

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40247
Docket No. MW-39523
10-3-NRAB-00003-060333
(06-3-333)**

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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 failed to call and assign Messrs. J. Moreno, A. Rodriguez and M. Alvarez for overtime service (unloading rail) on the Lordsburg, New Mexico, Subdivision between Mile Posts 1228 and 1278 on May 1 through May 4, 2005, and instead called and assigned junior employees H. Miramontes, F. Miramontes, E. Torres and A. Molina (Carrier’s File 1426775).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Moreno, A. Rodriguez and M. Alvarez shall now ‘... be paid their appropriate share of two hundred (200) hours at the time and one-half rate worked by Mr. Hector Miramontes, Mr. Fernando Miramontes, Mr. E. G. Torres, and Mr. Alfonso Molina from May 1, 2005 through May 4, 2005.***”**

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 Organization filed a claim for non-emergency overtime work performed by junior employees on System Gang 8541 on May 1, 2, 3 and 4, 2005. The gang was working a compressed work schedule and these four days were rest days. Specifically, the junior employees assisted with unloading ribbon rail.

The Organization maintains that the Carrier violated the Agreement when it used junior employees and did not call the Claimants, who were readily available, fully qualified, willing to perform the work and senior to the employees who worked the overtime.

The Carrier counters that the Claimants were informed of the overtime opportunity and did not want the work. According to the Carrier, only one Claimant filed a statement in support of the claim, and that the statement is not specific. Further, there are four Claimants, but only one statement about one Claimant. According to the Carrier, because there is a dispute in material fact, the claim must be dismissed. The Organization asserts that there is no dispute in fact because the Carrier's statement does not contain sufficient facts to refute the claim.

The initial claim was filed on May 23, 2005. During handling of the claim, the Carrier supplied an email statement from Track Supervisor K. Borron regarding the claim. His email is dated June 14, 2005 and states:

"I talked to everyone the morning before their days off [and] told them there would be a rail train to unload. [T]he foremans were to get volunteers to work the rail train. Art Romero the surfacing foreman had asked these men if they want[ed] to work the rail train and they DECLINED. THEREFORE THIS CLAIM IS DENIED."

The Organization supplied a handwritten statement from Claimant Moreno regarding the claim. His statement is dated July 25, 2005 and states:

“I, Julio Moreno asked the Foreman of Gang 8545 to work overtime. I told him I was willing and available for as many days as he need[ed] me. He did not inform or call me.

Julio R. Moreno”

The Board carefully reviewed the record evidence. The Organization maintains that Claimant Moreno requested the overtime, but was not called. The Carrier contends that all employees on Gang 8545 were informed of the overtime opportunity and that the Claimants did not inform their Foremen of their desire to work overtime.

In the instant matter, the Board is confronted with a conflict in the facts regarding whether the Claimant was offered the opportunity to work overtime. The Board is an appellate body and, as such, has no mechanism for measuring the validity of the Claimant’s statement versus the statement from Track Supervisor Borron. It is the well-settled principle of numerous Awards that when there is a conflict in material fact, the Board must dismiss the matter because the dispute in fact prevents the Organization from sustaining its burden of proof. Accordingly, the claim is 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 15th day of January 2010.

LABOR MEMBER'S DISSENT
TO
AWARD 40247, DOCKET MW-39523
(Referee Clauss)

The Organization is impelled to dissent to the Majority's findings because it is apparent that such findings are clearly erroneous which renders this award without precedential value. During the handling of this case on the property, the Carrier never denied that employees other than the Claimants performed rail unloading work on the Claimant's rest days. The Carrier alleged that the Claimants were aware of the overtime opportunity and did not take advantage of the offer of rest day overtime. In support of the Carrier's position it presented an unsigned e-mail note purportedly authored by Track Supervisor Borron, wherein he attested:

"I, talked to everyone the morning before their days off told them there would be a rail train to unload, the foremans were to get volunteers to work the railtrain. Art Romero the surfacing gang foreman had asked these men if they want to work the railtrain and they DECLINED THEREFORE THIS CLAIM IS DENIED." (Emphasis in original)
(Attachment No. 1 to Employees' Exhibit "A-4")

In this regard, Claimant Moreno provided a handwritten signed statement in which he attested to the fact that he personally inquired about overtime and notified the Carrier of his willingness and availability for any overtime, when he stated:

"I, Julio Moreno asked the Foreman of Gang 8545 to work overtime, I told him I was willing and available for as many days as he need me. He did not inform or call me." (Attachment No. 1 to Employees' Exhibit "A-3")

Clearly, the statement of Claimant Moreno specifically informed the foreman of Gang 8545, i.e., Mr. Romero, that he desired to work the rest days if he was needed. Apparently, his services were needed because the Carrier called and assigned employees junior to the Claimants to perform the work. What is noticeably absent from the record was any statement from Foreman Romero who was the employee who arranged to have the junior employees perform the rest day overtime work. There were no diametrically opposite written statements from the two (2) primary witnesses, i.e., Foreman Romero and Claimant Moreno which would give credence to an irreconcilable conflict in facts. Moreover, contrary to the comments of the Majority, the Carrier never took any issue with the Claimant's statement nor did it comment that he was the only one to supply a written statement during the handling of this dispute on the property.

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Hence, the statement provided by the Track Supervisor was not a first hand statement but was merely what was purportedly told to him by Foreman Romero and should have not been given any weight at all by the Board. Second hand unsigned hearsay statements do not trump first hand written statements as evidence to establish an irreconcilable conflict in facts. Therefore, I dissent.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Roy C. Robinson".

Roy C. Robinson
Labor Member