

**BEFORE PUBLIC LAW BOARD NO. 7007**

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

**Case No. 15**

**STATEMENT OF CLAIM:**

- (1) The Agreement was violated when the Carrier failed to assign Foreman P. Popczuk for overtime snow duty service on January 11 and 12, 2004 and instead called and assigned junior Foreman P. Brouillette (Carrier's File MBCR-BMWE-11/0504).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Popczuk shall now be compensated for fifteen (15) 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 the Claimant to perform the work in question, instead assigning a more junior employee. The Carrier denied the claim.

The Organization initially contends that there is no dispute that on January 11, 2004, the Carrier called and assigned B&B Foreman Brouillette to perform scheduled non-emergency planned overtime, involving snow removal duty, and that Brouillette reported as instructed and performed such work for fifteen hours. The Organization asserts that there also is no dispute that the Claimant is senior to Brouillette, and that Claimant was available, fully qualified, and willing to perform the subject overtime work. The Claimant would have performed the work in question had the Carrier afforded him the opportunity to do so.

The Organization argues that seniority is one of the most important cornerstones upon which collective bargaining agreements are made, and arbitral boards long have recognized that seniority is a valuable property right of an employee. The Organization emphasizes that this Board also has long recognized that overtime must be assigned based on the general principle of seniority.

The Organization maintains that the Carrier made no effort whatsoever to contact the Claimant and assign him the planned non-emergency overtime work on January 12, 2004. The Organization asserts that the Claimant was fully qualified and readily available for duty, but he was not afforded the work opportunity to which he was entitled by virtue of his superior seniority. The Organization insists that under these circumstances, there can be no question that the Claimant is entitled to the requested remedy.

Addressing the Carrier's defenses, the Organization points out that the Carrier did not dispute the fact that the Claimant is senior to Brouillette, and the Carrier also readily confirmed that the snow removal was performed at the location claimed. The Organization contends that the Claimant's regularly scheduled shift began at 3:00 p.m. on January 12, 2004, while the overtime work at issue was scheduled to begin at 4:00 a.m. on January 12. The Organization therefore asserts that the Claimant was fully qualified and readily available for duty, but he was not afforded the work opportunity to which he was entitled by virtue of his superior seniority.

As for the Carrier's statement that its payroll records indicate that the events at issue occurred on January 12, 2004, not January 11, 2004, the Organization insists that

the initial claim clearly outlined the dates, time frame, and circumstances involved in the instant dispute. The Organization maintains that the Carrier is attempting to establish a fact dispute where none exists. The Carrier called junior B&B Foreman Brouillette on January 11, 2004, for non-emergency snow removal work that began at 4:00 a.m. on January 12, 2004. The Organization emphasizes that the record is crystal clear on these facts.

The Organization then argues that the Carrier failed to produce any records that might have supported its assertion that Brouillette was called to cover work at North Station, and not the CRMF where the Claimant is the senior foreman. Citing a number of Board Awards, the Organization contends that where a party fails to produce records that contain material and relevant evidence, it does so at its own peril. Moreover, the Carrier's failure to provide relevant documents gives rise to the inference that those documents would not support the Carrier's assertions.

The Organization asserts that, as found in numerous Board Awards, a party asserting an alleged affirmative defense must submit proof in support thereof, and mere assertions are not acceptable as substitutes for such proof. The Organization insists that the Carrier failed to submit any credible evidence whatsoever in support of its affirmative defenses. The Organization maintains that the Agreement's seniority provisions are clear and unambiguous, and the numerous references to seniority throughout the Agreement and letters of understanding clearly demonstrate that both parties fully understood the meaning and importance of these provisions.

The Organization argues that there can be no question that the Carrier violated the

Agreement when it failed to afford the Claimant the opportunity to perform the non-emergency overtime work on January 12, 2004, so the Claimant is entitled to the full remedy requested.

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

The Carrier initially contends that the Organization has failed to meet its burden of proof in this matter. The Carrier asserts that the Organization has utterly failed to meet that burden, the claim is excessive, and the claim should be denied or dismissed in its entirety.

The Carrier emphasizes that the Organization does not dispute that the Claimant was headquartered at CMRF, and the time cards affirm that Brouillette worked at North Station. The Carrier argues that Brouillette was headquartered and called for work at North Station, not the CRMF. Moreover, Brouillette's time card reveals that he worked through his regular hours; Brouillette therefore was paid straight time, not overtime. The Carrier accordingly asserts that the claim for fifteen hours pay is "preposterous." The Carrier points out that the Claimant did not lose an overtime "opportunity" enjoyed by another employee.

The Carrier maintains that the Organization violated Rule 14 of the Agreement, governing grievances, when it failed to refer this matter to a tribunal within 185 from the Carrier's denial of the claim. The Carrier emphasizes that its denial was issued on May 19, 2005, but the Organization did not refer this matter to a tribunal until December 14, 2006, well beyond the time limit. The Carrier argues that the claims are flawed at this

point and should be dismissed.

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.

At the oral argument of this case, the Carrier withdrew the procedural argument that it had raised in its submission. Therefore, this Board will only deal with the substantive question.

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 did not assign the Claimant for overtime service and instead assigned Junior Foreman P. Brouillette. The controlling language in this case is found in Rule 11. It states, in part:

When necessary to work employees under this rule, the senior available 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 customarily performs such work.

The record reveals that the Claimant was headquartered at CRMF, which is a headquarter point as set forth in Rule 11. The time cards make it clear that employee Brouillette worked at North Station. Consequently, pursuant to the above rule, the

Organization has failed to meet its burden of proof.

It is fundamental that when an Organization raises a claim such as this, it has the burden of proof of coming forward with sufficient evidence to show that the Carrier violated the language of the Agreement. The Organization has failed to do so in this case. Therefore, the claim must be denied.

**AWARD:**

The claim is denied.

  
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**PETER R. MEYERS**  
Neutral Member  
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**ORGANIZATION MEMBER**  
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**CARRIER MEMBER**

DATED: 4/9/09

DATED: April 9, 2009