

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45080
Docket No. MW-47036
24-3-NRAB-00003-220084**

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 used Newburyport crew employes C. Darcy and D. Gordon to perform overtime work in conjunction with providing on-track protection for Positive Train Control (PTC) work on the East Route Main Line beginning on Sunday, September 27, 2020 at 10:00 P.M. through Monday, September 28, 2020 at 7:00 A.M. instead of using Cobble Hill headquartered Assistant Foreman Flagmen L. Donnelly and K. Mertsch whose crew ordinarily and customarily perform all of the work surrounding track protection for PTC work (System File S-2011K-1120/BMWE 09/2021 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimants L. Donnelly and K. Mertsch shall now each be compensated nine (9) hours at their respective time and one-half rates of pay, as well as receive all credits for vacation and all other benefits for the dates claimed on account of their missed work opportunity.””

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 September 27, 2020 employees C. Darcy and D. Gordon were assigned the overtime work of providing on track protection for Positive Train Control (PTC) work on the East Route Main Line. Claimants maintain they customarily perform this work and were improperly denied the overtime. Their claim was fully processed through the grievance procedure to consideration by this Board.

Rule 11 governs overtime, stating as follows in pertinent part:

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:

The Carrier assigned employees C. Darcy and D. Gordon headquartered at Newburyport to perform overtime service contractually reserved to Claimants who were headquartered at Cobble Hill. There can be no question that Claimants ordinarily and customarily perform the flagging/track protection work involved here

and, thus, were entitled to any associated overtime opportunities. As the work in question was not assigned to Claimants but to other employees who were headquartered in Newburyport and do not ordinarily and customarily perform flagging/track protection work, there can be no doubt that Claimants' rights were violated.

Position of Carrier:

Claimants were not eligible for the contested shift because they were not qualified to perform the work required. As a result, they would not have been assigned the shift, regardless of their work location.

Claimants are flaggers. Their ordinary and usual work consists of flagging work, which primarily consists of track protection. The shift here required more; the work mandated both track protection and hi-line vehicle operation. Neither Claimant is a qualified hi-line vehicle operator. Accordingly, the Carrier assigned the shift to Mr. Darcy and Mr. Gordon, who are I&R crew employees qualified to protect track and operate hi-line vehicles.

The Carrier insists it followed the collective bargaining agreement exactly in offering the work to employees who were the senior most qualified employees who ordinarily and customarily performs such work. It is well settled that, under this collective bargaining agreement, the Carrier is the entity that determines who is qualified to perform any assignment. See MBCR, PLB 7007, Case No. 14 (April 9, 2009, Meyers) ("[i]t is fundamental that the Carrier has the right to set the job skill requirements when it assigns work to employees. The carrier has the right to determine who is qualified to perform the job."). Insofar as qualification determinations are the sole prerogative of the Carrier, its determination that Claimants were not qualified may not be overturned.

Analysis:

The Organization bears the burden of proof in this matter, yet the record contains no affidavit or other evidence of facts to support the allegations. There is nothing to persuade the Board that Claimants were indeed qualified to operate hi-rail vehicles, nor is there any substantiation for the claim that the job did not require this skill. The Board lacks a basis for finding any contract violation in this case.

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 31st day of October 2023.