

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37204
Docket No. MW-36486
04-3-00-3-759

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier called and assigned junior employees J. Reed and P. Guzman to perform overtime service (operate tamper in the replacement of crossings) in the vicinity of Elvas Tower on October 24, 1999 instead of calling and assigning Mr. J. W. Brown (Carrier's File 1215199 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. W. Brown shall now be compensated for twelve (12) hours' pay at his respective time and one-half rate of pay."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

This dispute involves an overtime assignment to operate a Class 6a Tamper on Sunday, October 24, 1999 which the Organization alleges should have been made to the Claimant based upon his seniority rather than to the junior employees utilized. The record contains two e-mail statements from the Carrier's supervisors involved in such assignment written within a month of the incident, including one from Engineering Supervisor Davis who states that he asked for volunteers to work this overtime at the job briefing on Friday morning, October 22, 1999, and, despite being present, the Claimant failed to come forward or indicate his desire to work the overtime. The correspondence on the property also includes a written statement from the Claimant dated one year after the overtime in issue, indicating that Davis only asked for a Speed Swing Operator to work the October 24 overtime at the morning briefing, never mentioning a Tamper Operator, and sought no other volunteers. The Claimant asserts that the employees assigned the disputed overtime said that they were asked by a Foreman on Thursday night, October 21, 1999.

The Organization contends that, even if the Carrier sought volunteers at the morning briefing as alleged, it failed to follow the proper procedure in offering overtime by seniority, asserting that the Claimant should have been asked first, relying upon Third Division Awards 20120 and 19758. The Organization argues that the Carrier's offer of nine hours pay on the property is a tacit admission of liability, and argues that there is no dispute that the junior employees worked for 12 hours at the overtime rate, which is the appropriate remedy.

The Carrier argues that, at best, there is a fundamental dispute in material facts presented in this case. Pointing to the statements of Davis and the Claimant, it notes that Davis asserts that the Claimant was offered the same opportunity to work the disputed overtime as any other employee, but failed to come forward and express any interest in the assignment until after the fact. The Carrier points out that the Claimant acknowledges that Davis did ask for volunteers of some sort at the briefing. On the other hand, the Claimant denies that Davis asked for volunteers in general or for a Tamper operator, and states that he was never offered the

opportunity to work this overtime. The Carrier relies upon Third Division Awards 33895, 33487, 30593, 28790, 26406, and 21436 in arguing that the Board must dismiss this claim because it has no means of resolving this irreconcilable dispute of facts. The Carrier also contends that its manner of offering overtime in this instance complies with its contractual seniority obligations.

Initially we note that the Organization has not established a per se violation of the Agreement by the manner in which overtime was admittedly offered to this group of employees on October 22, 1999. A careful review of the record convinces the Board that this case does present an irreconcilable dispute of material fact with respect to the determinative issue of whether the Claimant was offered the opportunity to work the disputed overtime. We have no way of measuring the validity of the Claimant's statement or that of Supervisor Davis. As repeatedly noted by the Board in such circumstances, we function as an appellate body and have no way of resolving evidentiary conflicts or factual disputes. See Third Division Awards 28790 and 21436. Because this dispute of fact prevents the Organization from sustaining its burden of proving that the Carrier violated the Agreement as alleged, the claim must be dismissed. See Third Division Award 36406.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 28th day of September 2004.