

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37857
Docket No. MW-37099
06-3-01-3-662

The Third Division consisted of the regular members and in addition Referee Joan Parker when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former
(Missouri Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Arkansas Division Foreman W. Ault, for overtime service (flagging and related work) for outside contractor picking up rail between Mile Posts 295.0 and 364.0 on the Pine Bluff Subdivision on August 5, 6, 12, 13, September 2, 3, 4 and 9, 2000 and instead called and assigned junior Foreman D. Bingham (System File MW-01-6/1249474 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Ault shall now be compensated for ninety-two (92) 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.

The Claimant is a Track Foreman who holds seniority in the Track Subdepartment on the Arkansas Division. At the time pertinent herein, the Claimant was assigned to Division Gang 8001 and headquartered in Camden, Arkansas. Foreman D. Bingham also holds seniority in the Track Subdepartment, Arkansas Division. It is undisputed that the Claimant holds seniority greater than Bingham's. Both the Claimant and Bingham at the time in question worked a regular workweek of Monday through Friday, 8:00 A.M. to 4:30 P.M., with Saturday and Sunday as assigned rest days.

During the months of August and September 2000, an outside contractor was picking up rail between Mile Posts 295 and 364 on the Pine Bluff Subdivision, and required flagging on weekend and holidays. Foreman Bingham performed the flagging work on an overtime basis.

On October 2, 2000, the Organization submitted a claim on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement by failing to assign the overtime, rest-day flagging work to the Claimant. The Carrier denied the claim, and having failed to reach a satisfactory resolution of the issues on the property, the parties submitted the dispute to the Board for final and binding resolution.

The Organization contends that the Claimant was entitled to the overtime flagging work under the Agreement's Rules governing seniority, including Rule 1(c) which states, "Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad." According to the Organization, Rules similar to Rule 1(c) have been held by arbitral precedent to apply to all positions, whether regular, temporary or overtime. The Organization cites Third Division Award 20120 for the proposition that the Carrier is obligated to call a senior employee before a junior employee to notify him of a temporary vacancy. In the instant case, the Organization asserts, the Carrier failed to make the Claimant aware of the overtime work opportunity, and

the Carrier presented no "firsthand" or probative evidence to the contrary. The Organization relies on a handwritten statement received from the Claimant on July 5, 2001, stating, "I was not offered the overtime that I turned [in] a claim on between August 5th to September 9, 2000."

Central to the Organization's claim is the assertion that the Carrier notified the junior Foreman, Bingham, of the overtime work opportunity before notifying the Claimant (whom the Organization contends was never notified at all). The Carrier, however, contends that Manager Track Maintenance M. A. Turner advised all Foremen under his supervision of the overtime work opportunity in a conference call, so that the Claimant was made aware of the opportunity in the same manner and at the same time as Bingham. Having been made aware of the opportunity, the Claimant could have elected to exercise his seniority to claim the overtime work. According to the Carrier, the Claimant did not contact Turner to express interest in the overtime work, while Bingham did. The Carrier submits two Lotus Notes from Turner in support of its contention. The first, to J. J. Stoner dated November 6, 2000, states, "Bill Ault was not [denied] the over time. He neaver [sic] ask to work. He did not tell me that he wanted to work any over time or would have let him work. Mr. Bingham ask for the over time, and Mr. Ault did not ask." The second is dated March 28, 2001, and is addressed to R. M. Winkenbach:

"Foreman Ault was wholly aware of the over time, and if he had stepped forward and requested the over time he would ben[sic] allowed to work the over time. I talk to Foreman [Ault] every day, this overtime work was not part of foreman [regular] job but if he had ask for the overtime I would have let him work. I have phone conference with all my men every day. Foreman Bingham did ask for the overtime."

The Carrier further argues that at no time during the on-property handling of the instant claim did the Claimant or the Organization refute the assertion that the overtime rest-day work opportunity was common knowledge among the Foremen.

Turner's statements regarding his having informed his Foremen of the overtime work opportunity are not "general third party statement[s]," as the

Organization argues. The Organization cites Public Law Board No. 2960, Award 109 in support of its contention in this regard. However, Award 109 is not factually analogous to the instant case. In Award 109, the Carrier disputed what a Foreman had told the claimants, but presented no statement from the Foreman himself. Here, the Carrier has presented statements from the Claimant's direct Supervisor that the Claimant (and every other Foreman under Turner) was made aware of the work opportunity at issue. While Turner's statements do not explicitly express that he offered the work to the Claimant, neither does the Claimant's statement explicitly express that he was not aware of the work opportunity. The Board notes that the work in question proceeded over a month-long period, on four separate weekends. At any point during that period, upon becoming aware of the work, the Claimant had the ability to assert his seniority to claim the work. There is no evidence in the record, however, regarding when - according to Claimant - he did become aware of the work or why he would have been ignorant of its existence until after it had been completed.

The Board finds that the scant evidence in the record in the instant case presents an irreconcilable dispute of fact that the Board is without the authority to resolve. In a case very similar to the instant matter, Third Division Award 30591 the claimant supported his contention that the Carrier had not called him for overtime by submitting statements written by himself, his wife and his son, asserting that he had been home the entire day on the date in question. The Carrier presented a statement from the claimant's supervisor stating that the claimant had not been home when called and had shown up three hours later, after the work had been given to a junior employee. The Board stated:

"This Board is unable to determine from this record whether Carrier, in fact, failed to call Claimant. We have held in numerous other Awards that where there is a dispute in facts, it falls to the moving party to present sufficient evidence of a probative nature to convince the Board that its version of events is correct. The evidence in this case falls far short of meeting that burden. As a consequence, the claim must be dismissed."

The Board is unable to determine from the record in the instant case whether Turner told the Claimant about the overtime work opportunity at issue or not.

Turner said he did, the Claimant said he did not. Without authority to resolve this factual dispute in the Organization's favor, the Board is unable to reach the issue of whether the Carrier violated the parties' Agreement as the Organization alleges. The Organization failed to present evidence sufficient to meet its burden of proof regarding the material facts of its claim, and the Board must dismiss the claim.

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 1st day of August 2006.