

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44551  
Docket No. MW-45776  
22-3-NRAB-00003-200094**

**The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(Canadian Pacific Railway (Former 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 Mr. V. Rivera to report to his bulletin assignment as a foreman on a surfacing gang beginning June 19, 2018 and continuing and instead held him on his former track inspector position (System File J-1815D-410/2018-004420 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant V. Rivera shall be ‘\*\*\* compensated for all the hours of overtime that the Regulator Operator and Jackson 6700 Operator worked performing Foreman’s duties on the Claimant’s gang and territory, at the applicable overtime rate of pay. This is being filed as a continuing claim per Rule 33 paragraph 6 of the current CBA.’”**

**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 was assigned and working as a track inspector when, on May 29, 2018, he was awarded an assignment as foreman of a surfacing gang. The Carrier withheld the Claimant from his new assignment until it backfilled his inspector position.

On August 18, 2018 the Organization filed a claim asserting CP violated the Claimant's seniority rights by failing and refusing to release him from his inspector position to protect his foreman position. CP's not releasing the Claimant to report for his foreman assignment deprived him of overtime opportunities under Rule 15.1 ("Overtime will be distributed first to the employees who regularly perform the work ...") beginning June 19, 2018 and continuing.

In its claim denial dated October 15, 2018 CP cites Rule 9.8 which states the Carrier is not precluded from holding the Claimant in his inspector position "to meet business needs" and, since he was withheld, the Claimant was ineligible for overtime under Rule 15.1 because he was not performing foreman duties.

This claim is before the Board following its timely and proper presentation at all stages of appeal, up to and including the Carrier's highest designated officer, culminating with a conference where the parties discussed their positions advanced during on-property handling. In rendering this award, the Board confined itself to the record developed by the parties.

According to the Organization, the principle of *stare decisis* applies and disposes of this claim. BMW cites on-property Third Division Award 43517, involving virtually the same facts and Rule 9.8, as holding a carrier violates that rule when it asserts the affirmative defense - - "to meet business needs" - - as the reason for withholding an employee from an awarded position but fails to support it with documentation. Aligned with this view is Third Division Award 31107 stating a carrier "must be willing to furnish documentation" otherwise, BMW states, there is no evidence to support CP's defense which exposes the Carrier to acting at its own peril.

CP submitted no "materialistic proof" to support its asserted "business needs" affirmative defense, thus, it improperly withheld the Claimant from his awarded foreman position. As a consequence, the Claimant is the employee in Rule 15.1 "who regularly perform[s] the [foreman's] work" which entitles him to all claimed overtime

he would have worked in his foreman assignment beginning June 19, 2018 and continuing.

The Organization also maintains that on-property Third Division Award 43361, cited by the Carrier, is inapposite because the issue in that claim was the length of time an employee could be withheld from a new assignment and not whether the employee was withheld without a reason as occurred in the instant claim.

According to the Carrier, the burden to prove a contract violation resides solely with the BMW. The Organization's unproven claim is captured by Third Division Award 10950 - - "the burden is upon complaining employees to show that the action taken violates some part of the Agreement." Other than filing its claim, the Organization offers no evidence that CP violated the Agreement.

The Carrier did not violate the Claimant's seniority rights nor fail or refuse to allow him to report for his new assignment as foreman because Rule 9.8 "does not preclude the Carrier from withholding the employee to meet business needs" - - e.g., backfill the inspector position with the Claimant as there was no replacement available at the time of his awarded position. A business need is the only reason CP withholds an employee and no wording in the Agreement requires "materialistic proof" of it. Since the Claimant was not assigned to the foreman position, he was not the employee in Rule 15.1 "who regularly perform[s] the [foreman's] work" and that rendered him ineligible for overtime opportunities as explained in on-property Third Division Award 43361:

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 the overtime work[.]

Each party offers on-property awards as dispositive of this claim. The Organization states that on-property Third Division Award 43517 controls based on the principle of *stare decisis* and CP's failure to document its affirmative defense whereas the Carrier states that on-property Third Division Award 43361 controls for withholding the Claimant from his new assignment due to business needs. The measured judgment expressed in these awards is not dismissed or shelved because they represent industry practices and interpretation of rules, standards and definitions

under the Agreement. These awards are valued for their interpretation of Rule 9 - New Positions, Vacancies, Assignments and Displacements and Rule 15 - Overtime.

**Rule 9.8 is pivotal to disposition of this claim:**

**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.**

**[Emphasis added.]**

**Rule 9.8 does not impose a floor or ceiling on the length of time that a “successful applicant” may be held by the Carrier in his or her current assignment due to business needs but, when that occurs, the withheld employee “will be paid the rate of the newly awarded assignment or their current assignment, whichever is higher.” Rule 9.8 is an option to assign work by withholding an employee due to business needs at the time of the bulletined award. Unlike the claim in on-property Third Division Award 43517 where there was a merely the assertion of or reference to business need, in this claim CP articulated a business need - - no replacement available to perform inspections.**

**The phrase “to meet business needs” is not refined and tailored by explanation or example in the Agreement. This generic phrase is applied to the circumstances as they exist at the time of an awarded position with the covenant of good faith and fair dealing in American contract law guiding the interpretation and application of the phrase. That is, whether CP acted in a reasonable manner under Rule 9.8 - - compared to an unreasonable or arbitrary manner - - when it assigned work based on a business need by withholding an employee from an awarded position. A reasonable manner when assigning work is assessed within the context of new positions, vacancies, assignments and displacements. In this claim the Carrier exercised its authority to assign work “to meet business needs” by back filling the inspector position with the Claimant until a replacement was available. The unavailability of a replacement was a business need determination at the time the Claimant was awarded another position and credited as probative evidence regardless of documentation. At some point the inspector position was filled whereupon the Claimant was released to his new assignment. During the time the Claimant was withheld he received the higher rate of pay of the positions (inspector and foreman).**

The Board considered all evidence to assess whether the Carrier's withholding the Claimant for a business need aligned with the terms of the Agreement. Since the Organization did not establish that the Carrier interpreted and applied Rule 9.8 in an arbitrary or unreasonable manner when CP withheld the Claimant for its business need to backfill a vacated position, there is no violation of the rule.

As for the alleged violation of Rule 15.1, the measured judgement expressed in on-property Third Division Award 43361 is sufficient and persuasive for the Board in finding no violation in this claim. That is - -

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 the overtime work[.]

In short, this claim is denied as the Carrier complied with the Agreement when it assigned work to meet a business need by withholding the Claimant from his new assignment until a replacement was available.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant not be made.

**NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division**

Dated at Chicago, Illinois, this 8th day of October 2021.