

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40871
Docket No. MW-40987
11-3-NRAB-00003-090284**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 Hood River/The Dallas Section Gang employes G. Wilson, J. McLemore, L. Robinson and J. Schultz to perform overtime service (rail repair) at Mile Post 23.98 on the Portland Subdivision on November 20, 2007 and instead called and assigned employes assigned to the Troutdale Section Gang (System File C-0735U-170/1493825).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants G. Wilson, J. McLemore, L. Robinson and J. Schultz shall now each be compensated for five (5) 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.

This is an overtime dispute involving the Carrier's failure to assign the Claimants the job of removing and replacing a broken rail and associated grinding/welding duties on their regular territory (functions which were admittedly part of their regular assignment) and assigning such work to a section gang from a different territory. It relies upon the preference established in Rule 26(h) which provides, in pertinent part:

“Work on unassigned days - Where work is required by the Carrier to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee.”

The Carrier responded to the claim on the property by submitting an unsigned email dated January 16, 2008, from Manager of Track Maintenance M. Ortegon which states: “. . . the above Claimants could not be reached by phone to respond to a emergency broken rail. Members of the Troutdale section Mr. Jensen who are senior to the claimants were called to fix the rail.” The Carrier denied the claim on the basis that the Claimants were unavailable and that there was an “emergency” situation. In response, the Organization denied that the Carrier made any effort to contact the Claimants, challenging it to present a phone record that would reflect the attempted contact, and submitted a signed statement from all four Claimants indicating that they were available for work and did not receive any calls for overtime on that day. No phone records or additional statements were submitted.

The Organization argues that the Claimants' preference to the overtime at issue under Rule 26(h) is not disputed, and the record confirms that they were available to work and were never contacted for the assignment. It notes that MTM Ortegon never stated that he actually called the Claimants, but merely that they could not be reached by phone, and the Carrier failed to adequately rebut the Claimants' signed statement that they were not called by either a written, signed statement from an individual who allegedly made the calls, or by producing phone

records establishing that calls were made to the Claimants, as requested. The Organization asserts that because the Carrier failed to meet its burden of establishing its affirmative defense, the claim should be sustained, citing Third Division Awards 36396, 39670, 40228 and 40406. The Carrier contends that, at best, this case presents an irreconcilable dispute of fact that requires the claim to be dismissed for failure of the Organization to meet its burden of establishing a violation of the Agreement, relying on Third Division Awards 33487, 33895, 35948, 37478 and 37875.

A careful review of the record convinces the Board that this is not a case that should be dismissed on the basis that it presents an irreconcilable dispute of fact. There is no dispute that the Claimants have an Agreement preference over the Troutdale gang for this overtime assignment as the regular employees assigned to this work on this territory under Rule 26(h) and that the Troutdale gang was called to perform the overtime in issue. These facts are sufficient to establish the Organization's prima facie case. The Carrier raised the affirmative defense that it attempted to reach the Claimants for this assignment, but they were unavailable. The only proof submitted in support of this defense was the email from MTM Orregon set forth above, which only states that the Claimants could not be reached by phone. Even when challenged to provide some direct evidence that calls were actually made to the Claimants, especially in light of their signed statements that they were available and were not called, the Carrier provided no additional information. No specifics were given as to whether each Claimant was called individually, to what number, and at what time, and no phone records verifying that such calls were made were furnished. The facts of this case are clearly distinguishable from those relied upon by the Carrier. Under these circumstances, we are unable to conclude that the Carrier sufficiently established its affirmative defense that it met its obligation to offer the Claimants the overtime assignment and that the Claimants were unavailable. See, Third Division Awards 36396 and 40406. Because there is insufficient direct evidence to overcome the Organization's prima facie case, the claim will be sustained. Third Division Award 39670.

AWARD

Claim sustained.

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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 7th day of February 2011.