

BEFORE PUBLIC LAW BOARD NO. 7007

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

Case No. 13

STATEMENT OF CLAIM:

- (1) The Agreement was violated when the Carrier failed to call and assign Foreman R. Feole, Assistant Foreman J. Crawford and Machine Operator J. Silviera for scheduled overtime service assisting the Rosemont Maintenance Gang in changing Sperry rail defects on the West Route Main Line on January 3, 2004, and instead called and assigned junior employees D. Nickerson, D. Fitzgerald and A. Yandow (Carrier's File MBCR-BMWE-09/0504).
- (2) The Agreement was violated when the Carrier failed to call and assign Foreman R. Feole, Assistant Foreman J. Crawford and Machine Operator J. Silviera for scheduled overtime service assisting the Rosemont Maintenance Gang in changing Sperry rail defects on the West Route Main Line on January 4, 2004, and instead called and assigned junior employees T. Mangiafico, D. Fitzgerald and D. Goodwin (Carrier's File MBCR-BMWE-10/0504).
- (3) As a consequence of the violations referred to in Part (1) above, Claimants R. Feole, J. Crawford and J. Silviera shall now be compensated at their respective time and one-half rates of pay for all overtime hours worked by junior employees D. Nickerson, D. Fitzgerald and A. Yandow on January 3, 2004.
- (4) As a consequence of the violations referred to in Part (2) above, Claimants R. Feole, J. Crawford and J. Silviera shall now be compensated at their respective time and one-half rates of pay for all overtime hours worked by junior employees T. Mangiafico, D. Fitzgerald and D. Goodwin on January 4, 2004.

FINDINGS:

The Organization filed the instant claim alleging that the Carrier violated the parties' Agreement when it failed to assign the Claimants to perform the work in question, instead assigning more junior employees. The Carrier denied the claims.

The Organization initially contends that there is no dispute as to the Claimants' superior seniority, so this dispute centers on the Carrier's reason for not affording the Claimants this overtime opportunity. The Organization asserts that seniority is one of the most important cornerstones upon which collective bargaining agreements are made. Arbitral boards have long recognized that seniority is a valuable property right of an employee, and that overtime must be assigned on the general principle of seniority.

The Organization argues that the Carrier made no attempt to contact the Claimants and assign them the planned non-emergency overtime work in question. The Organization maintains that the Claimants were fully qualified and readily available for duty, but they were not afforded the work opportunity to which they were entitled by virtue of their seniority.

Addressing the Carrier's defense of its actions based on some alleged past practice under a previous agreement, the Organization emphasizes that the Carrier did not present a single shred of evidence that the previous understanding was carried forward under the current Agreement. The Carrier presented no credible evidence whatsoever to support its affirmative defense.

The Organization maintains that the Agreement's seniority provisions are clear and unambiguous, and there is no dispute as to the Claimants' superior seniority in this instance. Moreover, the numerous references to seniority in the Agreement and various letters of understanding demonstrate that the parties fully understood the meaning and importance of such provisions. The Organization points out that this Board repeatedly has held that agreements must be applied as written. The Organization emphasizes that

under these circumstances, there can be no question that the Carrier violated the Agreement when it failed to afford the Claimants to perform the work in question. The Claimants therefore are entitled to the requested remedy.

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. The Carrier asserts that the claim is excessive and should be denied or dismissed in its entirety.

The Carrier argues that the Organization has failed to specifically identify how the Claimants enjoyed a right to be called for this planned overtime under Rule 11.4. The Carrier points out that the work was maintenance work, and the employees assigned to it held regular positions in a maintenance crew at an outlying headquarters point, albeit not the Rosemont headquarters. The Carrier emphasizes that the Claimants all belonged to a Production Gang as described in Rule 29, and they held positions in the auxiliary welding crew without an assigned headquarters point.

The Carrier maintains that there is nothing in Rule 11 that establishes a demand right of the Claimants to the requested overtime; the Claimants were not located at the headquarters point, and they did not ordinarily and customarily perform such work. The Carrier insists that there was nothing out of the ordinary in the manner in which this work was assigned. The Carrier argues that Rule 11 does not provide that employees will be called in seniority order from the respective rosters after exhausting the headquarters point.

The Carrier then argues 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 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 did not call in more senior employees to perform the overtime work. The record reveals that the Claimants were employed by the Carrier in the Engineering Department. The work that was performed and that is at issue was maintenance work, and the employees that were assigned to perform that work regularly performed maintenance work in a crew at an outlying headquarters. The Claimants were part of a production gang and not maintenance employees.

Rule 11.4 states the following:

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 work day 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 (a) above shall be to the senior available qualified employee at the

headquarters who ordinarily and customarily performs such work.

The claimed work constituted maintenance work. The Claimants did not ordinarily and customarily perform such work. The Claimants were part of a production crew.

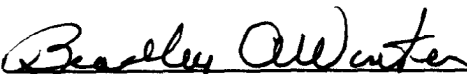
The Organization must meet the burden of proof in order for it to prevail on a claim. In this case, the Organization has failed to meet its burden of proof that the Carrier violated Rule 11.4 when it assigned the overtime at issue. Therefore, the claim must be denied.

AWARD:

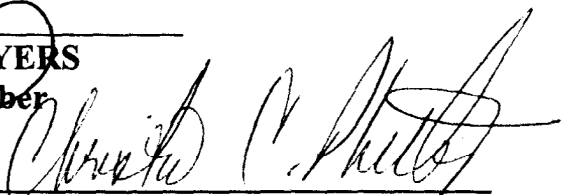
The claim is denied.



PETER R. MEYERS
Neutral Member



ORGANIZATION MEMBER



CARRIER MEMBER

DATED: 4/9/09

DATED: April 9, 2009