

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41505
Docket No. MW-41606
13-3-NRAB-00003-110243**

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**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to assign Gang 9066 Foreman D. Barber to accompany the work train moving Gang 9066's equipment in connection with the gang's change of assembly points from Modena, Utah to Mesa, Arizona on January 7, 8 and 9, 2009 and instead assigned junior employe N. Pilster (System File R-1035U-302/1531914).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Barber shall now be compensated for a total of thirty-one (31) hours at the applicable 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.

The Carrier initially argued that the instant claim is procedurally defective because the claim alleges the violation took place in 2009, whereas the initial claim did not state a year and, moreover, during handling on the property, the Organization stated that the year of the claim was 2010. The Organization defended by contending that the date reference was nothing more than a typographical error, which did not go to the substance of the claim, and it relied on a number of Awards in support of its position regarding this aspect of the claim.

The Board reviewed and rejects the Carrier's procedural argument. The Organization simply corrected a typographical error and did not materially alter the claim. See generally Third Division Award 41214.

On the merits, the Organization argued that the Claimant was the regular employee to accompany the movement of the work train from Modena, Utah, to a new location in Mesa, Arizona, because he was the Foreman of Gang 9066. In support, the Organization relied on the Claimant's statement submitted during the on-property handling of the claim. The Claimant has more seniority than Truck Foreman N. Pilster who accompanied the work train. The Organization further argues that the Carrier's defenses are not compelling, because it proffered no first-hand evidence to refute the Claimant's statement.

The Carrier countered that the Claimant was not the regularly assigned employee. Truck Foreman Pilster was responsible for following the equipment train and set up the move and, therefore, followed the train when it moved. In support of its position, the Carrier relied on Manager Neuner's written statement that the Claimant was the regularly assigned employee with responsibility for accompanying the work train on its move.

The burden is on the Organization to prove a violation of the Agreement. At page seven of its Submission, the Organization stated that the Claimant, as Foreman of the Gang, ". . . was responsible for overseeing all operations of the gang,

including accompanying the work train while moving the gang's equipment." This assertion is supported by the Claimant's statement that he had accompanied the work train on prior occasions. However, the Claimant's statement was contradicted by Manager Neuner's written statement that the Truck Foreman was the regularly assigned employee.

Neither the Organization nor the Carrier cited the Board to a Rule or policy regarding which employee accompanies the work train when work locations are changed between compressed halves. The Organization offered no Rule to show that the Gang Foreman accompanied the work train. There are only two written statements in the record – one from each side to the dispute.

Given the dispute as to who is the regularly assigned employee and the contradictory nature of the two written statements, the Board has no choice but to find that the Organization failed to meet its burden of proof to establish a violation of the Agreement. Consequently, the claim must be denied.

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 19th day of February 2013.