

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37993
Docket No. MW-37042
06-3-01-3-671**

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
(The Texas Mexican Railway 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 B&B Foreman L.H. Serna for B&B Sub-department overtime service (repair wooden crossing plank) between Mile Posts 92.00 and 93.00 in the vicinity of Benavides, Texas on December 8, 2000 and instead called and assigned junior Trackman M. Paz (System File MW-01-4-TM).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. H. Serna shall now be compensated for three (3) 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.

Claimant L. H. Serna holds over 23 years' seniority in the B&B Sub-department. M. Paz holds seniority in the Track Sub-department. At the time pertinent herein, both the Claimant and Paz were headquartered in Corpus Christi, Texas, and regularly assigned to work Monday through Friday, 7:30 A.M. to 4:00 P.M. The Claimant was working as a B&B Foreman, while Paz was working as a Trackman on Section Gang No. 2.

On Friday, December 8, 2000, at approximately 5:00 P.M., a passing train damaged a plank in a wooden crossing between Mile Posts 92.00 and 93.00, near Benavides, Texas. The Carrier called Paz to repair the plank, which required him to expend three overtime hours. According to a handwritten statement by the Claimant, dated December 12, 2000:

"I . . . am submitting this claim because [the Carrier] violated [the parties' Agreement] when Miguel Paz was called to work overtime on Friday December 8, 2000 at Benavides, Texas . . . [The parties' Agreement] specifically stipulates that employees will be given preference for overtime work for which they are qualified and available on the basis of seniority . . . I'm senior to Mr. Paz, the telephone at the Alice [Texas] bunkhouse was in working order, but I wasn't called . . . I was in the Alice bunkhouse when Mr. Paz came to the bunkhouse and drove M.W. #186 to Benavides. . . ."

Rule 1 of the parties' Agreement provides in pertinent part: "... except in emergency cases when Bridge and Building forces are not available track forces or forces from other departments will not be used to perform work in the Bridge & Building Department. . . ."

The Organization filed a claim on the Claimant's behalf on February 3, which the Carrier denied on March 19, 2001. The parties exchanged additional correspondence and discussed the matter in conference. Having failed to resolve the matter, the parties submitted it to the Board for final and binding resolution.

The Organization contends that no Rule 1 exceptions were present in the instant case, and that therefore the Carrier's making an assignment of the work in

question across sub-department lines was improper. According to the Organization, the Carrier submitted no evidence supporting its position that the damaged plank in the crossing constituted an emergency situation where immediate repair was necessary due to stoppage of trains. The Organization argues that the work could well have been performed over the weekend. Moreover, the Claimant's statement establishes that he was in the Alice bunkhouse and available to perform the work when the Carrier called Paz, and the Carrier submitted no evidence refuting the Claimant's statement. Under the parties' Agreement, B&B work can be assigned to Track Sub-department employees only in the case of a bona fide emergency, where no B&B employee is available. Therefore, the Organization submits, the claim should be sustained.

After a thorough review of the record, the Board finds that the Agreement was violated. While the Carrier contends that the Claimant was not available for the overtime work in question, alleging that he worked three hours of overtime making repairs to a bridge at MP 149.71 after his regular shift on December 8, 2000, the only evidence the Carrier submitted in support of its allegation is the Claimant's timesheet for December 8. The Claimant did indeed note three hours of overtime on his timesheet. However, nothing on the timesheet indicates when those three overtime hours were performed. The Carrier asserts that they were performed from 3:30 P.M. to 6:30 P.M., but again submitted no evidence to support its assertion. Based on the Claimant's timesheet, he may just as well have performed the three hours of overtime prior to his regular shift. The Carrier simply has not presented sufficient evidence (for example, statements from witnesses who were in a position to know the Claimant's whereabouts at the pertinent times) to refute the Claimant's detailed statement that he was in the Alice bunkhouse at 5:00 P.M. and available to perform the overtime work performed by Paz. Moreover, while the Carrier asserts that the damaged planking constituted an emergency repair situation, it submitted no evidence in this regard, nor even described the nature of the damage. Based upon the facts as established by the record, the Board must sustain the claim.

AWARD

Claim sustained.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of October 2006.