

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 45403
Docket No. MW-47698
2453-NRAB-00003-221106**

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 work in conjunction with the assistant foreman flagman work at Parcel 12 or otherwise on the Worcester Main Line on June 4, 12, 13 and July 17, 2021 from 3:30 P.M. until 11:00 P.M., 11:00 P.M. until 7:00 A.M. and from 3:00 P.M. until 11:00 P.M. on the respective dates instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman M. Gonzalez who was working the assignment in question and who was the senior available qualified employee of the gang or the employees assigned to the work or the senior available qualified employee at the headquarters who ordinarily and customarily performed such work (System File S-2111K-1133/BME 68/2021 KLS).**
- (2) The Agreement was violated when the Carrier used junior employee S. Fernandes to perform overtime work in conjunction with the assistant foreman flagman work at Parcel 12 on June 24, 2021 from 3:30 P.M. until 11:00 P.M. instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman J. Sweeney who was working the assignment in question and who was the senior available qualified employee of the gang or the employees assigned to the work or the senior qualified employee at the headquarters who ordinarily and customarily performed such work (System File S-2111K-1138/BMWE 70/2021).**

- (3) The Agreement was violated when the Carrier used junior employee S. Royal to perform overtime work in conjunction with the assistant foreman flagman work at Parcel 12 on June 29 and July 12, 2021 from 3:30 P.M. until 11:00 P.M. each day instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman J. Sweeney who was working the assignment in question and who was the senior available qualified employee of the gang or the employees assigned to the work or the senior qualified employee at the headquarters who ordinarily and customarily performed such work (System File S-2111K-1140/BMWE 73/2021).
- (4) The Agreement was violated when the Carrier used junior employees S. Royal, R. Lennox and S. Jung to perform overtime work in conjunction with the assistant foreman flagman work at Parcel 12 on the Worcester Main Line on July 19, 20, 21, 26 and August 2, 2021 from 3:30 P.M. until 11:00 P.M. instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman M. Joseph who was working the assignment in question and who was the senior available qualified employee of the gang or the employees assigned to the work or the senior qualified employee at the headquarters who ordinarily and customarily performed such work (System File S-2111K-1145/BMWE 82/2021).
- (5) The Agreement was violated when the Carrier used junior employees, L. Sanderson, B. Tyler, C. Serafini, C. Jennette, R. Lennox and J. Sweeney to perform overtime work in conjunction with the assistant foreman flagman work at Parcel 12 or otherwise on the Worcester Main Line on July 20, 21,, August 6, 8, 9 and 14, 2021 from 3:30 P.M. until 11:00 P.M. or 3:00 P.M. until 11:00 P.M. each day instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman M. Gonzalez who was working the assignment in question and who was the senior available qualified employee of the gang or the employees assigned to the work or the senior qualified employee at the headquarters who ordinarily and customarily performed such work (System File S-2111K-1146/BMWE 83/2021).

- (6) The Agreement was violated when the Carrier used junior employees M. Joseph and R. Lennox to perform overtime work in conjunction with the assistant foreman flagman work on the Worcester Mainline on August 9 and 10, 2021 from 3:30 P.M. each day 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 of the gang or the employees assigned to the work or the senior qualified employee at the headquarters who ordinarily and customarily performed such work (System File S-2111K-1150/BMWE 86/2021).
- (7) The Agreement was violated when the Carrier used junior employee M. Joseph to perform overtime flagman work at the Parcel 12 project on the Worcester Main Line on August 31 and September 1, 2021 from 3:30 P.M. until 11:00 P.M. each day instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman M. Gonzalez who was working the assignment in question and who was the senior available qualified employee of the gang or the employees assigned to the work or the senior qualified employee at the headquarters who ordinarily and customarily performed such work (System File S-2111K-1159/BMWE 88/2021).
- (8) The Agreement was violated when the Carrier used junior employee S. Royal to perform overtime work in conjunction with the assistant foreman flagman work at Parcel 12 on August 25, 2021 from 3:30 P.M. until 11:00 P.M. instead of using Readville, Massachusetts headquartered senior Assistant Foreman Flagman R. Lennox who was working the assignment in question and who was the senior available qualified employee of the gang or the employees assigned to the work or the senior qualified employee at the headquarters who ordinarily and customarily performed such work (System File S-2111K-1157/BMWE 89/2021).
- (9) As a consequence of the violation referred to in Part (1) above, Claimant M. Gonzalez shall now ‘...be compensated all hours worked by the junior employee), as well as all credits for vacation

and all other benefits for the dates claimed for his lost work opportunity.***'

- (10) As a consequence of the violation referred to in Part (2) above, Claimant J. Sweeney shall now '...be compensated eight (8) hours at the Assistant Foreman's time and one-half rate of pay as well as all credits for vacation and all other benefits for the dates claimed for his lost work opportunity.***'
- (11) As a consequence of the violation referred to in Part (3) above, Claimant J. Sweeney shall now '...be compensated fifteen (15) hours at the Assistant Foreman's time and one-half pay, as well as well as all credits for vacation and all other benefits for the date claimed for his lost work opportunity.***'
- (12) As a consequence of the violation referred to in Part (4) above, Claimant M. Joseph shall now '...be compensated all hours worked by the junior employee at the applicable overtime and double time rates, as well as all credits for vacation and all other benefits for the date (sic) claimed for his lost work opportunity.***'
- (13) As a consequence of the violation referred to in Part (5) above, Claimant M. Gonzalez shall now '...be compensated all hours worked by the junior employee at his applicable overtime and double-time rates, as well as all credits for vacation and all other benefits for the dates claimed for his lost work opportunity.***'
- (14) As a consequence of the violation referred to in Part (6) above, Claimant J. Alther shall now '...be compensated all hours worked by the junior employee applicable time and one-half and double rates of pay, well as all credits for vacation and all other benefits for the dates claimed for his lost work opportunity.***'
- (15) As a consequence of the violation referred to in Part (7) above, Claimant M. Gonzalez shall now '...be compensated fifteen (15) hours at the Assistant Foreman's time and one-half rate of pay, as well as all credits for vacation and all other benefits for the dates claimed for his lost work opportunity.***'

- (16) As a consequence of the violation referred to in Part (8) above, Claimant R. Lennox shall now ‘...be compensated six and one-Half (6.5 hours at the Assistant Foreman’s time and one-half rate of pay, 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 M. Gonzalez (Seniority date February 18, 2014), J. Sweeney (Seniority date July 12, 2016), M. Joseph (Seniority date January 27, 2015) and J. Alther (Seniority date June 12, 2012) worked out of Readville, Massachusetts.

On June 4, 12, 13 and July 17, 2021 from 3:30 PM until 11:00 PM, 11:00 PM until 7:00 AM and from 3:00 PM until 11:00 PM, the Carrier used junior employee, S. Royal (Seniority date January 20, 2018) instead of Claimant M. Gonzalez who was working the assignments in question.

On June 24, 2021 from 3:30 PM until 11:00 PM the Carrier used junior employee S. Fernandes (Seniority date January 23, 2018) to perform overtime work in work at Parcel 12 instead of using the more senior Claimant Sweeney who was working the assignment in question.

On June 29 and July 31, 2021 from 3:30 PM until 11:00 PM the Carrier used junior employee S. Royal (Seniority date January 23, 2018) instead of using the more senior Claimant Sweeney was working the assignments in questions.

On July 19, 20, 21, 26 and August 2, 2021 from 3:30 PM until 11:00 PM, at Parcel 12 on the Worchester Main Line, the Carrier used junior employees S. Royal (Seniority date January 20, 2018), R. Lennox (Seniority date June 23, 2015) and S. Jung (Seniority date June 5, 2018) to perform overtime work instead of using the more senior Claimant Joseph who was working the assignments in question.

On July 20, 21, August 6, 8, 9 and 14, 2021 from 3:30 PM until 11:00 PM or 3:00 PM until 11:00 PM each day, the Carrier used junior employees L. Sanderson (Seniority date March 28, 2017), B. Tyler (Seniority date December 14, 2016), C. Serafini (Seniority date July 12, 2016), C. Jennette (Seniority date March 21, 2016), R. Lennox (Seniority date June 223, 23015), and J. Sweeney (Seniority date July 12, 2016) instead of using the more senior Claimant Gonzalez who was working the assignments in question.

On August 9 and 10, 2021 from 3:30 PM each day, the Carrier used junior employees, M. Joseph (Seniority date January 27, 2015) and R. Lennox (Seniority date June 23, 2015) on the Worchester Mainline instead of the more senior Claimant Alther who was working the assignments in question.

On August 31 and September 1, 2021 from 3:30 PM each day, the Carrier used junior employee, M. Joseph (Seniority date January 27, 2015) on the Worchester Main Line instead of the more senior Claimant Gonzalez who was working the assignments in question.

On August 25, 2021 from 3:30 PM until 11:00 PM, the Carrier used junior employee, S. Royal (Seniority date January 23, 2018) on overtime work at Parcel 12 instead of the more senior Claimant Lennox who was working the assignment in question.

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 employees and were entitled to preference for these various assignments as a continuation of their regular assignments.

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 the Claimants were available to perform the assignment 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 the Claimants had all 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 the 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 the Claimants were 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 the 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.

AWARD

Claims sustained.

ORDER

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. 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.