

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40230
Docket No. MW-40523
09-3-NRAB-00003-080320**

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

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(and North Western Transportation Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign District Gang 3436 Foreman D. Perdue, II to overtime service on Gang 3436 territory between Tama and Ames, Iowa on January 14, 15, 16, 17, 18, 19, 20, 21, 22 and 23, 2007 and instead called trackmen from Gang 3436 (System File R-0731C-302/1469135 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Perdue, II shall now be compensated for a total of one hundred six and one-half (106.5) hours 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 underlying facts are not in dispute. The Carrier had Trackmen clear snow on an overtime basis over a period spanning from January 14 through 23, 2007. The Claimant requests 106.5 hours of overtime pay. He asserts that he was available, willing, and able to perform the overtime. He serves as the Foreman on Gang 3436 that operated at the time between Tama, and Ames, Iowa. The Carrier had Trackmen remove snow. The Carrier did not call the Claimant to supervise the snow removal by employees in his gang.

The Organization claims that Trackmen are not trained to obtain on-track safety permits, nor are they qualified to operate on-track vehicles. The Claimant is Rules qualified, and he regularly supervises employee performance of work. The Carrier violated Rule 3B that defines the work of a Foreman when it failed to call the Claimant to perform the Foreman functions in the performance of snow removal by the Claimant's Gang 3436. The Organization argues that the Carrier cannot have another classification of employees perform the Foreman's duties and assume his responsibilities.

The Carrier contends that there is no contractual requirement that the Carrier have a Foreman on the job at all times that employees perform assigned work. On the contrary, it falls within the managerial prerogative to determine the amount of supervision in place and to determine the consist of its crews.

The Board reviewed the record evidence developed by the parties on the property. There is no evidence that indicates that the duties and responsibilities of a Foreman were performed on any of the days the Trackmen of Gang 3436 cleared snow between January 13 - 24, 2007. The absence of evidence establishing this factual predicate removes the underpinnings of the Organization's claim. There is no contractual restriction on the Carrier's utilization of its forces, where the work of the classification that is the subject of the claim was not performed.

Third Division Award 11441 established that:

“The agreement does not require the assignment of a foreman under any particular circumstances as long as the duties of a foreman are not performed by any other employee.”

The Board recognized the principal that management determines the amount of supervision to be employed. See Third Division Award 14041.

The Board concludes that the Organization failed to meet its burden of proof by establishing that the Carrier violated a Rule.

AWARD

Claim denied.

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 2009.