

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40402
Docket No. MW-40026
10-3-NRAB-00003-070243
(07-3-243)**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union 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 System Gang 8553 employees W. Robin and L. Begay and System Gang 8552 employees R. Yazzie, Jr. and T. Belingachee, for overtime work (job site preparations) performed by System Gangs 8853 and 8852 employees near Newark, California on February 6 and 7, 2006 (Carrier’s File 1446472).**
- 2) As a consequence of the violation referred to in Part (1) above, Claimants W. Robin, L. Begay, R. Yazzie, Jr. and T. Belingachee shall now each be paid for twenty-four (24) hours at their respective time and one-half rates 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 the instant claim on the Claimants' behalf, alleging that the Carrier violated the parties' Agreement when it failed to call and assign the Claimants to perform certain overtime work that was performed by the System Gangs to which they were assigned.

The Organization initially contends that arbitral Boards long have recognized that seniority is a valuable property right of an employee, and that overtime must be assigned based on the general principle of seniority. The Organization asserts that the Claimants were regularly assigned to positions on System Gangs 8853 and 8852. The Carrier determined that non-emergency overtime work was necessary on the Gangs' assigned rest days, the claim dates, and the Carrier contacted all gang members with the exception of the Claimants.

The Organization argues that the Claimants were fully qualified and readily available for duty, but they were not afforded the work opportunity to which they were entitled by virtue of their seniority and regular assignments on System Gangs 8853 and 8852. Citing prior Awards, the Organization submits that it is well established that an employee's seniority entitles that employee to all the work of a position.

The Organization maintains that there can be no question that the Carrier violated the parties' Agreement when it failed to call the Claimants and afford them the overtime work opportunity on the claim dates to which they were entitled by virtue of their seniority and regular assignments on System Gangs 8853 and 8852. The Claimants therefore are entitled to the requested remedy.

The Organization asserts that in defending against this claim, the Carrier failed to state that the Claimants were called. Instead, the Carrier offered only the broad and unsupported assertion that the gang Foremen called all individuals who would respond to assist with the overtime work on their rest days. The Organization emphasizes that if the Carrier wished to support this assertion, then it easily could have furnished statements from the Foremen who allegedly contacted

the employees, but it failed to do so. The Organization points out that under the principle of negative inference the only conclusion that can be reached in connection with the Carrier's failure to provide any supporting documentation is that the Claimants were not called.

The Organization submits that it is well established that the party asserting an alleged affirmative defense must submit proof thereof, and that mere assertions are not acceptable substitutes for such proof. The Organization argues that the Carrier failed to submit any credible evidence to support its affirmative defense.

The Organization maintains that all members of System Gangs 8853 and 8852, except the Claimants, were called for the overtime work at issue, and the Carrier has not shown otherwise. The Claimants were fully qualified and readily available for duty, but they were not afforded the work opportunity to which they were entitled by virtue of their seniority and regular assignments on these System Gangs.

The Organization insists that the proper rate of pay under the circumstances is the applicable overtime rate, as settled by the overwhelming precedent established by this and other Boards.

The Carrier initially contends that its Foremen attempted to call the Claimants at home with regard to the overtime work at issue. The Carrier asserts that from the statement of Supervisor Harwick, it is clearly evident that the Claimants apparently were not available for the overtime work. The Carrier therefore argues that the Claimants have no legitimate claim to the work that was performed when they were not present.

The Carrier emphasizes that it consistently has taken the position that the Gang Foremen attempted to line up the Claimants to work on the dates in question. The Carrier points out that the Organization presented no evidence to support its position that another Foreman, who was not the Foreman of either of the crews involved, allegedly indicated that he did not have phone numbers. Pointing to a number of prior Awards, the Carrier contends that under these circumstances, the instant claim must be denied.

The Carrier goes on to submit that there has been absolutely no showing that any of the Agreement provisions cited by the Organization were violated in any way whatsoever. The Carrier contends that it is well-established that the moving party must present specific facts in connection with its claim, but the Organization's broad allegations in this case are vague, indefinite, and do not provide a basis for sustaining the instant claim.

The Carrier contends that mere unsupported allegations do not constitute proof. The Carrier asserts that the Board consistently has held that the party alleging an Agreement violation must provide proof of a definitive violation of the Agreement. The Carrier argues that the Organization's citation to various Agreement Rules and its assertion that they have been violated, without any support throughout the handling of this matter, constitutes only an allegation. The Organization failed to meet its burden of proof.

The Board concludes that the Organization failed to meet its burden to prove that the Carrier violated the Agreement because it failed to call the Claimants for overtime work on February 6 and 7, 2006. The record contains a statement from a Supervisor that stated the following:

"After contacting all Foremen, the Foremen contacted all the persons that they could get a response from on the days off."

The statement appears to indicate that there was an attempt made to call the Claimants to see if they were able to work the overtime at issue. The statement makes it clear that the Claimants were not available for the overtime work on the date in question.

Although the Organization argues that the Carrier was responsible to bring in the phone records demonstrating that the Supervisor did in fact attempt to call the Claimants, the Board disagrees. The Carrier came forward with a statement from a Supervisor indicating that the Foreman called all eligible employees. If the Claimants believed that they were not called, then it was their obligation to come forward with phone records to show that their phones were not contacted on the dates in question. There were not even any statements in the record from the Claimants indicating that they had not been called and, therefore, the only evidence with respect to calls is the unrebutted statement of the Supervisor.

The Organization bears the burden of proof in cases such as this. The Organization failed to meet that burden in this case and, therefore, the 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.