

PUBLIC LAW BOARD NO. 3460

Award No. 27, 28, 29

Case No. 27, 28, 29

PARTIES Brotherhood of Maintenance of Way Employees
TO and
DISPUTE Burlington Northern Railroad Company

STATEMENT
OF CLAIM

Case No. 27

1. Burlington Northern Railroad violated the effective Agreement September 17 (Wednesday) and 18 (Thursday), 1980 when using First Class Carpenter R. C. Fluharty to relieve the regular assigned Draw Bridge Tender on Columbia Bridge #1 between Kenewick and Pasco, Washington, during the regular shift of 4:00 p.m. to 12:00 midnight instead of using Draw Bridge Tender D. D. Williams.
2. Claimant D. D. Williams, the regular assigned Draw Bridge Tender assigned 8:00 a.m. to 4:00 p.m. now be allowed eight (8) hours time and one-half for this violation on September 17 and 18, 1980, a total of 16 hours pay in the amount of \$217.92.

Case No. 28

1. Burlington Northern Railroad violated the effective Agreement, Wednesday September 3, 1980 when using First Class Carpenter R. C. Fluharty to fill the regular assigned Draw Bridge Tender position on Snake River Bridge #3 southeast of Pasco, Washington during the regular shift of 12:00 midnight to 8:00 a.m. instead of regular assigned relief Draw Bridge Tender W. E. Miller.
2. Claimant W. E. Miller is the regular assigned relief Draw Bridge Tender on Bridge #3 and he now be allowed six (6) hours and forty-five (45) minutes of pay at his time and one-half rate of pay. Total amount claimed is \$91.94.

Case No. 29

1. Burlington Northern Railraod violated the effective Agreement Wednesday, October 15, 1980, when using First Class Carpenter R. C. Fluharty to relieve the regular assigned Draw Bridge Tender on Bridge #1 between Kenewick and Pasco, Washington during the regular shift (4:00 p.m. to midnight) instead of using Draw Bridge Tender D. D. Williams.

2. Claimant D. D. Williams, the regular assigned Draw Bridge Tender assigned 8:00 a.m. to 4:00 p.m. now be allowed eight (8) hours time and one-half for this violation on October 15, 1980, a total of eight (8) hours pay in the amount of \$108.96.

FINDINGS

Upon the whole record, after hearing, the Board finds that the parties herein are Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board is duly constituted under Public Law 89-456 and has jurisdiction of the parties and the subject matter.

The three disputes indicated above have been consolidated for purposes of analysis since they deal with identical problems involving different days and different claimants. The issues are exactly the same for all three claims.

The two Claimants herein, Mr. Williams and Mr. Miller are regularly assigned Bridge Tenders at Pasco, Washington. Mr. Williams with a seniority date of December 5, 1955 was regularly assigned as Tender on Bridge 1 Sunday through Thursday with Friday and Saturday as rest days (8:00 a.m. to 4:00 p.m. shift). Claimant Miller with a seniority date of May 28, 1975 was regularly assigned as relief Tender on Bridge #3 at Pasco, working

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Tuesday through Saturday with Sunday and Monday as rest days. Both men's seniority was on Roster No. 1, Rank D. Mr. Fluharty worked two days a week as a relief Draw Bridge Tender on the second shift 4:00 p.m. to 12:00 midnight on Saturday and on Sunday on Bridge #3. On Wednesday through Friday of each week, Fluharty worked as a First Class Carpenter on the Pasco Capitol's B&B crew, with rest days on Monday and Tuesday. He had seniority on Roster No. 1, Rank D Draw Bridge Tender of August 8, 1955. He was senior to both Claimants. On the three days indicated in the claim, the regularly assigned Bridge Tender did not appear for a variety of reasons and a relief operator was required. On all three occasions, Carrier called Mr. Fluharty and used him at an overtime rate of pay to fill the temporary vacancies. This was the circumstance which triggered the disputes herein. It should also be noted that on the dates in question Mr. Fluharty worked his regularly assigned position as a carpenter for eight hours and then performed the bridge tender work at the time and one-half rate of pay for the First Class Carpenter, in accordance with the composite service rule (Rule No. 44).

The Organization notes first that in each instance the exact location of the absent employee was the location of a draw bridge tender who were the Claimants in these cases. In each case the

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Claimants were not afforded the opportunity to perform the overtime work preceding or continuous with their regular assignments. The Organization notes that there is separate seniority for carpenters and draw bridge tenders and that Mr. Fluharty was a carpenter at the time of his assignment to the draw bridge tender work. The Organization argues first that the disputes arose when Carrier made the unilateral assignment to more than one occupation. This has been dealt with previously by a Third Division Award (Award 16571 and companion Award 16572) in which the Referee held that the Carrier was not entitled to unilaterally make assignments to more than one occupation without negotiation. According to the Organization, Mr. Fluharty was entitled to do draw bridge tender work, and that would be relief work only, on the Snake River Bridge on Sunday and on the Columbia River Bridge on Saturday, both days 4:00 p.m. to 12 midnight. The Organization insists that Mr. Fluharty's major assignment and classification of work is under Rule 55 (f) and is not that of a Draw Bridge Tender but that of a First Class Carpenter. The Organization emphasizes the fact that Fluharty is entitled to protect only the relief positions as Draw Bridge Tender to which he is assigned by bulletin. This assignment of a two-day relief assignment does not allow him to work more than those two days as a Draw Bridge Tender. The Organization relies, among other rules, on Rule 29 dealing with employees required to

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work continuously from one regular work period into another regular work period. The position of the Organization is also supported it contends by Rule No. 30. The Organization argues, finally, that Mr. Fluharty was not assigned in the same class and rank of Draw Bridge Tender as Claimants and is not an extra or unassigned employee and is not at the same location. The Organization concludes that the Carrier violated the Agreement in using a First Class Carpenter from a different rank in the B&B subdepartment to fill a bridge tender position in Rank D on an overtime basis instead of using Claimants who are regularly assigned bridge tenders.

Carrier's fundamental position is that Mr. Fluharty was the most senior of the bridge tenders and Carrier did not violate the Agreement by assigning the overtime relief work to him. In fact Carrier insists that the Organization has not met its burden of proof and has failed to establish that the Claimants, who were junior to Mr. Fluharty, were contractually entitled to work the overtime. Carrier argues that Mr. Fluharty, who clearly is the most senior employee with seniority in Rank D Draw Bridge Tender class should have been entitled to the overtime and was indeed properly assigned the overtime in question. Carrier cites Rule 2 (a) of the Agreement dealing with seniority and also with the basis for assignment of employees to vacancies. With respect to

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overtime there are no rules dealing with the assignment of overtime, but the issue has been clearly and vigorously determined on numerous occasions. Carrier cites Third Division Award 19758 involving the same parties. In that award the Board held, inter alia:

"We have consistently held, that unless overtime is specifically excluded from the seniority provisions of an agreement, it is subject to them....Overtime is a condition of employment and unless specifically excluded, it is to be deemed as part of the benefits of seniority."

Carrier states that following the issuance of that award it has assigned overtime according to seniority as in the instant case. Carrier argues finally that the Organization has cited no rules in the Agreement which support its interpretation and thesis in these claims. In short, the Organization has failed to establish any contractual basis for the claims involved in this matter.

As the Board views it the sole issue presented in these disputes is whether the Organization has met its burden of proof establishing the fact that the Claimants, because they have regular five day assignments, should have preference to overtime work over an employee with more seniority as a relief Draw Bridge Tender, when the relief Draw Bridge Tender only worked two days

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per week in that assignment. From the Board's point of view there has been no rule cited in the Agreement which supports the Organizations posture in these claims. It is well established and accepted by both parties to this dispute, as well as other participants in this industry (Third Division Awards 24943 and 14161, for example) that unless there is a local rule or a negotiated local practice providing for the assignment of overtime on some basis other than seniority, seniority shall be the determining factor in assigning overtime. The Organization herein has supplied no evidence of a local practice or rule which would support a different conclusion. Mr. Fluharty had seniority over the two Claimants and was entitled to the overtime, as the Board views it. If the Carrier had assigned the overtime to the Claimants involved herein under the clear terms of the Agreement, Mr. Fluharty would have had a legitimate claim for the time involved. Carrier did assign the overtime in accordance with the Agreement and the Organization has not established any basis specified in the contract for a different mode of assignment. The claims must be denied.

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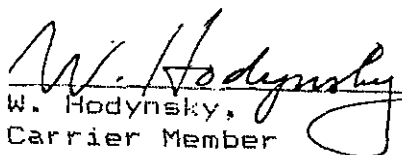
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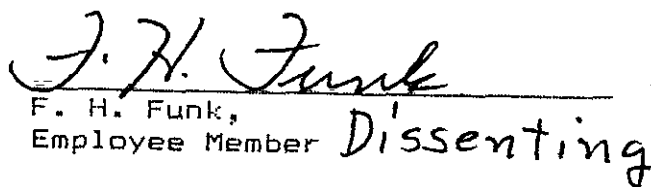
Claims denied.



I. M. Lieberman, Neutral-Chairman



W. Hodynsky,
Carrier Member



F. H. Funk,
Employee Member *Dissenting*

St. Paul, Minnesota

June
April 24, 1988