

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40990
Docket No. MW-41265
11-3-NRAB-00003-100118**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(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 Mr. J. Simmons to perform overtime service in McKinney Street Yard in Houston, Texas on October 25, 2008 and instead called and assigned junior employee M. Cormier (System File UPLW-404-09/1512622 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Simmons shall now be compensated for thirteen (13) hours at his overtime 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.

On Saturday, October 25, 2008, a Machine Operator was needed to perform overtime at the McKinney Street Yard in Houston, Texas. In a memo dated April 4, 2009, the Carrier's Manager of Track Maintenance B. Shields contends that he obtained a list of phone numbers of Tamper Operators and called the Claimant on October 25, 2008, but the Claimant did not answer; another employee was called, who also did not answer; junior employee M. Cormier was called, he answered and, therefore, received the overtime assignment.

In a statement dated November 9, 2008, the Claimant asserts ". . . that on Saturday October 25, 2008 . . . I was home at the time and was never called in to work."

Ordinarily, and because the burden is on the Organization to prove all elements of its claim, the Board would deny this claim due to irreconcilable facts in the record, i.e., the Claimant asserts that he was not called and the Carrier asserts that the Claimant was called.

However, we note that the Claimant's statement that he was at home and was not called on October 25, is dated November 9, 2008 — a short period of time after the October 25 calls were made. On the other hand, the Carrier's evidence that the Claimant was called and did not answer comes from a memo dated April 4, 2009, from MTM Shields — more than five months after the October 25 calls were made. Without more in the record from the Carrier (such as a phone log or some other evidence closer to the date of the incident than a memo more than five months after the fact addressing calls made on October 25) the Board does not see how MTM Shields could have independent recollection of an event such as the making of a phone call more than five months in the past. The Carrier needed more to refute the Claimant's statement that he was available and was not called. In this case, that evidence is just not sufficiently present.

This claim, therefore, has merit and will be sustained. The Claimant shall be made whole for the lost overtime opportunity.

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 20th day of July 2011.