

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40406
Docket No. MW-40213
10-3-NRAB-00003-070424
(07-3-424)**

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 Carrier violated the Agreement when it failed to call and assign Track Inspector D. Benesh to overtime service (inspect track) between Mile Posts 6.9 and 74 on the Clinton Subdivision on July 9, 2006 and instead called and assigned Track Foreman L. Kinley (System File 4RM-9749T/1454875 CNW).**
- 2) As a consequence of the violation referred to in Part (1) above, Claimant D. Benesh shall now be compensated for eleven (11) 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.

The Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement when it assigned a Track Foreman to perform certain overtime track inspection work, rather than the Claimant.

The Organization initially contends that the language of Rule 23L is clear, concise, and not reasonably subject to misinterpretation. The Organization asserts that there is no dispute that the Claimant was assigned as Track Inspector on Gang 3423 and that his area of responsibility included the inspection of track between Mile Posts 6.9 and 73.8 on the Clinton Subdivision. The Organization argues that the Claimant therefore was the "regular employee," as contemplated by Rule 23L of the Agreement.

Citing a number of Third Division Awards, the Organization maintains that it is well established that when an employee bids and is assigned, or otherwise exercises seniority to, a "regular" position, the employee is entitled to all work of that position. The Organization emphasizes that the record establishes that the Claimant was the "regular employee," as contemplated by Rule 23L, in that there is no dispute that the Claimant routinely inspected track between Mile Posts 6.9 and 73.8 on the Clinton Subdivision as part of his regular assignment as Track Inspector on Gang 3423. The Organization therefore insists that there can be no doubt that the Carrier violated the Agreement when it called and assigned the non-emergency, rest-day overtime work at issue to someone other than the Claimant, the regularly assigned employee who routinely performed the work.

The Organization goes on to point out that the Carrier's entire defense revolves around its position that there was an attempt to contact the Claimant on the claim date. Pointing to the Claimant's statement that he was available but received no telephone calls from management that day, the Organization emphasizes that the Carrier failed to provide any probative evidence to support its position. The Organization maintains that not only did the Carrier submit an unsigned, undated, typewritten "statement" allegedly furnished by Manager Track Maintenance (MTM) Swedberg, the Carrier failed to submit any firsthand account from MTM Flores, who supposedly attempted to contact the Claimant on the claim date. The Organization suggests that the Carrier is attempting to manufacture a "conflict" in the evidence.

The Organization then argues that even if MTM Flores did make a single attempt to contact the Claimant on the claim date, which is unsupported by the record, the Board consistently has held that a carrier must make a reasonable attempt to secure the services of the proper employee for overtime service. The Board repeatedly has held that a single telephone call does not constitute a reasonable attempt to reach an employee.

The Organization additionally references the Carrier's refusal/failure to provide the telephone records that would have established any attempts to contact the Claimant. The Organization submits that the Carrier had these records in its possession, and these records might have supported its affirmative defense, yet it failed to produce these documents. The Organization emphasizes that the Board consistently has held that when a party fails to produce records that contain material and relevant evidence, it does so at its own peril. Under the principle of negative inference, the Organization argues that the only conclusion that can be reached is that these documents would not have supported the Carrier's assertions.

The Organization further asserts that the Carrier did not dispute the number of hours claimed, and the proper rate of pay in a proven contract violation is the amount that the employee was entitled to receive had he been assigned to perform the subject work. The Organization maintains that the Claimant therefore is entitled to the requested remedy.

The Carrier initially contends that the Organization failed to meet its burden of proof in this matter. The Carrier asserts that this case involves a dispute in facts, relating to the Carrier calling the Claimant to perform the overtime in question. The Carrier argues that it called the Claimant, but he did not answer. The Carrier accordingly called another employee.

The Carrier contends that under Rule 31, the Organization must prove that the Carrier failed to call the Claimant for the work, and that the Claimant was the most senior person available. The Carrier insists that the Organization failed to prove that the Claimant was not called, and the Agreement clearly grants the Carrier the right to contact another employee should it be unable to reach the "available" most senior person. The Carrier argues that it attempted to contact the Claimant prior to contacting Kinley.

The Carrier asserts that Supervisor Swedberg's statement establishes the Carrier's attempts to offer the overtime work to the Claimant. From this, it is clear that the very basis of the claim – that a junior employee was assigned to the work instead of the Claimant – is completely without support. The Carrier submits that if the Claimant had answered the telephone, then he could have worked all of the overtime. The Carrier argues that the Organization may not believe the statements of the two Carrier Managers, and the Carrier may not believe the Claimant's allegations, but no one is in a position to say who is right.

The Carrier contends that a number of Third Division Awards have held that where, as here, there is a direct conflict of evidence, the Board is not in a position to decide who is correct. The Carrier asserts that if the Board finds a violation of the Agreement or awards any damages to the Claimant, the Board would be writing new Agreement language and initiating a new practice and Rule in the railroad arbitration industry. The Carrier argues that the Board is not empowered to initiate such agreement language.

The Carrier goes on to maintain that the only Agreement requirement is to offer overtime in seniority order, and the Supervisor complied with this provision. The Carrier attempted to contact the Claimant, but found him unavailable, so the junior employee was assigned to the work without any Agreement violation.

The Carrier asserts that the Organization failed to meet its burden of proving that the Agreement was violated in this matter. The Carrier argues, moreover, that the Claimant's self-serving statements support the Carrier's position.

The Board concludes that the Organization met its burden of proof that the Carrier violated the Agreement when it failed to call and assign the Claimant to overtime service on July 9, 2006, and instead called in a different employee who was not entitled to the work. Therefore, the claim must be sustained.

The record reveals that the Claimant is the regular employee who regularly performs track inspection duties on the territory as part of his regular assignment. Rule 23L states:

“Work on Unassigned Days - where work is required to be performed on a day which is not part of any assignment, it may be performed by

an available extra or assigned employee who shall otherwise not have forty hours of work that week; in all other cases, by the regular employee.”

The record reveals that the Claimant was the regular employee as contemplated by the Agreement. Although the Carrier asserts that it made one single call to attempt to bring the Claimant in to work, there is simply insufficient evidence that the Carrier made the required effort to bring in the appropriate employee (the Claimant) to perform the overtime at issue.

The Carrier has relied on the “regular employee” language on numerous occasions when it brought in the regular employee rather than the more senior employee to perform overtime work. In the instant case, the Claimant was the regular employee, and he should have received the overtime work at issue. Therefore, the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 25th day of March 2010.