

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43361  
Docket No. MW-44189  
19-3-NRAB-00003-170109**

**The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(Dakota, Minnesota & Eastern Railroad Corporation**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it withheld Mr. S. Loyd from reporting to his bulletined and assigned assistant foreman position on the Chillicothe section gang beginning on July 15, 2015 and continuing and when it failed to properly compensate him therefore (System File G-1515D-302 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Loyd shall now ‘... be compensated for the forty six and one half (46.5) hours of overtime, as shown earlier in the claim at the applicable rates of pay, as well as any additional overtime accrued by the Chillicothe Section forces which he would have been associate (sic) with if the Carrier had not hindered that opportunity,.’ beginning on July 15, 2015 and continuing.”**

**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 basic facts are not in dispute in this rules claim. The Claimant was a Track Inspector who was awarded a new position of Assistant Foreman of the Chillicothe section gang by bulletin dated July 9, 2015. The Carrier did not release him to assume the new position for some time thereafter. Had he assumed the new position by July 15<sup>th</sup>, the claim asserts he could have received higher pay as well as some 46.5 hours of overtime.

The Organization cites Rule 9, Paragraph 8, and Rule 15, Paragraph 1 in support of the claim. Those rules read, in pertinent part, as follows:

\* \* \*

“[Rule 9]

8. The name of the successful applicant will be posted for five (5) calendar days in the same manner as the original posting. *However, this does not preclude the Carrier from withholding the employee to meet business needs.* Employees withheld will be paid the rate of the newly awarded assignment or their current assignment, whichever is higher.

\* \* \*

[Rule 15]

1. \* \* \* Overtime will be distributed first to the *employees who regularly perform the work* and, thereafter, as equitable as practical to all employees qualified and *reasonably available* to perform the required work.”

\* \* \*

(Italics supplied)

As written, the language of Rule 9, Paragraph 1 does not impose any limit on the length of time a successful applicant may be retained in a former position by the Carrier. The relevant language requires only that the withheld employee be paid

for time worked at the rate of the newly awarded assignment if it is higher than the rate for the position in which the employee is retained.

Regarding the overtime component of the claim, once again, as written, overtime work goes first to the employees who regularly perform the overtime work. Until the Claimant is released to assume the newly awarded position, he cannot be an employee who regularly performs the work; therefore he is not eligible for the disputed overtime work under that portion of the rule. Similarly, while the Claimant is retained in his former position, he is not "... reasonably available ..." to perform the overtime work under that portion of the rule.

Given the text of the applicable rules, we find the Organization has not sustained its burden of proof to establish the Claimant's right to be paid for the missed overtime work in the Assistant Foreman position.

In Paragraph 4 of its March 18, 2016 letter confirming the conference on the property, the Organization asserted that the Carrier failed to pay the Claimant at the higher rate of pay to which he was entitled. As previously noted, Rule 9 entitles a withheld employee to be paid for all hours worked in the position in which he is retained if the newly awarded position has a higher rate of pay. On the record before us, it is not clear that the Claimant has been paid in accordance with the rule. Therefore, the claim is sustained in part as follows: The Carrier is ordered to review its records and pay the Claimant in accordance with Rule 9, Paragraph 8 if it has not already done so.

### **AWARD**

**Claim sustained in accordance with the Findings.**

**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 December 2018.**