

BEFORE PUBLIC LAW BOARD NO. 7007

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
and
MASSACHUSETTS BAY COMMUTER RAILROAD**

Case No. 11

STATEMENT OF CLAIM:

- (1) The Agreement was violated when the Carrier failed to call and assign B&B Mechanic R. DeJesus for scheduled overtime carpet cleaning service in the offices at Cobble Hill on August 21, 2003 and instead called and assigned junior employee N. O'Brien (Carrier's File MBCR-BMWE-03/1203).
- (2) The Agreement was violated when the Carrier, after Foreman W. Perry declined, failed to call and assign B&B Foreman D. Haskins for scheduled overtime carpet cleaning service in the offices at Cobble Hill on August 21, 2003 (Carrier's File MBCR-BMWE-04/1203).
- (3) As a consequence of the violations referred to in Part (1) above, Claimant R. DeJesus shall now be compensated for five (5) hours at his respective time and one-half rate of pay.
- (4) As a consequence of the violations referred to in Part (2) above, Claimant D. Haskins shall now be compensated for five (5) hours at his respective time and one-half rate of pay.

FINDINGS:

The Organization filed the instant claim alleging that the Carrier violated the parties' Agreement when it failed to assign Claimant DeJesus to perform the planned overtime work in question, instead assigning a more junior employee. The Organization further claims that the Carrier violated the parties' Agreement when it failed to offer the planned overtime work to Claimant Haskins after another B&B Foreman declined the opportunity. The Carrier denied the claims.

The Organization initially contends that with respect to the Carrier's manufactured "procedural" defense, alleging that the claims were procedurally flawed because they were undated, there is no dispute that the claimed work occurred on August 21, 2003. The Organization points out that in its denials, the Carrier readily confirmed that the initial claims had been received on September 23, 2003, forty-four days from the date of the occurrence. The Organization emphasizes that there can be no question that the claims were filed within the time limit stipulated in the Agreement. The Organization asserts that the mere fact that it may have inadvertently neglected to date the initial claims cannot stand to defeat said claims, especially where, as here, there is no question that the initial claims were received by the Carrier within the time limits provided by the Agreement. The Organization argues that the Carrier's attempted "procedural" defense is misguided and not worthy of serious consideration.

The Organization maintains that there is no dispute that Claimant DeJesus is more senior within the B&B Mechanic Classification than is the employee who was assigned the planned overtime work in question. The Organization further emphasizes that it is undisputed that the Carrier failed to offer the overtime opportunity to Claimant Haskins, who has established and retained seniority within the B&B Foreman Classification, after another B&B Foreman declined the opportunity. The Organization insists that Claimant Haskins should have been given the opportunity to supervise/assist the planned overtime duty. The Organization contends that both Claimants were available, fully qualified, and willing to perform the subject overtime work; they would have performed the work if Carrier had afforded them the opportunity.

The Organization points out that arbitral boards long have recognized that seniority is a valuable property right of an employee, and that overtime must be assigned based on the general principle of seniority. The Carrier, however, made no effort to contact the Claimants and assign them to the planned overtime work to which they were entitled by virtue of their seniority. The Organization asserts that there can be no question that the Claimants are entitled to the requested remedy.

As for any argument that a foreman was not necessary in connection with the work at issue, the Organization emphasizes that the Carrier did, in fact, ask a foreman to work the claimed overtime, but that foreman declined. The Organization insists that the Carrier therefore recognized that a foreman was necessary, but it failed to afford Claimant Haskins the work opportunity. With regard to the Carrier's assertion that it followed long-standing and accepted practice in this matter, the Organization argues that the Carrier presented no credible evidence whatsoever to support its affirmative defense.

The Organization maintains that the seniority provisions are clear and unambiguous, and the Agreement provisions make clear that both parties fully understood the meaning and importance of such provisions. There can be no question that the Carrier violated the Agreement when it failed to afford the Claimants the opportunity to perform the non-emergency overtime work at issue. The Organization therefore emphasizes that the Claimants are entitled to the requested remedy.

The Organization ultimately contends that the instant claims should be sustained in their entirety.

The Carrier initially contends that the Organization has failed to meet its burden of

proof. The Carrier asserts that the claims are excessive and should be denied or dismissed in their entirety.

The Carrier argues that the Organization presented no evidence to support the allegation that Claimant DeJesus stood to be called for the work in question. Similarly, the Organization failed to offer any substantive proof that a foreman was required to “supervise” the carpet cleaning and that Claimant Haskins stood for such assignment.

Pointing to Rule 14, which governs grievances, the Carrier goes on to assert that the Carrier issued its denial on March 31, 2004, but the Organization initiated handling before a tribunal on December 14, 2006, well beyond the 185-day period specified in Rule 14. The Carrier argues that the claims are flawed at this point, and they should be dismissed.

The Carrier then maintains that because the Organization has proceeded solely on the basis of hollow allegations, without one piece of relevant evidence showing how the Carrier violated Rule 11 of the Agreement, the Organization has utterly failed to meet its burden of proof. The Carrier ultimately contends that the instant claims should be denied in their entirety.

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

This Board has reviewed the procedural arguments raised by the Carrier and we find them to be without merit. It should be noted that at the oral argument, the Carrier withdrew the timeliness arguments that were set forth in the submissions.

This Board has reviewed the record in this case, and we find that the Organization

has met its burden of proof that the Carrier violated the Agreement when it failed to call and assign B&B Mechanic R. DeJesus for scheduled overtime carpet-cleaning service and assigned a junior employee to do that work. In addition, the Organization has provided sufficient evidence to support its position that the Carrier violated the Agreement when after a foreman declined the work, it failed to call B&B Foreman D. Haskins for scheduled overtime carpet-cleaning service.

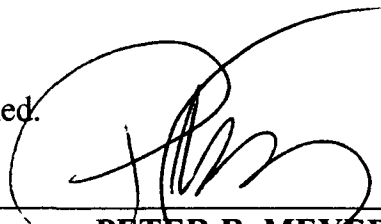
The record is clear that the Carrier scheduled non-emergency planned overtime of cleaning carpets at its Cobble Hill office building on August 21, 2003. The B&B Mechanic from the Cobble Hill gang was not available for the overtime, and the Carrier was obligated to assign the work in seniority order. It did not do that. Claimant DeJesus was the senior employee who should have received the overtime work.

With respect to the second part of the claim, it is clear that Claimant Haskins was the senior employee that held the B&B Foreman classification and should have been assigned the Foreman work after Foreman Perry declined the overtime. The record is clear that both Claimants were available, fully qualified, the most senior, and were willing to perform the overtime work.

It is not necessary for this Board to restate the importance of seniority other than to state that it is preserved in the parties' agreement. Since the Carrier failed to assign the appropriate senior employees who were fully qualified and readily available for the work, this Board has no choice but to sustain the claim. The Carrier does not dispute the number of overtime hours claimed and, therefore, the claim is sustained in its entirety.

AWARD:

The claim is sustained.

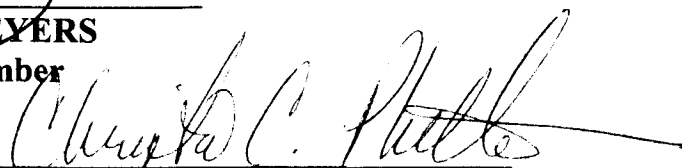


PETER R. MEYERS

Neutral Member



ORGANIZATION MEMBER



CARRIER MEMBER

DATED: 4/9/09

DATED: April 9, 2009