

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40398
Docket No. MW-40725
10-3-NRAB-00003-080590**

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 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 or allow regularly assigned Machine Operator - Class Common, Truck Driver R. Pruess to perform overtime service (haul ballast) to and around Marshalltown, Iowa on June 2 and 3, 2007 and instead assigned Mr. R. Weatherman (System File R-0723C-306/1479038 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Pruess shall now be compensated for a total of thirteen (13) 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.

Claimant R. L. Pruess was assigned to a Machine Operator common position on one person Gang PPC 664 headquartered at camp cars during the period pertinent to this dispute. He claims that the Carrier should have called him to work overtime on Saturday, June 2 and Sunday June 3, 2007. R. J. Weatherman, who worked the overtime as a Speed Swing Operator during the week prior to the overtime at issue and was headquartered at Marshalltown, Iowa, worked five hours on Saturday and eight hours on Sunday. The Organization claims pay for Pruess for all 13 hours worked by Weatherman at the rate of time and one-half.

Before proceeding further, the Board must clarify the state of the record that the parties established on the property. Certain facts were uncontested on the property. The Organization asserted that the Claimant was assigned to operate the dump truck out of Nevada, Iowa, during the week prior to the rest day overtime on Saturday and Sunday. In its Submission and before the Board, the Carrier belatedly contended that the Organization failed to establish that fact. Because the Claimant's assertion that he drove the dump truck during the week prior to the overtime was uncontested on the property, the Board accepts it as a fact for purposes of this Award.

Other uncontested facts that form the factual context for the Board's decision follow. Machine Operator Weatherman is qualified to operate an end loader; the Claimant is not. Manager of Track Maintenance Richins submitted a statement during the on-property processing of this claim advising that he assigned Weatherman to operate the end loader. Weatherman delivered ballast to various section gangs on June 2 and 3.

On the claim dates, Weatherman operated not only the end loader, but also the dump truck. The dump truck was parked in Nevada, Iowa, some 40 miles away from where Weatherman utilized the end loader to spread ballast in Marshalltown, Iowa. The Organization argues that this was a two man assignment. Weatherman had to operate the dump truck and the end loader sequentially. The Organization

argues that pursuant to Rule 23 L, the Claimant was the regular employee in so far as the operation of the dump truck is concerned, and he should have received the overtime opportunity.

The Carrier argues that the main purpose of the assignment was to operate the end loader. Hauling ballast by dump truck was incidental to the assignment to operate the end loader. The Carrier indicated in its response to the claim on the property that the purpose of the assignment was to deliver ballast to various section gang sites.

The Organization pursues its claim on the grounds that the overtime should have gone to the regular employee who operated the dump truck during the week prior to the overtime assignment. The Carrier defends on two grounds. First, the Claimant could not perform that aspect of the work that was the main work assignment, i.e., the operation of the end loader. Any hauling work that Weatherman performed was incidental to that work. The Carrier cited Public Law Board No. 6302, Award 52 between these parties as supportive of its position. Under Rule 77, the Carrier contends that hauling ballast was incidental to the assignment's purpose.

The Organization argues that Rule 77 was not raised on the property. In his response to the claim, Manager of Labor Relations Wayne stated that:

"Any operation of the dump truck in performance of Mr. Weatherman's duties to operate the end loader to perform the ballast distribution would have been incidental to his duties to distribute the ballast in performance of the end loader operation."

The parties addressed the substance of Rule 77 on the property.

The Board concurs with the Organization that this is a two person job. The assignment of Weatherman to operate the end loader does not address who is to operate the dump truck. The Claimant is the regular employee who operated the dump truck during the week prior to this overtime assignment. He should have been assigned to operate the dump truck.

The record does not reflect how much time Weatherman drove the dump truck, and how much time he spent operating the end loader. Whether the hauling is incidental to the operation of the end loader or vice versa does not establish how much time the dump truck was in operation.

That being said, the claim fails because the Organization did not meet its burden of proof. The Carrier correctly notes that the record does not support a finding that Weatherman drove the dump truck for 13 hours. Because the Claimant is not qualified to operate the end loader, the measure of the claim is the amount of time that Weatherman drove the dump truck. The Carrier put that matter at issue in Wayne's August 14, 2007 letter wherein he states, "According to Manager Track Maintenance Josh Richins, the Carrier did not assign Mr. Weatherman to operate a dump truck for thirteen (13) hours of overtime on the claim dates." In Third Division Award 31930, the Board observed:

"Once the allegations of the claim, including their accuracy as to types of equipment, hours and dates of work, were placed in controversy via the Carrier's denial, it was incumbent upon the Organization to prove such allegations by submission of probative evidence. The on-property record is devoid of such evidence."

See also, Third Division Award 26257 regarding the Organization's burden of proof. There is nothing in the evidence developed on the property that indicates the amount of time that Weatherman drove the dump truck. This is not a case where the Organization asked for the records on the property and the Carrier refused or failed to provide the necessary time records. The Organization did not develop this line of evidence on the property. This case differs from those cases where the time involved is not placed at issue by the Carrier, as it is here. The Board concludes that the Organization failed to meet its burden of proof on this critical element of its claim. Accordingly, the Board must deny the claim.

AWARD

Claim denied.

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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.