

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40294
Docket No. MW-39704
10-3-NRAB-00003-060543
(06-3-543)**

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 (former Missouri
(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 Buc Undercutter Operator R. Roberts to overtime service on August 6 and 7, 2005 and instead called and assigned junior Buc Undercutter Operator D. Walker (System File T05-24/1432835 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Roberts shall now be compensated for twenty-four (24) 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 Organization filed a claim for non-emergency overtime work performed by a junior employee on System Gang 9394 on the Gang's rest days of August 6 and 7, 2005. The Organization maintains that the Carrier violated the Agreement when it used a junior employee and did not call the Claimant. Specifically, the Organization claims that junior Machine Operator Walker performed service despite the Claimant being available, qualified, and willing to perform the work. Because he was not notified of the overtime opportunity, the Claimant was unable to perform the work. Moreover, Supervisor Johnson is abusive and hostile to the Claimant.

The Carrier counters that the Claimant was informed of the overtime opportunity and did not want the work. The Carrier asserts that a coworker statement indicates that the Claimant was informed of the overtime opportunity. According to the Carrier, because there is a dispute as to the facts, the claim must be dismissed.

The Claimant submitted a memo to the Carrier dated August 16, 2005, which provided, in pertinent part:

"This was planned overtime. I volunteered to come in 2 days early. I was contacted by B. Thornburg and I was told the parts we needed did not come in and Marion Bailey, my Undercutter Mechanic/EIC was going to assist another Undercutter gang install a new Wastebelt. I was told they had enough men from that gang for the job and that I was not needed.

I then called Mr. Bailey and told him what Mr. Thorenburg had said. I also informed Mr. Bailey that I was available and if there were any changes to please let me know. When I showed up for my

regular shift, I found out Mr. Thornburg and Mr. D. W. Walker showed up for work 2 days early and worked overtime.”

In the handling of the claim, the Carrier supplied the email statement of EIC Mechanic M. Bailey regarding this claim. The email is dated January 18, 2006 and states:

“Gary,

First part of Aug. gang to come in early first half to put in new shaker screens. During off days we found out the screens were not going to be in; I heard via phone from Rick Roberts that screens were not going to be in. Rick Roberts informed me that he received a call from Billy Thorenburg that screens were not going to arrive. Rickey Roberts told me that Billy Thorenburg said that they did not need to come in. I replied that they were still coming in. Rickey Roberts said that if he could not work at least 10 hours a day it was not worth his time to come in. I replied that we had plenty to do and if we ran out of stuff to do on the 051 we still had work to do on the 2003. Rick replied by saying ok.”

In a later email response to an inquiry about the date of the above conversation, Bailey sent the following email:

“What I was referring to is the conversation I had with Rick on Aug third or fourth about the work we were going to do on Aug six and Aug seven if you have any other questions please let me know.”

The Board carefully reviewed the evidence. The Organization maintains that the Claimant requested the overtime, but was not called. The Carrier asserts that the Claimant was offered the overtime, but did not take it.

In the instant matter, the Board is confronted with a conflict in the material facts regarding whether the Claimant was offered the opportunity to work the 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 of his co-worker. It is the settled principle of numerous Awards that, when there is a conflict in material fact, the Board must dismiss the matter because the dispute in facts prevents the Organization from sustaining its burden of proof. Accordingly, the instant 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 1st day of March 2010.