

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40499
Docket No. MW-39954
10-3-NRAB-00003-070105
(07-3-105)**

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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/or assign Gang 8433 employe H. Goings to perform track maintenance overtime work with Gang 8433 on the Yuma Subdivision in the vicinity of City of Indio, California, beginning on January 3, 2006 and continuing and instead called and assigned junior employe P. Branch from Gang 8470 (Carrier’s File 1442470 SPW).**
- 2. As a consequence of the violation referred to in Part(1) above, Claimant H. Goings shall now be compensated at his respective time and one-half rate of pay for all overtime hours worked by Mr. P. Branch in the performance of the aforesaid overtime work with Gang 8433 beginning January 3, 2006 and continuing.”**

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 Claimant was assigned as a Laborer and working as same on Gang 8433. During the period at issue in the instant matter, the Claimant was working a Monday through Friday workweek.

The Organization maintains that the Carrier violated Rule 25, among other Rules, when it called out a Truck Driver from Gang 8470 to perform overtime work with Gang 8433. The Organization continues that because there was no truck and Driver assigned to Gang 8433, there was no need for a Truck Driver during the overtime period. According to the Organization, the Claimant's lack of a CDL does not affect the instant claim because the Carrier has the right to require Foremen and Assistant Foremen to possess a CDL. The Foreman on Gang 8433 could have driven the truck and the Claimant could have then worked the overtime.

It is undisputed that the Truck Driver had less seniority than the Claimant.

Rule 25 provides:

“(a) Designated Limits – Employees assigned to track gangs having fixed headquarters location will be assigned designated limits within which they are to perform work, and such limits will be provided in advertisement and assignment notices.

* * *

(b) Preference for Overtime – Employees of gangs within designated limits will have preference to casual overtime in

connection with work performed by such gang. Other employees will have preference to overtime in connection with the work projects performed by such employees. Overtime in connection with emergencies will be handled by the most readily available forces, with preference to the employees of designated territory when time permits. This rule does not preclude gangs working together.”

In relying on the seniority comparison of the employees who were called out to perform the rail repair, the Carrier contends that that there has been no Organization allegation that the Truck Driver did anything other than normal Truck Driver duties. There is no allegation that anyone other than the Truck Driver performed the truck driving duties. There is also no allegation that the Truck Driver, or anyone else on the overtime assignment, performed Laborer duties.

The Board carefully examined the record in the instant matter. The Board notes that there is no reference in the record to any Organization claim that the assigned Truck Driver performed any other work than the duties of a Truck Driver.

The Claimant was one of the regular employees who could have been called to perform the overtime work. However, a Truck Driver was needed for Gang 8433 and the Claimant does not have a CDL. The Claimant is prohibited, by law, from driving the truck. The Organization can point to no Rule that requires the Carrier not to assign a Truck Driver to an overtime assignment. The Truck Driver and Laborer each perform separate duties. The Board notes that the Carrier has discretion in assignments and that discretion is limited by the Agreement, and of course, the applicable laws and regulations that are not at issue in this claim. See generally, Third Division Award 37437 and the citations contained therein. Not having an assigned Truck Driver on the gang does not affect the outcome of the instant claim. The Carrier had the right to assign a Truck Driver to drive the truck.

It is axiomatic that the burden to prove its claim is upon the Organization. As discussed above, the Organization failed to meet that burden and the claim must be denied.

**Form 1
Page 4**

**Award No. 40499
Docket No. MW-39954
10-3-NRAB-00003-070105
(07-3-105)**

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 15th day of June 2010.