

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38039
Docket No. MW-37123
06-3-01-3-675

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 Track Welder Helper M. A. Sotomayor for overtime service (removing and installing insulated joints, rail and rail anchors and help weld rail ends) at Mile Post 807.00 at Clint, Texas on the Del Rio Sub-division on August 12 and 13, 2000 and instead called and assigned junior employee R. Serna (System File MW-01-20/1250811 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. A. Sotomayor shall now be compensated for fourteen (14) 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.

Welder Helper M. A. Sotomayor alleged that on August 12 and 13, 2000, the Carrier ordered junior employees to work overtime "installing anchors to area where insulated plug was made." During the progression of the claim on the property, the Organization alleged violation of Rule 1(c) in that the Claimant possessed seniority as a Welder Helper and was not called to perform the overtime work. In fact, the Organization argued that the work of assisting Welder M. Lopez on the days of the alleged violation was performed by Division Track Foreman Serna. Serna was not a Welder Helper and had no right to the work. The Organization points out that Track Foremen and Welder Helpers are separate classes of employees and there is no Agreement provision or right to remove the work from the senior employee of a class and delegate such overtime work to an employee who does not possess the proper seniority and in fact holds no seniority as a Welder Helper.

The Carrier maintained initially that the Foreman called out employees for the work and that the Claimant must not have answered his phone or he would have been working. It further argued during the progression of the claim that "there has been no showing that Track Foreman Serna performed any alleged 'welder helper's work' on either August 12 or 13, 2000." It denied the claim.

As a preliminary point, the Board has often made it clear that attempts at settlement of disputes on the property will not be considered in any manner during our deliberations. This neutral has made that absolutely clear and will therefore not elaborate on the issue in this Award (Fourth Division Award 4906).

What we do center our decision upon is the Organization's burden to produce a prima facie case of an Agreement violation. Central to that case the Organization must present evidence that Track Foreman Serna performed Welder Helper work. This is particularly the case when, as here, the Carrier explicitly stated that "there has been no showing that Track Foreman Serna performed any alleged 'welder

helper's work'. . . ." We find no probative evidence to support a finding that Welder Helper's work was performed on either of the claim dates.

It is the burden of the Organization to present a prima facie case. It must have sufficient evidence to support its assertion that Welder Helper's work was performed. The Organization states that Track Foreman Serna performed Welder Helper work, but after the Carrier challenged that assertion, the Organization failed to come forward with any probative evidence. The on-property record presents an irreconcilable conflict in facts. The Board finds that it cannot decide from the record at bar if the work performed on August 12 or 13, 2000, was or was not Welder Helper work. The claim must therefore be dismissed.

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 21st day of December 2006.