

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44555  
Docket No. MW-46227  
22-3-NRAB-00003-200931**

**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. S. Brown to report to his bulletin assignment as a foreman on a surfacing crew working at Mile Post 72.0 on the Marquette Sub beginning on March 20, 2019 through March 29, 2019 (System File Z-1915D-712/USA-BMWE-DM&E-2019-00009931 DME).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant S. Brown must be compensated for sixty and one-half (60.5) hours of overtime at the applicable 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 was assigned and working as a track inspector when the Carrier abolished his position effective March 1, 2019. The Carrier awarded the Claimant the temporary position of foreman to a surfacing gang on March 15, 2019. CP withheld the Claimant from his awarded position during the period March 20, 2019 through March 29, 2019.

On May 14, 2019 the Organization filed a claim asserting CP violated the Agreement when it failed and refused to release the Claimant from his inspector position for assignment to his awarded foreman position. CP's not releasing the Claimant deprived him of overtime opportunities under Rule 15.1 ("Overtime will be distributed first to the employees who regularly perform the work ...") beginning March 20, 2019 through March 29, 2019.

In its claim denial dated July 9, 2019 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 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, CP abolished the Claimant's track inspector position effective March 1, 2019, re-bulletined that position and awarded it to another employee on March 8, 2019. A week later - - March 15, 2019 - - CP awarded the Claimant the surfacing gang foreman position but withheld him from it during the period of March 20, 2019 through March 29, 2019.

The Organization states that the principle of *stare decisis* applies and disposes of this claim. BMW states 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, BMW states, there is no evidence to support CP's defense which exposes 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 foreman position. As a consequence, the Claimant is the employee in Rule 15.1 “who regularly perform[s] the work” of foreman which entitles him to all claimed overtime he would have worked beginning March 20, 2019 through March 29, 2019.

The Organization also maintains that on-property Third Division Award 43361, relied on by the Carrier, is of no value because the issue in that claim was the length of time an employee could be withheld from an assigned position and not whether the employee was withheld without a reason as occurred in the instant claim.

In response to the Carrier’s assertion that the foreman position was not filled by any employee during the period of March 20, 2019 through March 29, 2019, the Organization states that CP used a different, unassigned and unknown employee to perform work which would have been assigned to the Claimant as foreman had he been released from his position.

As for the Carrier’s assertion of an emergency, Third Division Award 24440 defines emergency as a “sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt.” Operations did not cease but continued. Assuming an emergency existed, the Carrier fails to prove that the conditions made it impractical to assign the Claimant to his awarded position.

BMWE states that the claimed hours are accurate because CP confirmed them during conference. Undisputed is that the proper rate of pay for a lost work opportunity is the rate of pay the employee would have received, including overtime pay, but for the rule violation.

According to the Carrier, the burden to prove a contract violation resides solely with the BMWE. 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.

CP did not fail or refuse to assign the Claimant to his awarded foreman position because Rule 9.8 “does not preclude the Carrier from withholding the employee to meet business needs.” As stated during on-property handling and in its submission, the Carrier (1) “needed to hold Claimant in [his] inspector position in order to ensure that required work was completed” and (2) “Claimant was held on his former position

due to the cascade effect of backfilling positions and not having replacements” and (3) “the cascade effect of backfilling after new positions are awarded requires the [Carrier] to make decisions to meet business needs, and that includes holding some employees on their assignment until business needs can be met with their release.” CP provided a precise reason for withholding the Claimant and it shows that a business need is the only reason CP withholds an employee with no requirement in the Agreement for “materialistic proof” of it.

As for overtime, 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 as explained in non-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[.]

As for the requested remedy, during conference the Carrier discovered that no other employees performed foreman’s duties during the claimed time period. Since no employee performed the work of foreman, overtime pay is unwarranted. The work in question (with no foreman on the job) was emergent work for the Turkey River Washout. The Agreement is clear that emergency service may be performed as determined by CP.

Each party offers on-property awards as controlling in 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 the Carrier’s authority to assign work by 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 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 from a new assignment due to business needs as they exist at the time of the awarded position. Unlike the claim in on-property Third Division Award 43517 where there was merely an assertion of or reference to business need, in this claim CP articulated a business need - - no replacement available to perform required 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 not releasing the Claimant to his new assignment until a replacement was assigned. 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 as 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, 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[.]

The Board's finding no violation of Rule 9.8 and Rule 15.1 is a sufficient basis for denying such that other matters raised by either party will not be addressed.

**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.