

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44041
Docket No. MW-44098
20-3-NRAB-00003-170177**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.

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

PARTIES TO DISPUTE: (
(CSX Transportation, Inc.

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when, on September 6 and 7, 2015, the Carrier assigned junior Bridge and Building (B&B) Department employees W. Sanner and D. Renaud to perform overtime work including concrete demolition and timber sleeper removal from underneath the master retarder in the Cumberland Terminal Hump Yard and failed to assign such work to Carpenter Foremen J. Henry and A. McKenzie (System File A01500815/2015-193617 CSX).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Henry and A. McKenzie shall each be compensated ten (10) hours at their respective overtime time rate of pay.”**

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 Claimants maintain seniority in various classifications in the Maintenance of Way Department. During the time relevant to this dispute, the Claimants were assigned as Carpenter Foremen within the Carrier's B&B Department. On September 6, 2015, the Carrier required overtime concrete demolition and timber sleeper removal work in connection with master retarder work at the Cumberland Terminal Hump Yard. The Carrier assigned two trackmen from the Track Department to the overtime work, rather than the Claimants, who assert that they ordinarily and customarily performed B&B work such as concrete demolition and timber sleeper removal. There is no dispute that the Claimants are senior to the Trackmen who were assigned the overtime work. The Trackmen worked a total of ten hours of overtime.

The Organization filed a claim asserting that this type of work is ordinarily and customarily performed by B&B employees, the Claimants were available for this overtime, and would have worked if they had been called to do so. The Carrier denied the claim and the parties were unable to resolve the dispute on-property. The claim is now properly before this Board for final adjudication.

The Organization contends that the Carrier has violated Rule 17 § 1 of the parties' Agreement, which provides:

“RULE 17 - PREFERENCE FOR OVERTIME WORK

Section 1- Non-mobile gangs:

- (a) When work is to be performed outside the normal tour of duty in continuation of the day's work, the senior employee in the required job class will be given preference for overtime work ordinarily and customarily performed by them. When work is to be performed outside the normal tour of duty that is not a continuation of the day's work, the senior employee in the required job class will be given preference for overtime work ordinarily and customarily performed by them.

- (b) If additional employees are needed to assist in the work, other employees located within the seniority district will be offered/called in the order of their seniority, in the required job class.”

The Organization contends that the Claimants were entitled to the overtime work by virtue of their superior seniority, assignment to positions in the required job classification and department, and the provisions of Rule 17. The Organization contends that there is no dispute that the overtime work took place and that it consisted of breaking concrete and timber sleeper removal from the Carrier’s tracks, right of way, and appurtenances. The Organization contends that such work had been ordinarily and customarily performed by B&B Carpenters such as the Claimants.

The Organization contends that the Scope Rule plainly and unambiguously states that *all* work in connection with the construction, maintenance, repair, inspection or dismantling of Carrier buildings, bridges, tracks, right of way, etc. shall be performed by members of the Maintenance of Way Department. Further, the Organization contends that the subject work has been historically and customarily performed by members of the B&B Department and thus should have been offered to them pursuant to Rule 17. The Organization contends that these assertions were unrefuted on property.

The Organization denies that its claim is procedurally defective and denies that it has varied its claim in any way. It further contends that the Carrier belatedly raised this argument for the first time in its submission. The Organization also contends that the Claimants are entitled to the requested remedy.

The Carrier contends that the claim is procedurally defective, because the Organization now asserts that specialized equipment was used to perform the work, but its initial claim did not mention any machines. The Carrier contends that the Organization’s claim has been substantially altered and must be dismissed.

The Carrier further contends that the Organization has failed to show a violation of the Agreement, which states work is reserved to BMW members, but no Agreement language ever stated that concrete demolition is the exclusive right of the B&B class. The Carrier asserts that those assigned to do the work in question were BMW members, working in a BMW craft doing BMW-reserved work. The Carrier contends that the work was neither within a facility-maintained structure nor a bridge-

maintained structure, therefore neither Bridge nor Facilities BMW employees would be entitled to the work.

The Carrier contends that the Claimants' statements regarding who historically performed the work in question are self-serving. The two statements do not demonstrate system practice or the exclusion of other subgroups of the BMW performing the work in question. Further, it is not within the Board's scope of review to make determinations on credibility or conflicts of fact.

The Carrier asserted that the claim is procedurally defective because it has been substantially altered since its initial presentation. Although the Organization claimed that this argument was raised for the first time in its submission to this Board, a careful review of the parties' correspondence confirms that the argument was properly raised on property. The Carrier asserted that "BMW equipment operators were needed to perform the required work," and the Organization responded that the Claimants had "ordinarily and customarily performed this work with the very same equipment used." When the Carrier replied that anyone could operate the equipment, the Organization countered that the machine was of a specialized nature. The dates, locations, claimed work, and claimed hours have remained the same since the Organization's initial claim. Carrier's argument that the claim was substantially altered, although properly preserved, is not persuasive.

With respect to the merits of the claim, there is no dispute that the Claimants are senior to the Trackmen who were assigned the disputed overtime. The Carrier contends that this work was not reserved to the B&B Department under the Agreement, but it concedes that the work can be within the BMW scope. There is no factual challenge on the record that the work has ordinarily and customarily been performed by B&B carpenters. In such case, the Organization argues that as the senior employees in the required job class, the Claimants were entitled to perform the work.

The Claimants were undisputedly senior to the Trackmen who were afforded the opportunity. The assertion that this work is ordinarily and customarily performed by the Claimants is unrefuted on this record. Therefore, Rule 17 governs the distribution of overtime and the Claimants had seniority over the employees who were offered the work. The Claimants are entitled to the requested remedy.

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 18th day of June 2020.