the Organization do not reserve any particular type of work to any classification. There is considerable past arbitral support for the Carrier's argument. As noted in Third Division Award 39646:

"Prior Awards have established that Rule 55 is a classification Rule, not a jurisdiction Rule. ... The majority of Awards indicate that for

the Organization to claim that particular work is reserved for a particular classification, it must show not only that the work is by custom, practice and tradition performed by the classification claiming the work in the location of the claim, but that the work is performed exclusively by that classification system-wide. ... It is universally accepted that the Organization bears the burden of proof to establish its claim.”

The Carrier’s argument must be credited because the Organization did not enter any evidence to meet this burden.

The Organization’s central argument is based on the use of seniority in awarding overtime. There is arbitral precedent between the parties dating back many years holding that the seniority protections of Rule 2 apply to the assignment of overtime. Third Division Award 19758 – issued in 1973 – involved two employees assigned to the same classification in the same location, and held that seniority must be observed in assigning overtime. That Award also discussed exceptions where seniority was not observed under certain circumstances, including when a junior employee was working on a certain task that he had to complete; the availability of employees to work; emergencies; and contractual rules that permitted carriers to not observe seniority in assignments. Under this interpretation of Rule 2, when there is a need for a Truck Driver for overtime work, generally the most senior Truck Driver should be offered the work.

There are two reasons that this interpretation of Rule 2 does not apply to this case. First, this was not simply a matter of assigning a Truck Driver to work overtime driving a truck. Indeed, the Organization alleged that employees called to the derailment removed anchors, pulled spikes, unbolted anchor bars, replaced angle bars and performed other work associated with changing rail, but it did not allege that truck driving work was performed. Second, as acknowledged in Third Division Award 19758, Carriers have more flexibility in staffing overtime assignments in emergencies. Here, the Carrier was afforded latitude in staffing to repair the derailment. For these reasons, the Carrier did not violate Rule 2 or any other provision of the Agreement.

AWARD

Claim denied.

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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.