

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40805
Docket No. MW-40726
10-3-NRAB-00003-080591**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 assigned junior Extra Gang Foreman F. Casados to perform rest day overtime service of inspecting track south of Denver, Colorado from Mile Posts 00.0 to 5.0 on April 15, 2007 instead of senior Extra Gang Foreman L. Martellaro (System File D-07-34/1479028).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Martellaro shall now be compensated for six (6) 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.

When the claim arose, the Claimant and F. Casados held extra gang Foreman positions on different gangs. Although there were conflicting assertions made in the record, the only evidence pertaining to their assignments came from the email statement of the Manager of Track Maintenance. According to that statement, the Claimant's regular assignment involved the operation of a tamper and regulator on a surfacing gang when he was not performing Foreman duties. The junior employee, however, was to cover extra jobs and to relieve Foremen and Track Inspectors when they were not available.

In its claim, the Organization cited ten specific Rules as having been violated by the Carrier's assignment of the junior employee to perform the rest day track inspection. It also cited many prior Awards of this Division in support of its seniority-based contentions.

In its Submission, however, the Organization contended that Rule 26(h) was also pertinent to the claim. That Rule describes the preference order to be followed for the assignment of work on unassigned days, which the disputed work apparently involved. The Rule does not establish a preference based on seniority. Instead, it directs the work first to available extra or unassigned employees who will not have 40 hours of work for the week. If there are no such employees, then the Rule gives the preference to ". . . the regular employee." In its Submission, the Organization contended that the Claimant was also the regular employee within the meaning of the Rule.

Unfortunately for the Organization, it did not base its claim on this contention in whole or in part during the development of the record on the property. Nowhere was Rule 26(h) cited in the correspondence. Moreover, the Organization's claim never contended that the Claimant was the regular employee. Indeed, in its September 18, 2007, appeal on the property, the Organization contended that seniority was the ". . . central issue at hand."

It is well settled that we may not consider new evidence or argument that is raised for the first time before the Board. Thus, the Organization's contentions based on Rule 26(h) must be rejected.

In the alternative, we carefully reviewed the text of the ten Rules the Organization did cite in support of its claim on the property. None has been found to explicitly establish a seniority-based preference for the overtime work in dispute.

We also examined each of the prior Awards cited by the Organization. Given the state of the record herein, none are applicable. All of them involve other parties and/or other Rule language and/or significant factual differences.

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 December 2010.