

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 45072  
Docket No. MW-46811  
24-3-NRAB-00003-210748

The Third Division consisted of the regular members and in addition Referee Patricia T. Bittel when award was rendered.

(Brotherhood of Maintenance of Way Employes Division –  
(IBT Rail Conference

**PARTIES TO DISPUTE:** (

(Keolis Commuter Services

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier failed to assign Mr. T. Cormier and instead assigned junior employe S. Palombo to perform overtime patrol work on the East Route Main Line on July 18, 2020 (System File S-2011K-1114/BMWE 29/2020 KLS).

2) As a consequence of the violation referred to in Part (1) above, Claimant T. Cormier shall be compensated eleven and one-half (11.5) hours at his time and one-half rate of pay, as well as all credits for vacation and all other benefits.”

**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.

**Factual Background:**

On July 18 2020, the Carrier assigned junior employee S. Palombo to perform overtime patrol work on the East Route Main Line instead of assigning Claimant, a senior foreman who customarily performed such work. The Organization perceived this as a violation of the parties' Agreement, and filed a claim which has been processed through the grievance procedure to consideration here by the Board.

The applicable provision of the parties' Agreement states as follows in pertinent part:

**Rule 11 - OVERTIME**

1. Time worked preceding or following and continuous with the employee's assignment on regular eight-hour work periods shall be computed on the actual minute basis and paid for at the time and one-half rate, with double time on an actual minute basis after sixteen (16) hours of work in any twenty-four hour period (computed from the starting time of the employee's regular shift), except that overtime shall automatically cease and the pro rata rate shall apply at the starting time of the employee's next regular assigned work period.
2. Employees called to perform work not continuous with the regular work period will be allowed a minimum of two hours and forty minutes (2'40") at the time and one-half rate and, if held on duty in excess of two hours and forty minutes (2'40"), they will be paid on a minute basis at the time and one-half rate for all time worked.
3. Time worked on rest days and holidays will be paid for at the time and one-half rate with double time on an actual minute basis after sixteen (16) hours of work until relieved or until commencement of the employee's next regular assigned work period, whichever occurs first. Such continuous time worked after commencement of the next regular assigned work period shall be paid at the pro rata rate, pursuant to Section 1 of this Rule 11.
4. When necessary to work employees under this Rule, the senior available qualified employees will be called according to the following:
  - (a) Preference to overtime work on a regular work day which precedes or follows and is continuous with a regular assignment shall be to the

senior available qualified employee of the gang or the employee assigned to that work. (b) Preference to overtime work other than in (a.) above, shall be to the senior available qualified employee at the headquarters who ordinarily and customarily performs such work.

**Position of Organization:**

Rule 11(4)(b) provides that preference for overtime service shall be given to the senior, available qualified employee at the headquarters who ordinarily and customarily performs such work. Here, there is no dispute that Claimant was the senior qualified and available employee to be assigned to perform the contested work.

The Organization describes the record as devoid of evidence to support contention that Claimant was not qualified to perform the overtime. Though the Carrier alleged that Claimant said he was uncomfortable taking control of track at the cited location, it has failed to present any evidence which would support its position that Claimant was actually not qualified to take control of the track and perform the work involved. It is well-established that the party asserting an affirmative defense must submit support allegations with proof.

**Position of Carrier:**

At the time of the assignment, Claimant was working as a surfacing foreman on the East Route Main Line. He flatly stated that he was uncomfortable taking control of the track as he had not been recently qualified on the line. Based on this assertion, the Carrier's conclusion that he was not qualified to take control of the track was entirely reasonable. Claimant, who by his own admission was not ready to control the track, was not offered the position and the position was instead offered to the next most senior employee qualified to perform the work in the territory, Ms. Palombo. The Carrier's actions were entirely appropriate under the circumstances.

**Analysis:**

The Carrier interpreted Claimant's statement of discomfort as an admission that he should be deemed unqualified and was declining the work. Under the circumstances of the case, this interpretation was reasonable. The Organization has failed to meet its burden of proof that the contract has been violated.

**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 31<sup>st</sup> day of October 2023.**