

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44641
Docket No. MW-44383
22-3-NRAB-00003-210231**

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 employee J. Anderson to perform work unloading gang equipment beginning on November 19, 2015 through November 30, 2015 instead of assigning senior employee J. Johnson thereto (System File T-D-4903-M/11-16-0207 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Johnson shall be compensated ‘... all hours work (sic) by junior employees (sic) Jack Anderson with pay to be at claimant’s respective straight and overtime rate of pay for the hours they (sic) were not allowed to work.’”**

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.

Claimant J. Johnson, a Group 3 Machine Operator, has established and maintains seniority within the Carrier's Maintenance of Way Department. Between November 19 and 30, 2015, junior employee J. Anderson was assigned to unload gang equipment when the Claimant was qualified and able and willing to perform the work, according to the Organization. On November 19, 2015 Roadmaster Chad Lee asked for volunteers to unload equipment and employees senior to the Claimant volunteered. Thereafter the Claimant used his seniority to bump into Gang TMGX 0839 as a Truck Driver with a reporting date of November 23, 2015. On November 20, 2015 one of the previous senior volunteers forfeited the opportunity to perform the unloading work and Roadmaster Lee again sought a volunteer. Because he was working at a different location that day, the Claimant did not hear the call for volunteers, learning about it that evening from carpool mates on his way home. The Claimant called Roadmaster Lee that evening to ask why he was not given the work, being next in line by virtue of his seniority, was told that he could have the opportunity if he wished, but for various reasons declined to return to work that day. Thereafter the above-noted claim was timely filed and properly processed on the property without resolution. Accordingly, the Claim was progressed to this Board for final and binding adjudication.

The Organization relies on Rules 2, 5, 29, 30 and 55, asserting that seniority is a "fundamental pillar" of the Agreement and that it is well established that seniority rights can be used to claim overtime when such work is available. The facts in this case are clear. The Claimant is senior to Mr. Anderson. Regional/System Gang UC05 and Surfacing Gang SC55 were to be abolished at the close of the shift on Friday, November 20, 2015, but the Claimant told Roadmaster Lee that he wished to postpone his abolishment so that he could unload gang equipment beginning November 19, 2015. The Organization has presented a *prima facie* case of a Rule 2 violation. The Claimant was not at the November 20, 2015 briefing because he had been assigned to work elsewhere. When Roadmaster Lee responded to the Claimant's late afternoon call on November 20, 2015 and said that they could work things out, the Claimant was on his way home and was in line to bump into the Truck Driver position that following Monday. That does not defeat the claim because the Claimant was not offered the unloading work on November 20 and learned about the work when he was in the car

on the way home. The Carrier's failure to provide support for its affirmative defense does not constitute a factual dispute. The claim should be sustained as presented.

The Carrier notes that the Claimant was unavailable on November 19, 2015 by virtue of his assignment to formal training and that the claim should be denied because the Claimant refused the opportunity to unload the machines. The Organization has not provided evidence in support of what has been characterized as an "erroneous" position that the Claimant should have been assigned the unloading work. Moreover, giving credence to the Claimant's self-serving statement and the Organization's interpretation of the circumstances at hand simply leads to an irreconcilable factual dispute that requires that the claim be dismissed or denied. Additionally, Rule 2 is a general rule that "does not have the broad application that the Organization asserts." Should the claim be sustained, the Claimant is due only straight-time pay for work that he did not perform.

While the Organization lists several Rules in the claim filed on January 18, 2016 and in its submission in this case, primary reliance is on Rule 2. Seniority Rights and Sub-Department Limits, Section A. that states that "Rights accruing to employees under their seniority entitles (sic) them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided." It is well settled that Article 2.A. extends to overtime opportunities. See on-property Third Division Awards 19758 and 21340 as well as on-property Public Law Board 2206, Award 52. The question before this Board is whether, considering the unique circumstances of this case, the Claimant's seniority rights were violated when he was not called for overtime after Mr. Gibson, senior to the Claimant, forfeited his right to the overtime opportunity.

Two preliminary observations are in order. First, there is no irreconcilable factual dispute in this case that requires dismissal or denial of the claim. Second, it is obvious that the Claimant's seniority was not violated on November 19, 2015 because at the time, he did not have sufficient seniority. The evidence shows that because he was assigned to work at a different location on Friday, November 20, 2015, the Claimant did not learn of the unloading opportunity that morning and, therefore, did not consider the possibility until he was informed on his way home by his car pool mates. When the Claimant spoke with Roadmaster Lee that afternoon, he was not in a position to perform additional work that day and confirmed that he had placed a bump that on Monday, November 23, would place him in a different Gang.

While the fact situation is not irreconcilable, it is somewhat convoluted. The Board finds that the November 20-22 and November 23-30 periods must be viewed differently. None of the Board's reasoning is intended to suggest that either Roadmaster Lee or the Claimant acted in bad faith. The Board finds that the Claimant's November 24, 2015 e-mail to Vice Chairman Secretary/Treasurer Mozinski does not provide substantial evidence that at the post-work briefing on November 19, the Claimant clearly articulated his interest in following the train to unload machinery. Therefore, the Board finds no violation of the Claimant's seniority rights for the work Mr. Anderson performed on November 20. However, when Roadmaster Lee and the Claimant spoke on the afternoon of November 20 while the Claimant was on his way home, he clearly indicated his interest in unloading machinery and he also notified Roadmaster Lee that he had placed a bump effective November 23. Since the Claimant would have been available to unload machinery on November 21 and/or 22, any work done by Mr. Anderson on those days if, indeed work was performed, violated the Claimant's seniority rights under Rule 2.A. The on-property correspondence does not establish whether Mr. Anderson worked on those days. If Mr. Anderson did work on what would have been the Claimant's rest days, the Claimant is due damages at the overtime rate for those hours.

Regarding November 23-30, there is no evidence that the Claimant contacted Manpower to rescind or defer his bump. The Board will not speculate as to the likely consequences had contact been made. Certainly, the bump was a prudent exercise of the Claimant's seniority in order to protect his livelihood, knowing at the time that the Gang was to be disbanded and believing that his seniority would not protect his position within the Gang, but that did not absolve the Claimant of the responsibility to contact Manpower once the change in the situation became obvious. It was not the Carrier's responsibility to act on the Claimant's behalf. Because of the bump, the Claimant forfeited his opportunity to unload machinery on November 23 and thereafter. No violation of Rule 2.A. took place during this period; therefore, the Claimant is not owed damages.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

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

Dated at Chicago, Illinois, this 15th day of December 2021.