

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44633  
Docket No. MW-44141  
22-3-NRAB-00003-210223**

**The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.**

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

**PARTIES TO DISPUTE: (**

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

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned junior Machine Operator J. Six to operate an excavator on August 18, 19 and 20, 2015 instead of assigning senior Machine Operator K. Liles thereto (System File C-15- O020-16/10-16-0005 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Liles shall ‘... be paid at his respective rate of pay twenty-four (24) hours at regular time pay and twenty-two (22) hours at time and one-half pay as settlement of this claim.’”**

**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.**

Both Claimant Liles and Mr. J. Six have established and maintain seniority as Group 2 Machine Operators within the Maintenance of Way and Structures Department, with the Claimant senior to Mr. Six. On the dates giving rise to this dispute, both were assigned and working on the Brandt RoadRailer on Gang TMOX4852. The Carrier assigned Mr. Six to operate a leased excavator to install two (2) switches, remove old track and reposition on a turnout side for a grain loop while the Claimant continued his assignment on the Brandt RoadRailer. Mr. Six apparently worked twenty-four (24) straight time and twenty-two (22) overtime hours operating the leased Excavator. The above-noted claim was timely filed and properly processed on the property without resolution and thereafter progressed to this Board for final and binding adjudication.

The Organization asserts that Rule 2.A. was violated when junior Group 2 Machine Operator Six rather than the Claimant was assigned to operate a leased Excavator at times relevant. The Claimant was willing and available to perform the work. Rule 2.A. applies to regular, temporary and overtime positions.

The Carrier contends that the claim should be denied for several reasons. Both the Claimant and Machine Operator Six worked regular hours and overtime on the days in question. The case involves an irreconcilable factual dispute necessitating a denial or a dismissal of the claim. The Claimant suffered no loss of earnings so that damages would bring a windfall.

Of the Rules relied on by the Organization, particularly pertinent is Rule 2.A, which states that "Rights accruing to employees under their seniority entitles them to consideration for positions in accordance with their relative length of service in the Company as hereinafter provided." There is no dispute that the Claimant is senior to Mr. Six and that prior to Mr. Six's assignment to operate the leased Excavator, both he and the Claimant were assigned to operate the Brandt RoadRailer, the impact being that neither man was regularly assigned to the leased Excavator. Both are Group 2 Machine Operators. Rule 5 Seniority Rosters contains a list of Group 2 Machines that includes a category of Crawler Excavator with the Brandt RoadRailer the only machine listed in the category.

The Organization, with the burden of proof in this case, has not disputed the Carrier's assertion that during the time Mr. Six was assigned to the leased Excavator, the Claimant worked the same number of straight-time and overtime hours as did the junior employee. Therefore, there is no evidence that the Claimant lost work opportunities because of the assignments. Moreover, the Organization has not shown

either that the Claimant's hourly rate would have increased due to the operation of the leased Excavator or that operation of the leased Excavator would have benefited the Claimant by increasing future opportunities for more financially lucrative assignments or for successful bids on more attractive positions.

The Board does not believe that the Carrier was compelled by Rule 2.A. or any other Rule relied on by the Organization to assign the Claimant to operate the leased Excavator when such an assignment brought no demonstrable advantage.

The Board finds that prior awards submitted by the Organization can be distinguished from the Claimant's case because those Awards involved instances where Claimants were deprived of opportunities to work additional hours. This includes on-property Third Division Award No. 21678 in which the Board sustained a claim in which employees in a seniority district other than the Claimants' seniority district were used to perform non-emergency work for which the Claimants were qualified. The claim was sustained despite the fact that the Claimants were fully employed during times relevant and, therefore, lost no earnings. In that case, seniority rights were violated when the Carrier ignored seniority district divisions. The case considered herein does not involve any employee, let alone a junior employee, in another seniority district, and must be distinguished on that basis. While the Board believes that a demonstrable violation of seniority rights requires a remedy in order to deter future violations, even if that Order might arguably create a windfall, for reasons set forth above we find no violation of Machine Operator Liles' seniority rights.

**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 15<sup>th</sup> day of December 2021.