

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40369
Docket No. MW-40707
10-3-NRAB-00003-080519**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees 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 Forman D. Henderson to overtime service of assisting with the operation of the rail grinder working between Mile Posts 45 and 95.1 on the Geneva Subdivision on February 22, March 6, 7 and 8, 2007 and instead assigned MTM Supervisor J. McCoy (System File S-0703C-351/1476444 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Henderson shall now be compensated for forty-four (44) 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.

According to the Organization, on the dates set forth in the claim, a Rail Grinder operated between M.P. 45 and M.P. 95.1 on the Geneva Subdivision. That area is overlapped by two section gang territories (Gang 3039 headquartered at De Kalb, Illinois, with assigned territory of M.P. 45 to M.P. 64 and Gang 3040 headquartered at Rochelle, Illinois, with assigned territory of M.P. 64 to M.P. 95.1) on the dates in question, Section Foreman Wybourn of Gang 3039 and Track Supervisor J. McCoy assisted and escorted the Rail Grinder across the overlapping section territories. According to the Organization, the Claimant, who was an assigned Foreman on Gang 3040, should have been offered the opportunity to work any overtime as a regularly assigned employee.

The Carrier asserts that there are no breaks in the mileposts for the two gangs. According to the statement from Manager J. F. Nudera:

“My gangs 3039 and 3040, cover my entire territory from 45-95.1, there is no break down of m.p.’s, for each separate gangs. They are headquartered in different areas, but they all cover the same mile posts. Mr. Wybourn is the senior foreman, and Mr. McCoy is [t]he senior track supervisor.”

The Organization’s April 12, 2007 claim letter asserts that the Claimant, rather than Track Supervisor McCoy, should have been assigned to accompany the rail grinder.

“The work performed by Track Supervisor McCoy was not patrolling or making track Inspection. Instead the work was maintaining and repairing the track and should have been assigned to Claimant Henderson and Foreman Wybourn.”

The burden to demonstrate all elements of its claim falls on the Organization. But the record is in conflict. The conflicts which exist are over: (1) what work was actually performed by Foreman Wybourn (maintaining and repairing track as asserted by the Organization, as opposed to escorting grinding operations as asserted by the Carrier) (2) the boundaries of the territories of the gangs (two territories covered by two separate gangs as asserted by the Organization, or one territory with two gangs covering the territory but just headquartered at different locations as asserted by the Carrier) and, most significantly (3) whether there is any clear Agreement language supporting the Organization's position that Claimant Henderson, as a Track Foreman on Gang 3040, was entitled to perform the disputed work instead of Track Supervisor McCoy. Given these conflicts, the Organization cannot meet its burden of proof.

This claim shall therefore be denied.

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 25th day of March 2010.