

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44553  
Docket No. MW-45927  
22-3-NRAB-00003-200517**

**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. B. Merrill to report to his bulletin assignment as a Machine Operator B operating the Brandt truck at Mile Post 156 in Clinton, Iowa beginning November 6, 2018 through December 5, 2018 and instead held him on his position (System File Z-1915D-701/2019-006257 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Merrill shall now ‘\*\*\* be compensated for (58) fifty-eight hours at the overtime rate and (19.5) nineteen and a half hours double time as stated earlier in the claim, at the applicable rates of pay.’ (Emphasis in original).”**

**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 4, 2019 the Organization filed a claim asserting the Carrier violated the Agreement when it “prevented the Claimant from performing his regular duties Machine Operator B on the Brant truck” and were “performed by an unassigned employee.” By not releasing the Claimant to his assigned Machine Operator B position, the Carrier deprived him of overtime opportunities under Rule 15.1 (“Overtime will be distributed first to the employees who regularly perform the work ...”) beginning November 6, 2018 through December 5, 2018.

CP denied the claim on dated March 5, 2019 stating the Claimant was not deprived of overtime opportunities because he was withheld from and not assigned to the Machine Operator B position. Thus, he was not the employee “who regularly perform[s] [that] work.” Under Rule 9.8 CP is not precluded “from withholding the employee to meet business needs” and, during that time, compensates the employee at “the rate of the newly awarded assignment or current assignment, which is higher.”

This claim is before the Board following its proper and timely 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 that 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, the Organization states, there is no evidence to support CP’s defense exposing the Carrier to acting at its own peril.

Since CP submitted no “materialistic proof” to support its asserted “business needs” affirmative defense, it improperly withheld the Claimant from his awarded Machine Operator B position. As a consequence, the Claimant is the employee in Rule 15.1 “who regularly perform[s] the work” of Machine Operator B which entitles him to all claimed overtime he would have worked in that position beginning November 6, 2018 through December 5, 2018.

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 fail or refuse to allow the Claimant to report for his new assignment because Rule 9.8 "does not preclude the Carrier from withholding the employee to meet business needs" - - e.g., no replacement to fill a vacated position at the time of the Claimant's new assignment. 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 Machine Operator B position, he was not the employee in Rule 15.1 "who regularly perform[s] [that] work" which rendered him ineligible for overtime 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 for a business need. 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 in 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 for a business need 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 for a business need at the time of an awarded position. 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 for a vacated position at the time of new assignment for the Claimant.**

**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 holding the Claimant in his current assignment 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. During the time the Claimant was withheld he received the higher rate of pay specified in Rule 9.**

**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 to fill the vacated position.

**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.