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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40991
Docket No. MW-41267
11-3-NRAB-00003-100140**

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to allow Mr. J. Allen to continue in performing frog repair work at the East Switch Shale, Colorado into overtime on October 14, 2008 and instead allowed junior employee M. Lara to perform said overtime service (System File D-08-35/1513526).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Allen shall now be compensated for eight (8) hours at his respective time and one-half rate of pay and for three (3) hours at his respective double time 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.

At the relevant time, the Claimant was assigned as an REO/TMO Machine Operator on Utah Division Gang No. 6307. The Claimant also held Utah Subdivision WelderHelper seniority. At that time, M. C. Lara was a Ssectionman assigned to the Utah Division Mack, Colorado, Section Gang and held no WelderHelper seniority. The Claimant was otherwise senior to Lara.

The dispute arose over an overtime assignment on October 14, 2008.

In its claim dated December 1, 2008, the Organization states:

“Commencing on October 14, 2008, Claimant, who is currently assigned as an REO/TMO Machine Operator on Gang #6307, was utilized as a Welder Helper/Section-man/Track Laborer for this specific day, working his regularly assigned straight-time hours performing Welder Helper/Section-man Track Laborer work, working to assist Mack Section Foreman Dennis Wykoff and Lead Arc Welder Jamie Cordova to repair an RBM Frog at the East Switch Shale, Colorado, in the vicinity of MP 478.0, on the Green River Sub-division. . . .”

Overtime was required and was assigned to junior employee Lara who was working with Welder Cordova when the defective frog was found and the repairs began. The Claimant was released and did not get the overtime.

Initially, the Board agrees with the Organization’s position that the dispute is not about whether, as the Carrier initially argued on the property, the Carrier was obligated to assign an additional employee to perform the overtime. The dispute is, as the Organization correctly argues, which employee was entitled to the overtime — the Claimant or junior employee Lara.

Supervisor B. Cordova provided the following statement:

“Mario Lara was assigned to the section at Mack - due to the fact that this is Mario’s territory he was working with the welder all day and when they found the frog that needed repair. . . .”

If this is all the Board had, we would sustain the claim. According to the Organization’s position on the claim, the Claimant was performing Welder Helper work with Welder Cordova on the day the overtime was assigned to Sectionman Lara. Again, according to the Organization’s December 1, 2008 letter, “[c]ommencing on October 14, 2008, Claimant, who is currently assigned as an REO/TMO Machine Operator on Gang No. 6307, was utilized as a Welder Helper/Section-man/Track Laborer for this specific day, working his regularly assigned straight-time hours performing Welder Helper/Section-man Track Laborer work, working to assist Mack Section Foreman Dennis Wykoff and Lead Arc Welder Jamie Cordova to repair an RBM Frog at the East Switch Shale, Colorado, in the vicinity of MP 478.0, on the Green River Sub-division.” [Emphasis added] In its Submission at Page 3, the Organization also states that “. . . the Claimant performed welder helper duties for Welder Cordova during regular hours of service.” Thus, from the above, it appears that both the Claimant and Lara were working with Welder Cordova when the defective frog was discovered and the repairs began, but the Claimant who holds Welder Helper seniority was sent home and the junior Sectionman Lara who holds no Welder Helper seniority was retained for the overtime. Under the facts presented in the claim and as argued in the Organization’s Submission, the Claimant should have been entitled to continue the work he was performing. Simply stated, according to the Organization’s view of the facts, the Claimant was working with Welder Cordova when the defective frog was discovered and the repairs began and, being a Welder Helper, the Claimant should have been allowed to continue that work into overtime.

However, there is more. According to the Claimant’s November 18, 2008, statement, “I labored that day on straight-time as a REO so I should be [paid] overtime to[o] as a Helper which I hold a date” [Emphasis added].

In his statement, the Claimant does not assert that on the date in dispute he was working as a Welder Helper with Welder Cordova when the defective frog was

found and the repairs began. Nor does the Claimant contend that in the performance of any of his duties as an REO that day that he was working with Welder Cordova when the defective frog was found and the repairs began. Instead, the Claimant asserts that he was working as an REO and, therefore, not “. . . as a Welder Helper/Section-man/Track Laborer for this specific day, working his regularly assigned straight-time hours performing Welder Helper/Section-man Track Laborer work, working to assist Mack Section Foreman Dennis Wykoff and Lead Arc Welder Jamie Cordova to repair an RBM Frog. . . .” The Claimant’s statement that he was working as an REO, coupled with Supervisor Cordova’s statement that the work was being performed with Lara, caused the Carrier to assert that the Claimant had been working as an REO in another location.

If the Claimant was working as an REO and was not working with Welder Cordova when the defective frog was discovered and the repairs began, there is no Rule support for the position that the Claimant should have been moved over from his assignment to replace Lara to perform the work. If anything, although addressing work on unassigned days, there is Rule support for the Carrier’s position that the Claimant’s greater seniority as a Welder Helper than Lara (who had no Welder Helper seniority) did not entitle the Claimant to displace junior employee Lara for the overtime opportunity when the Claimant was working elsewhere when the overtime opportunity arose. See e.g., Rule 35(k):

“(k) PERFORMANCE - In the performance of overtime work on unassigned days, employees regularly assigned to work in a higher seniority class will not be permitted to displace employees regularly assigned to work in a lower class.”

The material facts in this record are therefore in dispute. If the Claimant was working with Welder Cordova when the defective frog was found and the repairs began, then the overtime work was his. But if the Claimant was working as an REO and if he was working elsewhere, then he was not entitled to the overtime work. The bottom line is that the Board cannot tell from this record what the Claimant was doing when the defective frog was found and the work began. The Claimant’s statement that he was working as an REO is not consistent with the Organization’s assertion that the Claimant was working with Welder Cordova as “. . . as a Welder Helper/Section-man/Track Laborer for this specific day. . . .” Because the burden

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of proof is on the Organization, those contradictory facts require a denial of the claim.

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 20th day of July 2011.