

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45392
Docket No. MW-47503
25-3-NRAB-00003-220683**

The Third Division consisted of the regular members and in addition Referee Diego Jesús Peña 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 the Carrier used junior employees to perform overtime and double time work in junction with the Force Account Flagging Crew on multiple dates beginning December 14, 2020, instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman J. Alther who was working the assignment in question and who was the senior available qualified employee (System File S-2111K-2111K-111/BME 21/2021 KLS).**
- (2) The Agreement was violated when the Carrier used junior employees to perform overtime and double time work in junction with the Force Account Flagging Crew on multiple dates beginning February 3, 2021, instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman J. Alther who was working the assignment in question and who was the senior available qualified employee (System File S-2111K-2111K-116/BME 29/2021 KLS).**
- (3) The Agreement was violated when the Carrier used a junior employee to perform double time work in junction with the Force Account Flagging Crew on January 28, 2021, instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman J. McGee who was working the assignment in question**

and who was the senior available qualified employee (System File S-2111K-2111K-115/BME 30/2021 KLS).

- (4) As a consequence of the violation referred to in Part (1) above, Claimant J. Alther shall now ‘...be compensated all hours worked by the junior employee (sic), at the applicable time and one-half and double time rates of pay as outlined, as well as all credits for vacation and all other benefits for the dates claimed for his lost work opportunity.’***’
- (5) As a consequence of the violation referred to in Part (2) above, Claimant J. Alther shall now ‘...be compensated all hours worked by the junior employee (sic), at the applicable time and one-half and double time rates of pay as outlined, as well as all credits for vacation and all other benefits for the dates claimed for his lost work opportunity.’***’
- (6) As a consequence of the violation referred to in Part (3) above, Claimant J. McGee shall now ‘...be compensated eight (8) hours at the Assistant Foreman’s double time rate of pay as well as all credits for vacation and all other benefits for the date claimed for his lost 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

Claimant J. Alther worked as an Assistant Foreman headquartered out of Readville, Massachusetts. His seniority date is June 12, 2012.

On December 14, 2020, the Claimant Alther worked overtime from 3:30 PM until the Carrier removed him from his assignment at 11:00 PM and assigned junior employee, J. Magee (Seniority date March 21, 2015) to complete the flagging work. On December 23, 28, 29 and 30, 2020, the Claimant worked his regular shift from 7:00 AM through 3:30 PM when the Carrier then assigned J. McGee, M. Joseph (Seniority date not specified), J. Sweeney (Seniority date July 12, 2016), and S. Slavin (Seniority date April 9, 2014) to complete the flagging work.

On January 4, 5, 11, 12, 18, 19, 20, 21 and 22, 2021, Claimant Alther worked his regular shift from 7:00 AM through 3:30 PM when the Carrier then assigned either J. McGee, M. Joseph, J. Sweeney, and S. Slavin to complete the flagging work.

Position of Organization

The Organization maintains that by replacing the Claimants Alther and Magee with less junior employees and not allowing him to continue his flagging duties, the Carrier violated Rules 5 and 11 of the Agreement. Rule 5 is the Seniority Article and Rule 11 is the Overtime Article. The Organization contends that the Claimants were the most senior employees and were entitled to preference for this overtime and double time work as a continuation of his regular assignment.

In response to the Carrier's contention that it replaced the Claimants due to safety concerns, the Organization argues that the Carrier failed to satisfy its burden of proof.

Carrier's Position

The Carrier denies that it violated any provisions of the Parties' Agreement as claimed by the Organization. The Carrier contends that the Organization failed to satisfy its burden of proof in establishing that the Carrier's action violated Rules 5 or 11.

The Carrier argues that it properly exercised its discretion to protect the safety of its employees and the riding public when it directed the other employees to replace

the Claimants. According to the Carrier, the Claimants had worked 16 hours at the end of their shift and to assign them the work would have created a safety hazard.

Analysis

This is a rules case. For that reason, the Organization has the burden of proving its case by a preponderance of the evidence. Generally, in rules cases, the Board will examine the facts brought forward by the Organization and compare and analyze those facts against the relevant agreement provisions at issue.

Rule 5, "Seniority" states:

1. Seniority of employees covered by this Agreement starts at the time and date their pay starts.
2. When two or more employees' pay starts at the same time and date, they shall be given a
4. Assignments to positions covered by this Agreement will be based on qualifications and seniority; qualifications being sufficient, seniority will govern.

The relevant section of Rule 11, "Overtime" states:

4. When necessary to work employees under this Rule, the senior qualified employees will be called according to the following:
 - (a) Preference to Overtime work on a regular workday 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.

The burden was on the Organization to prove that the Carrier violated the relevant provisions of Rules 5 and 11. The evidence established that with regards to Claimant Alther, the Carrier assigned a junior employee to complete his assignment on December 14, 23, 29, 30, 2021 and January 4, 18, and 20, 2021. The Organization failed to prove its claim with regards to the dates employee M. Joseph worked (December 28,

2020, January 5, 11, 11, 12, 19 and 21, 2021) because there was no evidence that this employee was junior to the Claimant.

The Carrier contends that it had discretion to direct the other employee to complete the assignments on the dates in question for safety reasons. It contends that Claimant Alther had completed a 16-hour shift on the dates in question prior to assigning the work in question. The Carrier believes that assigning the work to Claimant Alther would have posed a safety hazard.

Rules 5 and 11 provide its employees a valuable property right—seniority. For this reason, the Carrier cannot disregard an employee’s contractual seniority right without cause. Second Division Award, 2910 (1958). The Carrier believes that Claimant Alther was no longer qualified to safely work the assignments on the dates in question. While the Carrier has broad discretion for determining the fitness and qualifications of an employee to perform assigned job duties, that discretion is subject to limited review.

To satisfy its burden that an employee was not qualified to work safely, the Carrier must present facts establishing that its rationale was not arbitrary or capricious. Third Division Award No. 35495 (2001). In this case, the Carrier simply declared that Claimant Alther was unfit to work on the dates in question. The Carrier presented no facts or evidence supporting its conclusion that Claimant Alther was unfit or unqualified to work on the assignments on the dates in question. Arguably, working a long shift could disqualify an employee for safety reasons. But to satisfy its burden, the Carrier needed evidence supporting its belief that Claimant Alther was not fit for the assignments in question. Disqualifying a senior employee with nothing more than a conclusory declaration is not evidence. To satisfy its burden, the Carrier was required to provide facts supporting its belief that Claimant Alther could not work safely.

In the absence of evidence supporting its conclusion, the Board is without evidentiary support to evaluate the Carrier’s belief that Claimant Alter was not fit or qualified to work the assignments on the dates in question.

With regards to the Organization’s claim that the Carrier violated Rules 5 and 11 when it used a junior employee to perform double time work on January 28, 2021 instead of using Claimant McGee, the Organization failed to satisfy its burden that the Carrier violated Rules 5 or 11. There was no evidence identifying the alleged junior employee who allegedly performed this work and whether this unnamed employee was in fact junior to Claimant McGee.

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to Claimant Alther be made for the dates December 14, 23, 29, 30, 2021 and January 4, 18, and 20, 2021. This Board also orders that an Award favorable to Claimant McGee not 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.

AWARD

Claims sustained in part and denied in part.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant 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 19th day of December 2024.