

SPECIAL BOARD OF ADJUSTMENT NO. 1048

AWARD NO. 117

Parties to Dispute:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

AND

NORFOLK SOUTHERN RAILWAY COMPANY

(Carrier File MW-ROAN-00-70-LM-512)

Statement of Claim:

Claim on behalf of B. L. Harry for eight (8) hours at the overtime time rate in that Section Foreman, B. A. Falls, was used to drive a dump truck on October 14, 2000.

Upon the whole record and all the evidence, after hearing, the Board finds that the parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended, and this Board is duly constituted by agreement under Public Law 89-456 and has jurisdiction of the parties and subject matter.

AWARD

After thoroughly reviewing and considering the transcript and the parties' presentation, the Board finds that the claim should be disposed of as follows:

BACKGROUND

This case questions the use of a section foreman to drive a dump truck on an overtime basis to haul stone over his own section gang territory in lieu of using an assistant section foreman or another section territory who was senior as a machine operator.

On Saturday October 14, 2000¹ a need arose to haul stone on a portion of the territory maintained by the Narrows Section Gang. B.A. Falls, the assigned section foreman at Narrows was assigned this overtime task and used a dump truck to complete the assignment. The record evidence confirms that

¹ All dates herein occurred in calendar year 2000 unless otherwise noted.

this particular dump truck was not used on a regular basis and accordingly, there was no established machine operator position associated with this particular vehicle. B. L. Harry, the Claimant herein, was the assigned Assistant Foreman at the Whitethorne Section, where no work was performed at this time. The Organization submitted a claim for eight (8) hours at the overtime rate, maintaining that since a dump truck was utilized, the Claimant, who was assigned as an assistant section foreman on the Whitethorne Section Gang, should have been called since as a Machine Operator, since he was senior to the Narrows Section Falls foreman. Moreover, the Organization asserts that the dump truck is an assigned machine operator position and does not fall to section foreman. The Carrier denied the claim on the basis that driving a dump truck does not exclusively accrue to the machine operator classification, particularly when the particular truck used to haul stone was not regularly assigned to a machine operator due to its sporadic use.

DISCUSSION

In making a determination based on the facts herein, the Organization, who bears the burden of proof in this case, must be able to point to a specific Rule or the existence of an exclusive system-wide practice that supports its claim. In this regard, the Organization points to Rules 2 (Seniority Groups, Classes & Grades), 3 (Establishment of Seniority), 4 (Seniority Rosters), 5 (Seniority Rights) and 39 (Overtime) in support of its claim. These Rules are general in nature: Rule 2 defines seniority groups and includes the title of Machine Operator as part of Group 1. Rule 3 provides guidance on the establishment of seniority, Rule 4 provides for the creation of separate seniority rosters showing the names of employees with their seniority dates, Rule 5 provides guidance on the use of seniority rights generally, and Rule 39 provides general guidance on overtime and overtime payment. Respectfully, none of the Rules cited by the Organization grants an assistant foreman the right to work overtime based on his machine operator seniority. In addition, given the undisputed fact that this particular dump truck was not regularly assigned to a machine operator position during the normal work week, there is no Rule that requires that a machine operator be called for this particular overtime assignment on the basis that a dump truck was used as an integral part of this overtime assignment.

The inability of the Organization to point to a specific Rule or a custom, history or practice of sufficient duration to demonstrate the mutual intent of the parties is fatal to their claim. In this regard, the Board finds compelling an Award issued by Referee Peter Meyers that dealt with a substantially identical situation on the property between these same properties. In PLB 1837, Referee Meyers relied on arbitration precedent in denying a claim of an assistant foreman account a crane operator obtained track time for a work train, noting the following as the basis of his decision:

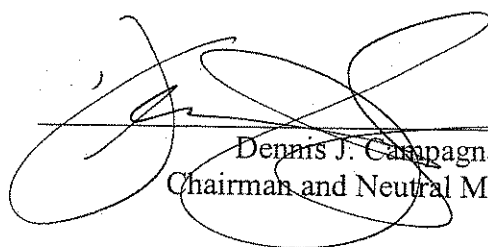
The Board has reviewed the record in this case, and we find that the work of securing track time that was performed by the crane operator was not work which exclusively accrued to the assistant section foreman classification either by agreement language or system-wide exclusive past practice. Numerous arbitration awards have held that when the scope and classification rules are general in nature, the Organization bears the burden of proof that the disputed work has, by custom and practice, been performed by one classification to the exclusion of all other employees. The Organization has failed to meet that burden of proof in this case.

The Board has reviewed the cases cited by the Organization in support of its contention and finds them unconvincing. The Third Division Case between the Brotherhood of Railroad Signalmen and Union Pacific Railroad Company, while finding in the Organization's favor, dealt with a fact pattern not remotely close to the case before this Board. In that case, while holding that the principle of the assignment of overtime on a seniority basis governs unless restricted by Rules or practice, the Board noted that the signal failure leading to the four hour overtime assignment at issue occurred in an adjacent territory where the assigned employees were both unavailable, and the Claimant and junior employee worked in the same joint signal maintenance territory. Accordingly, there was no reason to deny the most senior employee the overtime. (Award # 33909) A second Third Division case between the BMWE and Consolidated Rail Corporation (Award #35420) turned on a well established practice that provides that while a Carrier is not obligated to use employees of a certain class, but chooses to do so, it is obligated to choose from that class on the basis of seniority. Accordingly, once the Carrier elected to offer Trackmen's overtime on the Pittsburgh Seniority District to Repairmen assigned to the Canton Maintenance of Way Shop seniority district, it was obligated to assign this overtime according to the Canton employees seniority. This case, while interesting in its own right, has no relevance to the facts at hand.

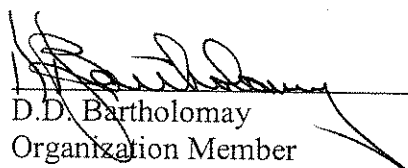
Given the foregoing, the Board finds that the Organization has failed to prove that the work performed by B.A. Falls should have been performed by the Claimant either on the basis of a specific Rule or the existence of an exclusive system-wide practice that supports its claim. Accordingly, the claim must be denied.

CONCLUSION

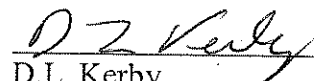
The claim is denied.



Dennis J. Campagna
Chairman and Neutral Member



D.D. Bartholomay
Organization Member



D.L. Kerby
Carrier Member

July 24, 2006
Dated