

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45399
Docket No. MW-47646
25-3-NRAB-00003-220987**

The Third Division consisted of the regular members and in addition Referee Diego Jesús Peña when the 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 employee S. Royal to perform overtime flagging work on April 1, 2021 at Parcel 12 from 3:30 P.M. until 11:00 P.M., instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman S. Fernandes who was working the assignment in question and who was the senior available qualified employee (System File S-2111K-1122/BME 48/2021 KLS).**
- (2) The Agreement was violated when the Carrier used junior employees J. Sweeney, J. Alther and M. Joseph to perform overtime flagging work on April 13, 14, 15 and 21, 2021 instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman J. Ahern who was working the assignment in question and who was the senior available qualified employee (System File S-2111K-1127/BMWE 54/2021).**
- (3) As a consequence of the violation referred to in Part (1) above, Claimant S. Fernandes 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 dates claimed for his lost work opportunity.***’**

- (4) As a consequence of the violation referred to in Part (2) above, Claimant J. Ahern shall now ‘...be compensated all hours worked by the junior employee, at the applicable time and one-half rate as outlined, as well as all credits for vacation and all other benefits for the dates 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

Claimants S. Fernandes (Seniority date November 20, 2017) and J. Ahern (Seniority date November 16, 2010) worked out of Readville, Massachusetts.

On April 1, 2021 at Parcel 12 from 3:30 PM until 11:00 PM, the Carrier used junior employee, S. Royal (Seniority date January 23, 2018) instead of Claimant Fernandes who had worked the prior assign and was the senior available employee.

On April 13, 14, 15 and 21, 2021. the Carrier used junior employees J. Sweeney (Seniority date July 12, 2016), J. Alther (Seniority date June 12, 2012) and M. Joseph (Seniority date June 12, 2012) to perform overtime flagging work instead of using the more senior Claimant Ahern who had worked the prior assignment and was the senior available employee.

Position of Organization

The Organization maintains that by replacing the Claimants with junior employees, 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 available employees and were entitled to preference for the assignments in question as the most senior available employees.

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 prior to the assignments in question, 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 the Carrier assigned junior employees to complete the assignments on the dates in question, and that Claimants Fernandes and Ahern were available to perform the assignments on the dates in question.

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 both Claimants had completed lengthy assignments prior to the work in question and to allow the more senior employees to continue working would present 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 the Claimants were 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, 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 both Claimants were unfit to work on the dates in question. The Carrier presented no facts or evidence supporting its conclusion that the Claimants were 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. To satisfy its burden, the Carrier needed evidence supporting its belief that both Claimants were unfit to work 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 both Claimants 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 the Claimants were not fit or qualified to work the assignments on the dates in question.

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants be made in accordance with the findings above. Claimant S. Fernandes is to 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 allowed under the Collective Bargaining Agreement, and Claimant Ahern is to be compensated for the hours worked by the junior employees on April 13, 14, 15 and 21, 2021 that he should have worked and for all credits for vacation and all other benefits allowed under the Collective Bargaining Agreement.

AWARD

Claims sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) 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.