

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39670
Docket No. MW-38816
09-3-NRAB-00003-050228
(05-3-228)**

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier directed Assistant Foreman A. Teller to vacate his position on Gang 8558 at the close of his shift on January 11, 2004 and utilized a junior employe to work said position on January 12, 13 and 14 2004 (System File W-0420-153/1396614).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Teller shall now be compensated for ‘ . . . all straight time and Overtime hours worked on his position of Assistant Foreman on gang 8558 on the dates of January 12th 13th and 14th 2004, and the per-diem for those same days.’”**

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 underlying facts of this case are not in dispute. In January 2004, the Claimant was assigned to System Gang 8558 in Palm Springs, California. He bid on, and was awarded, a position on System Gang 8553 in Phoenix, Arizona, effective January 15. The Carrier released him from System Gang 8558 on January 11.

The Organization contends, and the Carrier does not dispute, that the Claimant was, in the normal course of events, entitled to work on Gang 8558 through January 14, 2004. In its denial of the Organization's claim for compensation for the Claimant for those days, the Manager of Labor Relations explained the Carrier's reasons for releasing the Claimant early:

"(I)t has been brought to my attention by Manager Special Projects, Curt Maddex, that Claimant requested to be released early from Gang 8558 due to family problems. Claimant had been going through numerous family issues that caused him to miss work and leave work early. Claimant's managers and supervisors had been generously allowing him time to deal with the difficulties in his personal life. As a result of this information, claim is denied because Claimant was released from Gang 8558 due to his own request and through no fault or rule violation of the Carrier."

The Carrier record includes an unsigned and undated memo, on the letterhead of the Manager Special Projects, which recites, in relevant part:

"(I)t is true Mr. Teller received a bid for a position which was not in effect until the 15th of the month. Prior to Mr. Teller receiving this bid Mr. Teller was having many problems at home to the point of not showing up for work and on several times was sent home because of safety to himself and others. Mr. Teller told us he was bidding off to be closer to home, so when he received his bid he had asked Tommy Vega (the foreman) if he could be released early to go home to take care of personal issues. . . . When asked by Tommy

Vega if Mr. Teller could have the time off early to start the new position there were no questions asked why not to accommodate him.”

The Claimant submitted a statement in which he denied having made a request to leave System Gang 8558 early.

The issue in this case is the reason for the Claimant’s early release from Gang 8558. The Carrier contends that because it provided a statement that the release was at the Claimant’s request, and the Claimant denies having made such a request, this matter presents an irreconcilable factual conflict as to the central issue in this case, a conflict which cannot be resolved in this forum. Thus, the Carrier asserts, the Organization failed to meet its burden of proving that the Carrier violated any Rules by forcing the Claimant to leave early, and the claim should be dismissed.

We cannot agree that this matter should be dismissed on the basis that it presents an irreconcilable factual conflict. The Carrier does not dispute that the Claimant would, in the normal course of events, have been entitled to work his old assignment until his new one began on January 15, 2004, and that he was released early. That fact is sufficient to establish the Organization’s prima facie case. The Carrier raised the affirmative defense that the Claimant was released at his own request, and the Carrier bears the burden of proof on that issue. In support of its position, the Carrier proffered the unsigned, undated statement on the Manager of Special Projects’ letterhead. The statement does not assert that the Claimant made the request to leave early to the Manager of Special Projects, but rather recites a hearsay allegation that the request was made to the Claimant’s Foreman. Significantly, there is no statement from the Foreman, the witness with primary knowledge of the events, or any documentary evidence supporting the Carrier’s version of events.

It was incumbent upon the Carrier to provide direct evidence in support of its affirmative defense. The Carrier’s unsigned, undated, hearsay statement is, we find, insufficient to create an irreconcilable conflict of fact, especially because the Claimant provided a statement that he did not ask for early release, and is too lacking to overcome the Organization’s prima facie case. Because the Carrier does not dispute that the Claimant would have been entitled to work the days in question

absent his supposed request to leave his assignment early, the claim will be sustained.

AWARD

Claim sustained.

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 22nd day of April 2009.