

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45332
Docket No. MW-48004
25-3-NRAB-00003-220519**

The Third Division consisted of the regular members and in addition Referee George Edward Larney when award was rendered.

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

PARTIES TO DISPUTE: (
(Wisconsin Central, Ltd. (WC)

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. Buchenauer to work as a foreman assigned with the night section gang at Green Bay, Wisconsin beginning on January 8, 2021 and continuing on a regular daily basis (Carrier’s File WC-BMWED – 2021-00011 WCR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Buchenauer shall ‘. . . be allowed pay at the time and one half-and-double-time rates of pay at the Mobile Relief Forman rate of pay for all hours worked by the Green Bay night section, beginning sixty days retroactive from the date of this letter, and continuing on a regular daily basis. * * *”**

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 Todd Buchenauer has established and maintains seniority in the Carrier's Maintenance of Way Department. On the date giving rise to the dispute, the Claimant was assigned and working as a mobile relief foreman.

Pursuant to the provisions set forth in Rule 17D of the Agreement, beginning on January 8, 2021 and continuing on a regular daily basis, Carrier established a Night Section Gang to perform service at Green Bay, Wisconsin. Rule 17D reads in its entirety as follows:

The Company may establish Night Section Gangs at any headquarters location, provided the headquarters location has positions established under this Rule that have a starting time between 5:00 AM and 8:00 AM. Positions established under this Section shall consist of at least a Track Foreman and one additional position. The starting time for Night Section Gang positions shall be between 5:00 PM and 8:00 PM and such Gangs shall have five (5) consecutive work days of eight (8) hours duration and shall have Saturday and Sunday as rest days. Employees assigned to such gangs will receive in addition to any compensation otherwise provided for in this Agreement, a differential of fifty cents (\$0.50) per hour for each hour worked between starting time and 5:00 AM.

Subsequent to January 8, 2021, Carrier filled and awarded the position of Machine Operator C-Tractor as required by Rule 17D to staff the Night Section Gang with at least one additional position along with filling and awarding the position of Track

Foreman. For reasons not specified in the record evidence before this Board by either of the Parties, the bulletined position of Foreman was not filled and awarded but left vacant during the entire duration of the claim period. As a result, Carrier was contractually prohibited from operating the Night Section Gang due to not complying fully with the staffing provisions of Rule 17D.

The Organization submits that instead of assigning the Claimant, a mobile relief foreman, to temporarily fill in for the vacant track foreman position that was bulletined for the Night Section Gang, in other words to perform the duty of a relief foreman, the Carrier unilaterally opted to violate the Agreement by assigning the Machine Operator C-Tractor employee to work the day shift which was outside his bulletined night position. This unilateral assignment of the the Machine Operator C-Tractor employee by the Carrier to work a job outside his awarded night job resulted in his being deprived

of the differential compensation of fifty cents (\$0.50) per hour for each hour worked. The Organization argues there was no mutual agreement on its part for Carrier to reassign the Machine Operator C-Tractor employee to work the day shift asserting this maneuver by Carrier is characterized as “direct dealing” with an employee and constitutes not only a violation of the Collective Bargaining Agreement but also does not comply with Section 7116(a)(5) of the Federal Services Labor-Management Relations Act. Article 7116 addresses the broad subject of Unfair Labor Practices and Section (a) lists potentially eight (8) such practices committed by an Agency. Section (a)(5) reads as follows:

“To refuse to consult or negotiate in good faith with a labor organization as required by this chapter.”

However, notwithstanding the above cited contract violation, which does not constitute the subject claim before us, the Organization instead brings the claim that relief foreman, Claimant Buchenauer was entitled, based on his seniority status, to be assigned to fill the bulletined Night Gang Foreman position for the entire time that position was left unfilled and never awarded. That being the case, the Organization asserts the Claimant is entitled to receive the variety of overtime compensation he was deprived of receiving during the duration of the ongoing claim period. As support for its position, the Organization cites Rule 22 of the Contract - Overtime, Section 3, Preference for overtime work, paragraph 3A which reads in its entirety as follows:

When work is to be performed outside the normal tour of duty and not in continuation of the day’s work, the senior active employee in the required job class in the assigned gang will be given preference for overtime work ordinarily and customarily performed by them.

As further support for its position, the Organization asserts that in this case, there is no dispute that the Claimant was the senior active employee in the required job classification of mobile foreman and as such, the Carrier should have given him the preference to work overtime. Additionally, the record established that the Claimant regularly performed the duties as a relief foreman in Green Bay, Wisconsin and thus, Carrier’s failure to assign the Claimant to work the night gang alongside the awarded Machine Operator C-Tractor position was obviously done to avoid the payment of overtime to the Claimant asserting this was clearly a blatant violation of the Claimant’s seniority rights. Carrier on the other hand submits it was justified assigning the Machine Operator C-Tractor position to the day shift explaining it was a matter of the Operator’s safety of not having to work the night shift alone.

In furtherance of its position the instant claim should be denied, Carrier submitted Case No. 190 decided by all members of Public Law Board No. 7566 rendered December 20, 2023. This Board fully concurs with the central Finding rendered in Case No. 190 as being dispositive of the instant case before us and summarized as follows:

- Rule 17D does not require Carrier to staff a bulletined foreman position upon its establishing a Night Section Gang noting Rule 17D is devoid of any language of such a requirement or contractual obligation.

Based on this central Finding, Carrier in this case established a Night Section Gang by the very fact it moved to do so under the provisions of Rule 17D as evidenced by bulletining a foreman position and at least, the one additional position required to work along with the Track Foreman, the position of Machine Operator C-Tractor position which it subsequently filled and awarded to an employee. The very fact the Foreman position went unfilled and not awarded resulted in no work performed by the Night Section Gang which was inoperative at all times during the claim period asserted. Thus, the position held and advanced here by the Organization that Rule 17D required Carrier to have filled the Foreman position and that Rule 22 3A required Carrier to fill said Foreman position with the Claimant because he was the most senior employee in his job classification, who was available and willing to perform the duties of a relief foreman, and who had done so in the past at the Green Bay, Wisconsin location is totally rejected by the Board absent any contract language of such a requirement or obligation relative to both Rule 17D and Rule 22 3A. Furthermore, this Board is in full agreement with Carrier's position that the Claimant is not entitled to any compensation for work not performed.

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 2024.