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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37959
Docket No. MW-37113
06-3-01-3-656

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 H. Brown, Jr. for overtime service (flagging and related work) for Tamper ATS 305S on the Pine Bluff Subdivision between Mile Posts 385.0 and 386.0 in the vicinity of Stamps, Arkansas on September 16 and 17, 2000 and instead called and assigned Welder J. T. Mulholland (System File MW-01-91/1250826 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Brown, Jr. shall now be compensated for (30) hours pay at his respective time and one-half rate of pay and for five (5) hours pay at his respective double time 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.

On September 16 and 17, 2000, there was overtime work to be performed at Stamps, Arkansas. The Claimant held seniority as a Track Foreman in the Track Sub-department. He was not assigned the overtime. The Carrier assigned the flagman's duties to Welder J. T. Mulholland, an employee junior to the Claimant.

There is no dispute in the record that Welder Mulholland worked 30 hours of overtime and five hours of double overtime performing flagman's duties. The Organization filed claim alleging that the Claimant was due the work according to his seniority. There is no dispute that the Claimant had greater seniority and was not used to perform the work.

The Carrier denied violation of the Agreement arguing that the Claimant did not request the overtime. The Carrier further argues that even so, this work did not belong under the Scope of the Agreement to the Organization. Among other arguments, the Carrier holds that the Claimant had no direct right to the work and the overtime assigned to the junior employee was fully consistent with past practice and the provisions of the Agreement.

The Board notes that there is nothing in the record that assigns the work of flagging to BMWE-represented employees. The Carrier stated that "... the function of flagging is not reserved to any class or craft of employees." There is no contrary proof in the record. Additionally, the Carrier noted that the Claimant did not request the overtime. The Carrier presented a statement from its investigation, wherein Manager Track Maintenance Turner stated:

"Mr. Brown was not denied the overtime, he did not ask for the overtime. Mr. Brown is headquartered at Camden, 55 miles away, and Mr. Mulholland is headquartered at Lewisville, 5 miles away, but if Mr. Brown would have said that he wanted to work the overtime, I would have let him."

The Board finds no rebuttal. The on-property claim by the Claimant makes no reference regarding the surrounding events or practice relevant to this flagging claim.

The Board carefully studied the record. The Organization argued that because this is the same work and class of work performed by the Claimant during his regular workweek, it was, therefore, work that belonged to the employees. The Carrier directly denied and argued that there was no "... specific Agreement language embodying such restrictions." The Board is not persuaded that this work must only be performed by a Track Foreman. There is no language or proof of exclusivity presented on the property to support this assertion.

The Board studied the Rules and the Organization's arguments in response to the Carrier's statement that it is the "... Carrier's managerial prerogative to assign whatever class or craft of employee to perform required flagging." Our study of the Awards cited by the parties and the on-property record support the Carrier.

While seniority assignment is protected by Agreement, the failure of the Organization to provide probative evidence of the Claimant's right to this work over that of a Welder is what lies as the basis of this claim and the Board's rejection. If there was probative evidence that the Carrier was restricted from using employees in different sub-departments the Organization might prevail. Absent evidence that the Carrier used a junior employee in the same sub-department or that language prohibited the use of a Welder as opposed to a Track Foreman, the claim must fail.

AWARD

Claim denied.

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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 19th day of September 2006.