

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43517
Docket No. MW-44802
19-3-NRAB-00003-170553**

The Third Division consisted of the regular members and in addition Referee Meeta A. Bass 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 failed and refused to allow Assistant Foreman C. Utt to report to his bulletin assignment as assistant foreman headquartered at Ottumwa, Iowa on February 2, 2016 and instead held him on his former position (System File G-1615D-301/8-0104 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Utt shall ‘*** be compensated for the thirteen and three quarters (13.75) hours of overtime, as shown earlier in the claim at the applicable rates of pay, as well as any additional overtime accrued....’ beginning on February 2, 2016 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.

On January 28, 2016, the Carrier awarded the Claimant the position of Assistant Foreman on the Ottumwa Section Crew headquartered in Ottumwa, Iowa. Prior to this date, Claimant was assigned to and working on a rail gang. Claimant was withheld from assignment to the newly awarded position. In so doing, the Organization asserts Claimant was denied overtime opportunities available with the newly awarded position between February 2, 2016 and February 24, 2016, and compensation equivalent to thirteen and three quarters (13.75) hours and continuing.

The Organization filed a first level claim by letter dated March 21, 2016. The Carrier denied the claim by letter dated May 13, 2016. The Organization appealed the initial denial to the Highest Designated Officer by letter dated June 24, 2016, and the same was denied on August 18, 2016. A formal conference was held with no change in the position of the Carrier. This matter is before this Board for a final resolution of the claim.

The Organization asserts that applicable rules of the Agreement are 1:Scope, 4:Rates of pay and Work Categories, 6:Seniority, 9:New Positions, Vacancies, Assignments and Displacements, 14:Workshifts and Work Cycles, and 15:Overtime.

“RATES OF PAY

On the effective date of this Agreement, the following hourly rates of pay will apply to the following work categories, subject to entry rates.

Work Category Rate of Pay....

Assistant Foreman \$22.57

2. WORK CATEGORIES

The following is a general description of the work categories listed in this Rule. This definition is not intended to restrict the work that may be performed by an employee assigned to a position within a work category

under this Agreement. Likewise, this general description of work is not intended to limit the work other DM&E employees or third parties may perform...

d. Assistant Foreman - An employee who generally assists a Foreman in the planning, direction, and oversight of a crew or team and who may also perform any other work for which qualified.

RULE 6 – SENIORITY

1. Seniority Rosters

a. Employee System Seniority Rosters will be established by work category pursuant to Rule 4.2.

RULE 9 - NEW POSITIONS, VACANCIES, ASSIGNMENTS AND DISPLACEMENTS

1. New positions and vacancies in existing positions of more than thirty (30) calendar days will be posted in places accessible to all employees covered by this Agreement for a period of seven (7) calendar days. This requirement may be satisfied by posting electronically as long as all employees covered by this Agreement have access to the information.

*** * ***

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 · OVERTIME

1. 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 Board has reviewed the record developed by the parties during their handling of the claim on the property, and considered evidence related to the following to make its determination of this claim: Whether or not the Carrier violated Rule 9 and 15.1 of the parties' collective bargaining agreement when the Claimant was withheld on assignment after being awarded a new position, and if so, what should the remedy be?

The Organization contends that the Carrier violated the Claimant's seniority rights when it failed and refused to release Claimant from his rail gang position to protect his newly awarded assistant foreman position on the Ottumwa Section Crew. The Organization contends that the Carrier retains authority to assign only that work that has been otherwise restricted by the parties' Agreement. Rule 9(8) states that the only textual justification for withholding an employee from his bid-in position that is permitted under the Agreement refers to the Carrier's meeting its business needs. Further, the Organization contends that the Carrier has failed to establish a business need in defense of this claim. Moreover, the Organization argues that Claimant is the senior regular employee and therefore is entitled to the overtime work as described in Rule 15-1. The Organization asserts that the past practice has been to call senior regular employees of the gang for overtime. It is the position of the Organization that Claimant is entitled to the overtime hours that he would have worked had he been timely and properly released to the new awarded position.

The Carrier contends that the company has the right to manage its operations as it sees fit unless restricted by agreement language. There is no agreement language to support the requirement or entitlement for assignment, or payment of overtime work for which Claimant did not perform. There is no language in the controlling Agreement which restricts the Carrier's ability to hold an employee on a former assignment. There is no language in the controlling Agreement that references the length of time the Carrier is permitted to hold an employee on a former assignment. The Carrier contends that the Organization has failed to meet its burden of proof to show any violations of the Agreement. Moreover, the Carrier contends that there is no language in the Rule 15-1 that overtime shall be based on seniority. Notwithstanding, Claimant's name is not listed

on the current Assistant Foreman Track seniority roster 1 found. Claimant's seniority date as a laborer is 06/08/2015 which at the time of roster publication placed him 209 out of 229 positions on the labor roster. The Claimant is not "the senior regular employee." There is no practice, as alleged by the Organization, that overtime is called pursuant to the terms of the Controlling Agreement. The Organization improperly alleges a practice of overtime by other employers. It is the position of the Carrier that the claim should be denied.

The fundamental rule of contract interpretation is that where the language of the agreement is clear, there is no need for the arbitrator to go beyond the face of the contract in order to resolve the dispute. The dispute should be resolved in accordance with the plain meaning of the language and within the four corners of the document. If the language is unambiguous, the role of the Arbitrator is to enforce the clear meaning and not to interpret. Language is said to be ambiguous if it is susceptible to reasonable but conflicting interpretations.

The language of this Agreement is clear and unambiguous. The language of Section 9.8 of the Agreement requires the Carrier to post the name of the successful applicant for five (5) calendar days. It further "does not preclude the Carrier from withholding the employee to meet business needs." Lastly, in the event that the Carrier withholds an employee, the Carrier must pay said employee the rate of the newly awarded assignment or their current assignment, whichever is higher.

The assignment of work is a right reserved to management. However, in this Agreement, the parties have negotiated and carved out of its management right a "business need" exception. The Carrier must now demonstrate a business need for withholding an employee from assignment. A careful review of the on-the-property handling of this claim indicates that the Carrier failed to establish a business need. A general assertion of a business need is insufficient to support its defense, and therefore, the Claimant was improperly withheld from his assignment.

The Board finds that the Carrier violated the Article 9.8. In the event that Claimant as an assistant foreman was denied overtime opportunities due to the Carrier improperly holding him from his assignment, the Claimant is entitled to compensation for lost overtime work opportunity at the rate the Claimant would have received absent the violation of the Agreement in accordance with Article 15.1. Article 15.1 reads

“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 language of Article 15.1 does not provide for a distribution of overtime by seniority. The Organization asserts that overtime has been distributed by seniority as past practice, and assertion which is denied by the Carrier. Once again, a general assertion is insufficient to support the Claimant’s claim. Moreover, past practice does not generally modify clear unambiguous contract language.

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 27th day of March 2019.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 43517- DOCKET MW-44802

(Referee Meeta Bass)

In this instance, the Majority erred in its finding that Rule 9.8 of the Agreement was open to an interpretation beyond the language written in the Collective Bargaining Agreement. Rule 9.8 specifically states the employee's award to another position "does not preclude the Carrier from withholding the employee to meet business needs." There is no further clarification needed. The Agreement was negotiated in good faith. Had the skilled negotiators intended to include additional restrictions beyond the language included in the agreement they would have done so. The Majority's ruling that a "general assertion of a business need is insufficient to support its defense" is a newly created standard not comprehended by this agreement and is an improper burden placed on the Carrier at the hands of the Majority.

A nearly identical situation was addressed by Referee Gerald Wallin, in On-Property Awards 43361 and 43362, wherein the Board held that employees were not entitled to overtime they did not work:

"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 Claimant is retained in his former position, he is not "...reasonably available..." to perform overtime work under that portion of the rule."

The aforementioned decisions were Awarded after the submission for this case, and were therefore produced to Referee Bass at arbitration (which has been standard historical practice when awards were unavailable prior to submission).

The Majority's failure to address the applicability of these recent on-property awards of an identical nature, and to hold the Company to a newly created standard outside of the plain language of the Agreement, was wholly improper a dereliction of arbitral precedent.

Therefore, I respectfully dissent.

Anthony Mosso
Anthony Mosso

Jeanie L. Arnold
Jeanie L. Arnold

September 5, 2019