

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45089
Docket No. MW-47236
24-3-NRAB-00003-220207**

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

**(Brotherhood of Maintenance of Way Employees 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, from 11:00 P.M. on October 20, 2020 until 7:00 A.M. on October 21, 2020, the Carrier utilized employee B. Hogan, who was working as an assistant foreman, to perform OA Welder work, on overtime, near North Station around Tower A instead of offering the work to OA Welder-Covering R. Lomberto who ordinarily and customarily performed such work (System File S-2011K-1123/BMWE 16/2021 KLS).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. Lomberto shall now ‘... be compensated eight (8) hours of his respective time and one-half rate of pay, as well as all credits for vacation and all other benefits for the date claimed for the 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:

The Organization alleges that from 11:00 p.m. on October 20, 2020 until 7:00 a.m. on October 21, the Carrier utilized employee B. Hogan, who was working as an assistant foreman, to perform OA Welder work, on overtime near North Station around Tower A. OA Welder R. Lomberto asserts he ordinarily and customarily performs such work and should have been given the overtime. The resulting claim was processed through the grievance procedure to consideration by the instant Board.

The governing provision of the parties' Agreement is Rule 11 regarding Overtime. That provision states as follows in pertinent part:

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:

There is no dispute that Claimant was the senior qualified and available employee to be assigned to perform the subject work. In light of the Claimant’s established superior seniority as an OA Welder, there can be no question that the Carrier violated the Agreement when it assigned an assistant foreman to perform the welding work of concern here.

Position of Carrier:

The Carrier contends it has no knowledge of any OA torch work being performed as alleged. It notes there was no evidence of an OA torch being used, and finds no reason why such a torch would have been needed. Since it did not believe OA torch welding was necessary for the shift, it did not assign a welder, such as Claimant, to perform the work.

MBCR, PLB No. 7007, Case No. 36 at 3 (Meyers 2011) examined the same Rule 11 contract language at issue here and found “[i]t is fundamental that the Carrier has the right to set the job skill requirements when it assigns work to employees”, and that “[t]he Carrier has the right to determine who is qualified to perform the job”). The Carrier exercised that right here and determined what personnel were necessary to perform the work on the shift. It did not believe that an OA Welder was necessary for the work being performed and therefore did not assign one.

The Organization submitted no evidence in support of its position during the grievance procedure, hence the Carrier concludes it has not met its burden of proof. Third Division Award No. 44686, the Board clarified that “the Party with the burden of proof may not rely on mere assertions.”

Analysis:

The record in this case does not contain sufficient evidence to support the conclusion that qualification on an OA torch was required to complete the shift in question. The only statement submitted was unsubstantiated, stating “I, Brian Hogan, used torches to complete a job on 10/20-10/21 at Tower A.” There is no specification of what type of torches were used, what they were used for, whether the use was necessary or for what proportion of the shift they were in use.

Incidental use of some sort of torch by individual choice of an employee does not establish the necessity of being qualified on use of an OA torch in order to complete the shift. The Organization had the burden of proving that qualification on an OA torch was required; we find that this burden has not been met.

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.