

BEFORE PUBLIC LAW BOARD NO. 6915

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

Case No. 17

STATEMENT OF CLAIM:

1. The Agreement was violated when the Carrier assigned Machine Operator S. Powell to perform track foreman duties on the Burlington, Antioch and Schiller Park Territories on May 29, 2006 between the hours of 1100 and 2300 (Carrier File WC-134-106-032).
2. As a result of Part 1 above, Track Foremen Eric Jones shall be compensated for twelve (12) 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 machine operator, rather than the Claimant, to perform certain overtime track foreman duties across the Burlington, Antioch and Schiller Park territories. The Carrier denied the claim.

The Organization initially contends that the Carrier violated the parties' Agreement when it assigned a machine operator to perform track foreman duties on May 29, 2006. The Organization asserts that May 29, 2006, was observed as the Memorial Day Holiday so it was not a regularly assigned work day for any of the individuals involved in this dispute. The Organization argues that having determined that overtime service was necessary on this date, the Carrier decided to assign the work to an employee holding seniority in the track foreman classification. After determining that the first track foreman that it called was not available, the Carrier attempted to contact the Claimant,

who was the track foreman next in line for the overtime duty.

The Organization maintains that instead of attempting to call the Claimant at the telephone number that the Claimant had provided for such purposes, the Carrier attempted to contact the Claimant via his Carrier-issued cell phone, which then was securely locked for the weekend in the Claimant's Carrier-assigned vehicle. The Organization emphasizes that rather than contacting the Claimant on the telephone number that he had provided the Carrier, the Carrier instead called and secured the services of Machine Operator Powell, who performed twelve hours of overtime service. The Organization submits that the Claimant was deprived of this work opportunity and the monetary benefits flowing therefrom.

The Organization submits that arbitral boards long have recognized that seniority is a valuable property right of an employee. The Organization argues that the Carrier's decision to ignore the Claimant's superior seniority and to assign a junior employee to the subject overtime work clearly deprived the Claimant of the rights associated with his established seniority.

The Organization suggests that when the Carrier first called the Burlington Section Foreman for the overtime work in question, the Carrier made the determination that the foreman classification was the proper classification for the work. Pointing to prior Board Awards, the Organization insists that it is well settled that when the Carrier elects to use employees of a certain class for work, it is obligated to do so with respect to the employees' seniority.

The Organization contends that the Carrier apparently recognized the Claimant's

right to the work when it attempted to contact him for the work. The Organization emphasizes that the problem is that the Carrier made only a single attempt to contact the Claimant, it made that call to the wrong number, and it thereafter asserted that no further attempts were necessary.

The Organization points out that the Board consistently has held that a reasonable attempt must be made to secure the services of the proper employee for overtime service, and numerous Board decisions have held that a single telephone call does not constitute a reasonable attempt to reach an employee. The Organization contends that there can be no doubt that there is no support for the Carrier's position that a single telephone call is sufficient to determine an employee's availability.

Addressing the Carrier's assertion that it was not obligated to call the Claimant for this overtime service because it had called the Burlington Section Foreman, the Organization maintains that the claimed work was performed over the Burlington, Antioch, and Schiller Park territories. The Organization emphasizes that as the regularly assigned Antioch Section Foreman, the Claimant had a right to the claimed work over the called junior employee. Moreover, the Carrier did call the Claimant, so it was obligated to make a reasonable attempt to secure his services.

As for the allegation that the Claimant was not a proper claimant, the Organization emphasizes that the Carrier decided to call the Burlington Section Foreman and the Claimant for this work. The Organization suggests that it is absurd for the Carrier to now assert that it called the wrong class of employee for this work.

The Organization submits that it is equally absurd for the Carrier to argue that it

was not obligated to continue calling down the seniority roster until it was exhausted.

The Organization insists that the Carrier is obligated to call employees in seniority order for overtime work. Moreover, under Rule 11 of the Agreement, employees are required to advise the Carrier of their address and telephone number. The Organization contends that it is expedient for the Carrier to access that information when making calls while perusing the seniority roster in the classification needed for the work. The Organization argues that this is exactly the method of calling provided for recall to service pursuant to Rule 12C.

The Organization asserts that this dispute concerns overtime preference between the Claimant and Machine Operator Powell, who is a foreman junior to the Claimant. The Organization emphasizes that while the Claimant was assigned as foreman on the Antioch Section Gang where the claimed work was performed, there is no evidence that Powell was associated with any of the three territories where the overtime work was performed. The Organization insists that it is clear that the Carrier did not fulfill its Agreement obligations.

The Organization emphasizes that the Carrier attempted to contact the Claimant for the subject overtime work, but called him at a number other than the contact number he provided to the Carrier for such situations. The Organization suggests that the Carrier's defenses to this claim are nothing more than blatant attempt to avoid monetary liability for its mistakes and its violation of the Agreement.

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 and did not answer the call. The Carrier emphasizes that the Organization has acknowledged that the Carrier attempted to contact the Claimant via his Carrier-issued cell phone, but the Claimant did not answer the call. The Carrier therefore suggests that even if the Organization could support its contention that a violation occurred, the Claimant would not be a proper claimant because he was called.

The Carrier emphasizes that it is not unreasonable to call the Claimant on his Carrier cell phone for Carrier business. The Carrier asserts that it should not be penalized for having done so. The Carrier also argues that if the Claimant desired to be accessible for overtime work, simple logic would dictate that he would have had his Carrier-issued cell phone readily at his disposal to accept calls for overtime. As for the Organization's suggestion that the Carrier had some obligation to call the Claimant at his home, the Carrier points out that there is no proof that the Claimant was, in fact, at home or that he would have answered that phone.

The Carrier insists that there is nothing in the Agreement that obligates it to

attempt multiple means of contact with an employee in this circumstance. The Carrier asserts that the opportunity for the work was afforded the Claimant when he was called but did not answer. The Carrier points out that the Claimant was given this opportunity even though was not in the “assigned gang” and even though the work in question was not ordinarily and customarily performed by the Claimant as a foreman.

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 was called and failed to respond, he is not a proper claimant and 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 met its burden of proof that the Carrier violated the Agreement when it assigned Machine Operator Powell to perform foreman track duties on May 29, 2006, instead of the Claimant, Track Foreman Eric Jones. Therefore, the claim must be sustained.

The record reveals that Claimant Jones holds foreman seniority in the Track Department. On Memorial Day, May 29, 2006, the Carrier determined that it needed to


have a track foreman patrol track and make repairs. Foreman Schumacher was the foreman. The Carrier was unable to contact Track Foreman Schumacher. The Carrier then called the next person in seniority line, the Claimant. Instead of calling the Claimant on his home telephone number that he has on record with the Carrier for calls of this kind, the Carrier attempted to contact the Claimant on his Carrier-issued cell phone. The Claimant apparently had his Carrier-issued cell phone off on his day off. The Carrier was unable to reach the Claimant and, therefore, contacted Machine Operator Powell, and he was assigned the overtime duty for the day. There is no question that Machine Operator Powell is junior to the Claimant.

The Carrier makes a great deal of argument in its submission about how seniority does not necessarily govern and that the Carrier was not obligated to contact the Claimant. However, the fact remains that the Carrier made an effort to contact the Claimant; it is simply that the Carrier did not call the appropriate telephone number to reach the Claimant. The Claimant was the appropriate person because he was a track foreman and the Claimant had more seniority than the person that was actually called in to work that day. Consequently, we find that the Carrier violated the contract when it called in the wrong person to do the work. The Carrier compounded its own problem by failing to call the Claimant at the number that he had listed for telephone calls of this kind.


Consequently, the Organization has met its burden of proof in this case. The Claimant should have been called in to work, and the Carrier failed to make the appropriate effort to do that. Therefore, the claim must be sustained.

AWARD:

The claim is sustained.



PETER R. MEYERS
Neutral Member


ORGANIZATION MEMBER

DATED: May 10, 2010


CARRIER MEMBER

DATED: May 10, 2010