

PUBLIC LAW BOARD 5564

In the Matter of Arbitration between:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
DIVISION – IBT RAIL CONFERENCE**

and

**NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD
CORPORATION**

Case No. 69

Award No. 69

THE ORGANIZATION’S STATEMENT OF THE CLAIM

This Decision resolves the Organization’s claim as follows:

1. The Carrier violated the Agreement when it assigned members of Blue Island Gang 3 to perform overtime service on the Rock Island District on June 8, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 25, 2016 instead of Ms. L. Powell who was assigned to the LaSalle Street Gang headquartered on the Rock Island District (System File C 16 06 08/8-21-696 NRC).
2. As a consequence of the violation referred to in Part 1 above, Claimant L. Powell shall be compensated for fifty-two (52) hours at her respective overtime rate of pay.

STATEMENT OF THE CASE

Based on the record developed by the Organization and the Carrier, this Public Law Board (Board) finds the Parties herein to be a Carrier and Employees within the meaning of the Railway Labor Act, as amended, and that this Board has jurisdiction over the Parties and the dispute.

This dispute is between the Brotherhood of Maintenance of Way Employees Division – IBT Rail Conference (BMWE or Organization) and the Northeast Illinois Regional Commuter Railroad Corporation (Metra or Carrier) (collectively the Parties). The dispute arises out of BMWE’s claim that Metra violated the Parties’ Agreement Appendix O, Section 5.

There is no dispute over the facts. The Parties dispute the interpretation and application of Agreement Appendix O, Section 5 to the facts.

The Claimant, L. Powell, a Building and Bridges (B&B) mechanic driver, is assigned to the LaSalle Street Gang. The LaSalle Street Gang is headquartered at LaSalle Street on the Carrier's Rock Island District and is responsible for work at LaSalle Street up to Milepost 0.4.

On June 8, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 25, 2016, Metra assigned the Blue Island Gang 3 to perform overtime work on the Carrier's Rock Island District.

On August 3, 2016, BMW presented the Claim on behalf of Claimant contending that the Carrier violated Agreement Appendix O Agreement when it utilized Blue Island Gang 3 members for the overtime work. BMW asserted that the Claimant should have been assigned work ahead of Foreman D. Butler, Mechanic Driver J. Jauregui, and Mechanic D. S. Galligan. BMW argued that Claimant suffered a loss of overtime work opportunity of 52-hours at time-and-one-half rate totaling \$2,040.48.

On September 28, 2016, Metra denied the Claim stating that the overtime on June 8, 2016 involved only 3-hours overtime work and was performed on an emergency basis and outside the Appendix O overtime rule. Regarding the other Claim dates, Metra stated that Blue Island Gang 3 members were assigned to the overtime work as an extension of their regular assignment and as a continuation of their daily work.

On November 21, 2016, BMW appealed the denial.

On January 17, 2017, Metra denied the appeal.

On April 26, 2017, the Parties conferenced the Claim but failed to resolve the dispute. On August 3, 2017, BMW forwarded the dispute to this Board. This dispute is now properly before this Board for adjudication.

The applicable provisions of the Agreement, Appendix O states:

APPENDIX O

OVERTIME

AGREEMENT between the Northeast Illinois Regional Commuter Railroad Corporation and the Brotherhood of Maintenance of Way Employees

IT IS AGREED:

In the application of Rule 17. Call Rule and Rule 18. Overtime of the April 16, 1984 General Rules Agreement, as amended, the following procedures will govern the assignment of overtime, whether planned or emergency.

* * *

Section 5. Rock Island - B&B: This district is broken down into three areas: LaSalle Street to M.P. 0.4 is normally assigned to the LaSalle Street Crew; M.P. 0.4 to Joliet is normally assigned to Blue Island Gang No. 1; and C.W.I. and the Heritage Corridor are normally assigned to Blue Island Gang No. 2. These gangs handle all B&B work on the district, including planned and emergency overtime. Any such overtime, either planned or emergency, is offered to the gang normally assigned to that area. Seniority within individual gangs is always honored.

- Any overtime help for LaSalle Street Gang would first go to Blue Island Gang 1 and then to Blue Island Gang 2.
- Any overtime help for Blue Island Gang 1 would first go to Blue Island Gang 2 and then to LaSalle Street Gang.
- Any overtime help for Blue Island Gang 2 would first go to Blue Island Gang 1 and then to LaSalle Street Gang.

* * *

DISCUSSION AND FINDINGS

BMWE asserts that it is undisputed that the Claimant is assigned to the LaSalle Street Gang, Rock Island District, and that Metra assigned Blue Island Gang 3 employees to perform work within the LaSalle Street Gang boundaries described in Appendix O,

Section 5.

BMWE asserts that Appendix O clearly and unmistakably establishes seniority boundaries and work rights of employees so that the work in a district will be handled by the gangs in that district. For this reason, BMWE argues that the Claimant was entitled to the work which the Carrier assigned to Blue Island Gang 3. BMWE argues the well-established principle supported by many NRAB Awards that where seniority is confined, work is also confined.

BMWE asserts that Metra presented no valid defense to the Claim. BMWE argues that the Claim states sufficient facts and evidence to demonstrate Metra violated Appendix O, Section 5.

BMWE argues that Metra's defense that an emergency situation arose on June 8, 2016 is without evidentiary support in the on property record. BMWE argues that absent proof of an emergency the defense cannot defeat the Claim.

Moreover, BMWE asserts that there is no evidence that the Blue Island Gang 3 performed the work as part of the Gang's daily assignments.

Metra asserts that BMWE has not met the burden of proof to prove the Claim because BMWE did not prove all requisite elements of the Claim and merely quotes the Rule relied on.

Next, Metra asserts that the Agreement was not violated because the work performed was an emergency call out situation and the employees assigned were senior to the Claimant.

However, this dispute does not concern the Claimant's relative seniority compared to the Blue Island Gang 3 employees. The Claim challenges the assignment of the Blue Island Gang 3 employees in violation of the work boundaries defined in Appendix O, Section 5. Indeed, Appendix O, Section 5 does not mention the Blue Island Gang 3 with regard to work rule boundaries.

The plain, clear and unambiguous language of Appendix O, Section 5 defines the boundaries for B&B work on the Rock Island district and provides that certain overtime work belongs to the LaSalle Street Crew and Blue Island Gangs 1 and 2. Appendix O, Section 5 includes B&B work that is planned and emergency overtime as well. The Board recognizes that Metra has leeway in the event of an emergency under other work rules which were not presented in the Claim processing by either Party.

While Metra argues that BMWWE has not proven all elements of the Claim, the Carrier's September 28, 2016 Claim denial establishes that its representative fully understood and accepted all the salient facts of the Claim.

It is only in Metra's January 17, 2017 Claim appeal denial that the Carrier's representative asserts that the Claim lacked proof and was vague and indefinite. However, the Claim contained sufficient specificity and detail for the Carrier's representative to identify the Claimant's assignment on June 25, 2016, and then describe in detail the disputed work and overtime hours as follows:

Furthermore, the Organization's remedy of fifty-two (52) hours at Claimant's overtime rate of pay has not been demonstrated in record. Claimant is not entitled to remedy sought for the dates of June 8, 15 through 23, and 25, 2016. First, Claimant worked 8 hours of overtime on June 25, 2016 therefore Claimant could not have lost an overtime opportunity as alleged on this date. Furthermore, after a review of the overtime work performed by employees Butler, Jauregui, and Galligan, it is clear that employee Butler worked forty-five (45) hours of overtime, employee Jauregui worked fifty-one (51) hours of overtime and employee Galligan worked fourteen and a half (14.5) hours of overtime in total for the dates of June 8, 15 through 23, and 25, 2016. It has not been demonstrate in the record how Claimant would be entitled to fifty-two (52) hours of overtime when neither of the cited employees worked that amount overtime over the cited timespan.

This response establishes that the Claim was stated in sufficient detail and with sufficient specificity for Metra's representatives to fully understand and respond to the Claim.

We turn next to Metra's defense to the Claim that an emergency required the

assignment of the Blue Island Gang 3 to the work. It is well-established in NRAB Awards that when the Carrier asserts that an emergency exists to justify deviating from the requirements of the Agreement, the Carrier is obligated to present sufficient evidence establishing an emergency existed. Specifically, the Carrier must demonstrate that its extraordinary action of deviating from the governing work place rules was necessary to preserve property and to protect life and limb. In this regard, it would be reasonable to find a record of some actions or reaction recognizing the emergency in announcements or declarations of the existence of the emergency by the Carrier. In addition, it is reasonable to expect that out of a sense of urgency, an emergency would result in rapid deployment of forces on overtime assignments. However, the record contains no evidence of actions, reactions, emergency announcements, emergency declarations or rapid deployments by the Carrier.

The record also shows, and it is undisputed by Metra, that the Carrier assigned the Blue Island Gang 3 to work within the boundaries of the LaSalle Street Crew and Blue Island Gangs 1 and 2 without advancing proof of an emergency situation during the Claim processing. The Carrier's mere assertion of an emergency situation during the Claim processing is insufficient to overcome its obligation under Appendix O, Section 5.

In this dispute, based on the totality of the circumstances and evidence, there is no evidence of an emergency **before** the Carrier assigned the Blue Island Gang 3 to work on the LaSalle Street Crew and Blue Island Gangs' 1 and 2 territories. For this reason, the Carrier's emergency exception defense is a *post hoc* response to BMW's Claim filing.

The Board finds these facts establish a *post hoc* emergency defense by the Carrier amounts to an excuse for the Carrier's violation of the agreement and not grounds supporting or a defense of the Carrier's deviation from the governing overtime assignment work rules.

For all these reasons, the Board finds the Carrier violated the Agreement Appendix O, Section 5.

However, BMW's requested remedy is an overreach. The Board recognizes that the Claimant is entitled to be made whole for the Carrier's violation of the Agreement, but

the Claimant is not entitled to a windfall.

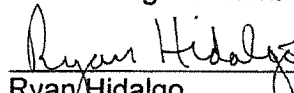
The record establishes that the Claimant is a B&B Mechanic Driver as is J. Jauregui who was assigned to the disputed work. Jauregui provides a comparable with regard to the work the Claimant would have otherwise performed but for Metra's violation of Appendix O, Section 5.

The Carrier's appeal denial states that Jauregui worked 51-hours overtime and that the Claimant received 8-hours overtime for another assignment on June 25, 2016. Therefore, the Carrier must make the Claimant whole with 43-hours overtime pay at the appropriate rate.

AWARD

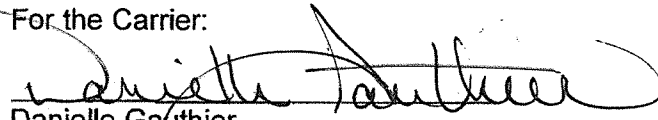
BMW's claim is sustained consistent with the remedy described above.

For the Organization:



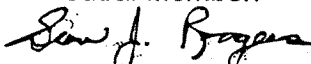
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For the Carrier:



Danielle Gauthier
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Neutral Member:



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October 31, 2019