

BEFORE PUBLIC LAW BOARD NO. 6915

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
CN – WISCONSIN CENTRAL RAILROAD**

Case No. 18

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned Boom Truck Operator K. Phetteplace to perform track work behind the rail grinder beginning at 6:00 P.M. on May 30, 2006 through 7:00 A.M. on May 31, 2006 and from 6:00 P.M. on May 31, 2006 through 7:00 A.M. on June 1, 2006 (System File WC-134-106-033).
2. As a result of Part 1 above, Track Foremen Eric Jones shall be compensated for twenty-seven (27) hours' pay at time and one-half the foreman's 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 assigned a boom truck operator, rather than the Claimant, to perform certain overtime track inspection duties on May 30 and 31, 2006. The Carrier denied the claim.

The Organization initially contends that the Carrier, without making any attempt whatsoever to contact the Claimant in recognition of his superior seniority, called and assigned the overtime work at issue to a junior employee. The Organization asserts that although the work in question was planned so as to be continuous with Boom Truck Operator Phetteplace's normal starting time, this work was not a continuation of his regularly assigned duties as a Boom Truck Operator. The Organization argues that Phetteplace testified that he was not required to operate a boom truck during this overtime and that he did not work his day-time hours. The Organization therefore

submits that there can be no doubt that the Carrier's defense to this claim is inaccurate and invalid. Because the Carrier failed to present a valid defense, the instant claim must be sustained.

The Organization maintains that the Carrier's denial of the claim is based upon a false premise, and a sustaining award is in order for that reason alone. The Organization points out that the Claimant was the proper employee to be assigned to the subject work. The Organization emphasizes that it is apparent that the Carrier determined to have qualified foremen perform the claimed work, which was not continuous with the Boom Truck Operator's assignment or any other assignment.

The Organization argues that Rule 22, Section 3, governs the assignment of this work. The work was performed between Marsh and Schiller Park, an area that includes the Antioch Section where the Claimant is Foreman. The Organization emphasizes that the Carrier has determined that the work accrues to the foreman classification, and there is no dispute that the Claimant was the senior active employee in the required job classification in the assigned gang, as contemplated by Rule 22, Section 3.

The Organization asserts that even if Phetteplace had greater foreman seniority, which was not shown, Phetteplace was assigned elsewhere as a boom truck operator, not as a foreman. The Organization maintains that there can be no doubt that the Carrier violated the Agreement when it assigned Phetteplace to perform overtime foreman duties on the claim dates.

The Organization submits that some of the Carrier's assertions, such as needing a track inspector to perform the subject work, directly contradict the documented facts of

this dispute. The Organization insists that the Carrier's defenses herein are nothing more than a blatant attempt to avoid monetary liability for a proven violation of the Agreement. The Organization asserts that by the Carrier's own admission, the proper employee to perform the work in question was a foreman, and Rule 22, Section 3 clearly gives preference for the work to the Claimant over Boom Truck Operator Phetteplace.

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

The Carrier initially contends that the Organization has not presented any factual evidence or support to meet its burden of proof. The Carrier asserts that there is no proof of an Agreement mandate with which the Carrier failed to comply, nor is there any proof that the Carrier handled this matter in a manner that was contrary to Agreement requirements or practice. The Carrier argues that there also is no proof that the work in question is a customary and ordinary function of the Claimant in his assigned position as a Section Foreman.

The Carrier maintains that the Claimant is not a proper claimant in that he was called on May 29, 2006, for the same duties, but he did not answer the call. The Carrier submits that the Organization has not presented any proof that the Claimant's entitlement to the work was any greater than that of the person(s) called to perform the service. The Carrier additionally emphasizes that the Organization has failed to submit any evidence proving that the clear language of the Agreement supports its claim, that the material facts are sufficiently different from those of Case 17, and that the duties in question were "ordinarily and customarily" performed by the Claimant. The Carrier insists that the

Organization cannot prove that the Claimant was “in the assigned gang” that ordinarily and customarily performs track inspection.

The Carrier argues that nothing in the Agreement required it to call the Claimant in preference to Phetteplace or any other employee possessing the necessary skills and qualifications. The Carrier acknowledges that the Claimant may have performed such work from time to time, but he did not do so “ordinarily and customarily” in the job class of Foreman. The Carrier contends that the Organization has offered no proof to substantiate its assertion, so the Claimant cannot be deemed as having met either criterion specified in Rule 22, Section 3.

The Carrier points out that track inspectors do not belong to any “gang,” as that term is used on the railroad. The Carrier submits that although there are a number of different gangs on the railroad, there are no “track inspection gangs,” as evidenced by the fact that no such term is found in the Agreement. The Carrier contends that it is an imaginative stretch to suggest that a foreman of a headquarter section gang is “in the assigned gang” of those who “ordinarily and customarily” perform track inspection as a significant and/or primary part of their duties. The Carrier emphasizes that the Organization appears to suggest that if an employee performed a particular function once, then that employee can and should be used whenever or wherever the Carrier should choose to perform any remotely similar function.

The Carrier then points to Rule 8, which allows the Carrier to select employees to perform track inspection work with no regard for seniority whatsoever. The Carrier contends that the provisions of Rule 8 cannot be ignored or deemed insignificant in this

matter. The Carrier points out that although the Organization is not fond of this rule, it nevertheless agreed to include it in the Agreement. The Carrier maintains that pursuant to Rule 8, no employee has a right, by virtue of seniority standing, to the track inspector position, except those already selected by the Carrier and already assigned as track inspectors. The Carrier therefore contends that it does not matter whether the Carrier attempted to contact the Claimant because it was under no specific contractual requirement to do so.

The Carrier asserts that if the Organization believed that the Agreement already conveyed an employee's right to track inspector work according to seniority standing, then it would not now be attempting to obtain that very right in the parties' current negotiations. The Carrier insists that the Organization cannot obtain through the arbitration process what it was unable to obtain through the collective bargaining process. The Carrier submits that if the Organization were to prevail here, then it would use the decision as foundation for its position that seniority would govern the filling of track inspector positions, which would render meaningless the Carrier's right to select track inspectors in accordance with Rule 8.

The Carrier contends that the Organization's position has no support in the clear agreement language, so the Organization has failed to carry its burden of proof in this matter.

The Carrier asserts that because the Claimant had no contractual preference or right to the position greater than the employee used to perform the work, any monetary remedy would be excessive. Moreover, because the Organization has failed to establish

that the Agreement was violated, no remedy is due.

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 failed to meet its burden of proof that the Carrier violated the Agreement when it assigned Boom Truck Operator Phetteplace to inspect track behind the rail grinder on May 30 through June 1, 2006, and failed to call the Claimant. Therefore, the claim must be denied.

The Organization has presented no evidence of any violation of the Agreement. There is no showing that the Claimant was entitled to perform the work any more than any of the other employees. Rule 22, Section 3 states the following:

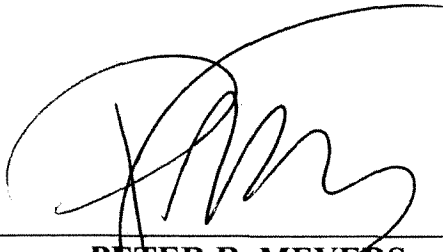
When work is to be performed outside the normal tour of duty and not in continuation of the day's work, the senior active employee in the required job class in the assigned gang will be given preference for overtime work ordinarily and customarily performed by them.

The record reveals that the Claimant may have performed that work every once in a while, but he clearly did not perform that work "ordinarily and customarily."

The Claimant had no contractual preference or right to the position any greater than the employee that was used by the Carrier. Consequently, this Board finds that the claim shall be denied.

AWARD:

The claim is denied.



PETER R. MEYERS
Neutral Member

ORGANIZATION MEMBER

DATED: May 10, 2010



CARRIER MEMBER

DATED: May 10, 2010