

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40394  
Docket No. MW-40577  
10-3-NRAB-00003-080398**

**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 refused to allow Mr. H. Ramone to begin work on August 8, 2006 and advised him before the start of that work day that he was to go home and that an unauthorized absence (UA) would be placed on his record (Carrier’s File 1462246 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Ramone shall ‘. . . now be compensated for ten (10) hours net wage loss, straight time and overtime, and Per Diem, including any and all benefit losses suffered by him on August 8, 2006. We would also ask that the unauthorized absence (UA), be removed from his record.’”**

**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 asserts that on August 8, 2006, Claimant H. Ramone presented himself at 4:45 A.M. for a 5:00 A.M. start at the designated assembly point for System Gang 8500 in Tucson, Arizona. The Carrier defends by asserting that the Claimant was late for work and, as a consequence, Foreman, T. Vega sent him home.

The record developed on the property contains no statement from the Claimant as to when he reported for work. The record contains statements from Supervisors who were not on site at the time, but who assert that the Claimant was late for work that day.

The Organization bears the burden of proof in cases such as this. The parties disagree on the central fact in this case, i.e., whether the Claimant reported on time or was late for work. There is no evidence in the record to support the Organization's assertion that the Claimant timely reported for work on August 8.

Due to a failure to prove the central fact in this case and the conflict between the parties over this central fact, both serve as a basis for the Board to deny the claim. The Board has held that as an appellate body it has no way of resolving evidentiary conflicts. See Third Division Awards 36566 and 37659. In Public Law Board No. 2960, Award 154, Referee Gil Vernon held:

"We essentially have two parties making assertions. But the burden is on the Organization to establish the necessary fact. It has not done so." (Award 36566)

Further, in Third Division Award 27226 the Board acknowledged the Carrier's discretion to refuse to permit a tardy employee to work. Rather, the Carrier may send the employee home; such does not constitute discipline. Accordingly, without the ability to resolve the factual dispute over whether the Claimant timely reported for work, the Board will not disturb the Carrier's decision to place an unauthorized absence in the Claimant's personnel record.

**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.