

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40393
Docket No. MW-40576
10-3-NRAB-00003-080397**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

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 Mr. C. Harelson to perform overtime service at a derailment site near Klamath Falls, Oregon on July 28 through August 1, 2006 and instead called and assigned junior employee W. D. White (Carrier’s File 1462245 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Harelson shall now ‘. . . be compensated twenty-eight (28) hours of time and one-half (overtime) worked by the junior employee ***’”**

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.

Both the Claimant, C. Harelson and W. D. White, who is junior to the Claimant in seniority, were assigned to Gang 8562 during the five-day period of July 28 through August 1, 2006. The Organization claims that the Carrier violated the parties' Agreement when it called and assigned White rather than Claimant Harelson to the overtime assignment that resulted from a derailment at Modoc Point, Mile Post 445.75 near Klamath Falls, Oregon, on the Cascade Subdivision.

The Organization argues that the Carrier ignored the Claimant's seniority. The Claimant, as the senior qualified employee, should have been called first. The Organization asserts that both the Claimant and White worked as Laborers on Gang 8562.

The Carrier asserts this situation constituted an emergency. On that basis, it used the employees who were on the scene. The Claimant made himself unavailable and failed to notify his Supervisor of his availability to work overtime.

In response to these Carrier defenses the Organization does not concede that this derailment constituted an emergency. Even it was an emergency, there is no evidence in the record that supports the Carrier's failure to call the senior employee. The Carrier knows the available overtime opportunities. There is no contractual requirement that the Claimant make his availability to work overtime known. It is the responsibility of the Carrier to contact senior employees when overtime opportunities develop.

The Board finds it unnecessary to address these arguments, because the following is determinative of the issue. The Organization asserts that both the Claimant and White were working as Laborers on Gang 8562. The Organization affirms that the Claimant was assigned to Track Laborer work during the period in question. White was assigned and performed Special Power Tool Machine Operator work between July 28 and August 1, 2006. Both the Track Laborer and

the Special Power Tool Machine Operator are grouped under System Extra Gang Laborer and subject to Side Letter No, 3.

White was paid double time for the work that he performed on Saturday July 28. Otherwise, he was paid at the straight time rate. There is no evidence that White worked any other overtime. That finding reduces the claim to the overtime that White worked on July 28. However, the undisputed record establishes that White worked as the Special Power Tool Machine Operator on July 28. He did not perform Track Laborer work; the type of work performed by the Claimant.

It is undisputed that the Claimant is senior to White. However, the Organization failed to establish the Claimant's entitlement to the overtime work of operating the Special Power Tool Machine on July 28. That is the work White performed. White was the regular employee performing that work. He performed that work, and only that work, on all five days at issue here. The Organization failed to develop an argument that the Claimant was entitled to this work. The Organization bears the burden of proof in claims such as this. See Third Division Award 32646. It failed to meet that burden in this case. Accordingly, the instant claim must 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.