

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44285
Docket No. MW- 43527
20-3-NRAB-00003-200429**

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: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to assign Mr. K. Liles to overtime service in connection with cold weather watch on November 29, 2014 through November 30, 2014 and instead assigned junior employee A. Boyer (System File C-15-0020-3/10-15-0087 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Liles must now be paid twenty-nine and one-half (29.5) hours at his time and one-half rate of pay and for eight (8) hours at his double 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 Claimant has established and holds seniority in various classifications within the Maintenance of Way and Structures Department. On the date giving rise to this dispute, he was assigned as a machine operator in the Roadway Equipment Sub-department.

Beginning on November 29 and 30, 2014, Burlington, Iowa experienced exceptionally cold temperatures. Because of the severity of these low temperatures, the Carrier determined that the machines assigned at Burlington needed to be run during the nights in order to be operable the following day. Section Foreman, Ryan McSparen, called in Austin Boyer for the cold weather watch. There is no dispute that the Claimant is senior to Boyer or that McSparen did not contact the Claimant to perform the overnight watch work.

The Organization filed this claim asserting that the Claimant was senior to Boyer and was fully equipped and able to perform the overtime work. The claim was denied and then appealed to the highest officer on-property. As the parties were unable to resolve the claim, it is now properly before this Board for final adjudication.

The Organization contends that there is no dispute that the work took place as claimed. Further, there is no question that the Claimant is senior to Boyer, fully qualified, available and willing to perform the overtime service in question and would have performed it had the Carrier called and afforded him the opportunity to do so.

The Organization contends that it challenged the Carrier to produce evidence to substantiate its contention that Boyer was filling a temporary vacancy, but the Carrier failed to produce such evidence. The Organization contends, therefore, that the Claimant is entitled to compensation for the lost overtime opportunity.

The Carrier contends that there is no employee who fits the criteria to be assigned to overtime work pursuant to Rule 2A of the Agreement. The Carrier contends that Boyer was called out because at the time he had been filling in on the section and that the Claimant was not entitled to be called because he was not the regularly assigned employee on the machine.

The Organization asserts that Rule 2A of the parties' Agreement governs this case. It reads,

“A. Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided.”

In the on-property handling, the Carrier presented Rule 24J as controlling, to wit:

“J. Work on Unassigned Days

Where work is required by the Company to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee.”

While the Organization’s point is well-taken that the parties’ Agreement protects seniority rights, the Carrier adequately responded that Boyer was called because he was temporarily filling in on the section where the overtime service occurred. The Organization challenged this assertion but demanded that the Carrier produce evidence to support its position.

If Boyer was temporarily filling in, then the Claimant had no claim to the overtime opportunity. But the record before this Board contains inconsistent facts with respect to this crucial matter. As an appellate forum, this Board is not able to reconcile this factual dispute. Under such circumstances, the Board must find that the Organization has failed to satisfy its burden of proof, and the claim must be dismissed.

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 23rd day of October 2020.