

BEFORE PUBLIC LAW BOARD NO. 6043

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES DIVISION
IBT RAIL CONFERENCE
and
ILLINOIS CENTRAL RAILROAD COMPANY**

Case No. 59

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

1. The Carrier violated Rule 25(c) of the Agreement when it failed to assign Claimant R. Street, who was regularly assigned as trackman on the Allenby Section Gang ICAY FO1 and whose regularly assigned territory included Mile Post 101.3, to perform the work of repair/change a broken rail at Mile Post 101.3 and instead assigned Mobile Foreman M.L. Schultz, Chiles Section Foreman T.L. Miller, Welder C.E. Browning and his welder helper thereto (System File S.C040808.2/IC-BMWE-2008-00007).
2. As a consequence of the violation outlined in Part (1) above, Mr. R. Street is entitled to five (5) hours' pay at his respective time and one-half rate of pay."

FINDINGS:

The Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement when it failed to assign the Claimant to perform the work of repairing/changing a broken rail. The Carrier denied the claim.

The Organization initially contends that the Claimant was the regular employee normally assigned to perform work at the location involved here. The Organization asserts that Rule 25(c) expressly provides that overtime will accrue to the incumbent of the position who normally would be assigned to perform such work. The Organization argues that not only is it undisputed that the Claimant regularly was assigned as a trackman on the Allenby Section Gang ICAY FO1, there also is no dispute that as part of his regular assignment, the Claimant normally and regularly performed track

maintenance work, such as repairing/changing broken rails, within the Allenby Section Gang's assigned territory, which included Mile Post 101.3. The Organization insists that there can be no dispute that the Claimant is the regular employee, as contemplated by the clear and unambiguous language of the Agreement. Pointing to prior Board Awards, the Organization submits that it is well established that when an employee bids on and is assigned or otherwise exercises seniority to a "regular" position, that employee is entitled to all of the work of that position.

The Organization insists that the clear and unambiguous language of the Agreement, the facts of the instant claim, and the principle enumerated by these prior Awards require that the instant claim be sustained. The Organization maintains that there can be no doubt that the Carrier violated the Agreement when it assigned the overtime work of broken rail repair to employees other than the Claimant, who is the regularly assigned employee who normally and regularly performed that work.

Pointing to the Carrier's position that the Claimant should not be compensated in connection with this matter because no trackman was used in his place, the Organization contends that the Carrier's defense is grossly misleading and without merit. Reiterating its assertion that the Claimant should have been assigned to perform the subject work under Rule 25(c), the Organization argues that there can be no question that the Carrier was required to assign the Claimant to the overtime work at issue because he undisputedly is the normal/regular employee assigned to perform such work. The Carrier directly violated the Agreement by failing to assign the Claimant to perform the work.

The Organization goes on to insist that if the Carrier's explanation for not

compensating the Claimant is considered reasonable and acceptable, then the seniority and work classification provisions set forth in the Agreement essentially would be meaningless. If the Carrier's defense is considered acceptable, then employees of all different sub-departments and work classifications could perform any track work at any time and at any location. This also would render meaningless the dispute resolution process for claims and grievances identical in nature to the instant claim. The Organization insists that a decision favorable to the Carrier could eradicate years of arbitral precedent that protects seniority and work classification provisions within the multiple agreements that exist between the Organization and various Carriers.

The Organization points out that the Carrier did not challenge the monetary remedy during the handling of this issue. Pointing to prior Awards, the Organization nevertheless emphasizes that the proper rate of pay for overtime violations is the applicable overtime rate.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that the Organization has not met its burden of proof. The Carrier asserts that because there was no "trackman" used, required, or necessary to perform the subject work in place of the Claimant, the Claimant did not have any right to the work. The Carrier argues that it was not necessary to have a trackman to accomplish the repair, and there is no contractual basis to support the Organization's position that the Claimant was required. The Carrier points out that in the event it was necessary to perform any welding, a trackman could not perform that welding. The

Carrier submits that a welder and a welder helper were ready, available, and qualified not only to perform any necessary welding, but also any other tasks associated with the repair of the broken rail.

The Carrier maintains that the Organization's position here suggests that without regard for whether an additional employee was needed to perform the work, the Carrier had to use that additional employee and pay him overtime merely because the work was performed within the territory of the section gang to which the trackman was assigned. The Carrier submits that under this reasoning, if only two employees from a four- or five-person gang were needed to perform certain overtime work, the Carrier would be required to hold over all of the gang members and pay them overtime. The Carrier insists that there is no Agreement language to support this position, and the Organization has failed to meet its burden of proving by a preponderance of the evidence that the Agreement has been violated.

The Carrier goes on to contend that the Agreement did not require it to hold over and pay overtime to an employee who was not needed to complete the work. The Carrier suggests that if the parties had intended that all employees assigned to a gang were to be used in this or other overtime circumstances, then the language of the Agreement would have said so. The Carrier insists that the Agreement does not say this, but instead clearly directs, in the singular, that if an employee is necessary or required to perform work, then the overtime would accrue to the incumbent, again in the singular. The Carrier argues that no trackman was required or necessary to perform the subject work, and there is no proof to the contrary in the record.

The Carrier emphasizes that the Organization bears the burden of proving, by a preponderance of the evidence, that the Agreement was violated. The Organization has failed to meet this burden, so it cannot prevail in this matter. Moreover, the Carrier argues that absent proof that the Agreement was violated, no remedy need be considered.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The parties being unable to resolve their dispute, this matter came before this Board.

This Board has reviewed the record in this case, and we find that the Organization has met its burden of proof that the Carrier did violate Rule 25(c) of the Agreement when it failed to assign the Claimant, the regularly assigned trackman on the Allenby Section Gang, to perform the work of repair/change of a broken rail at Milepost 101.3 on the date in question. Therefore, the claim must be sustained.

The record reveals that the Claimant was the regularly assigned employee and the incumbent for the job to perform the work. The work that was performed at 3:30 p.m. was exactly the type of work that is performed by the Claimant. Since the Claimant is the regularly assigned employee, Rule 25(c) required that he be the person assigned the overtime work in question. Rule 25(c) states:

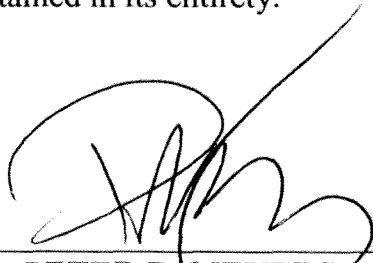
Where overtime work is needed to be performed prior to continuous with or following a regular assignment on a rest day or holiday, such overtime will accrue to the incumbent of the position who would normally be assigned to perform such work.

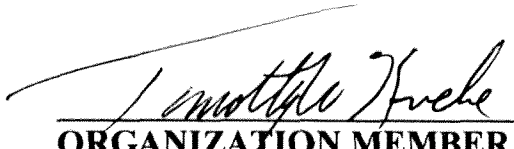
The Claimant was the incumbent of the position who would normally be assigned


to perform the work. The Carrier failed to call the Claimant to perform that work and, therefore, the claim must be sustained in its entirety.

AWARD:

The claim is sustained.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER
DATED: Sept 17, 2010

CARRIER MEMBER
DATED: Sept 17, 2010