

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41589
Docket No. MW-41742
13-3-NRAB-00003-110359**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
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(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 Mr. J. Borich to perform overtime sectionman work (track repair) after a derailment between Mile Posts 58 and 59 in the vicinity of Monument, Colorado commencing on February 28, 2010 and continuing through March 1, 2010 and instead called and assigned junior employee C. Ledford to perform said work (System File D-10-30/1536552 UPS).**
- (2) The claim referenced in Part (1) above, as appealed by General Chairman C. M. Morgan on August 12, 2010 shall be allowed as presented because said claim was not disallowed by Director Labor Relations B. W. Hanquist in accordance with Rule 49.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Borich shall now be compensated for a “*** total of twelve (12) hours overtime, eight (8) hours double-time, four (4) hours triple time and eight (8) hours straight time.”**

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 Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement when it failed to call and assign him to perform certain overtime work, and instead assigned a junior employee to perform the work at issue. The Organization further alleges that the Carrier failed to disallow the original claim in accordance with Rule 49.

The Organization contends that the claim should be sustained in its entirety because (1) the Carrier failed to disallow the appeal within the prescribed time limits set forth in Rule 49 (2) the Carrier violated the Agreement when it called and assigned a junior employee to perform the work at issue instead of calling and assigning the Claimant to perform the work (3) there is no merit to the Carrier's defenses, and (4) the Claimant is entitled to the requested remedy. The Carrier counters that the instant claim should be denied in its entirety because the Carrier did not violate the Agreement when it elected to use the qualified employee rather than using the Claimant. The Claimant possessed neither welding seniority nor the necessary CDL/DOT license to attempt to perform the work. Furthermore, the Claimant was not the proper and qualified employee to perform the subject work associated with the Track Arc Welder Hy-Rail position. Lastly, the Organization failed to meet its burden of proof.

The Board reviewed the procedural argument raised by the Organization and concludes that it has merit. Therefore, the claim must be allowed as presented in accordance with Rule 49(a)(1) which states, in part:

"Should any such claim or grievance be disallowed, the Carrier will within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance will be allowed as presented"

The record evidence reveals that the original claim was filed by General Chairman Morgan of the Organization's Colorado Springs office on April 22, 2010. That claim was timely denied by the Carrier by letter dated June 15, 2010, and sent to Morgan in Colorado Springs by Assistant Director of Labor Relations Wayne.

The Organization filed a timely appeal of the claim on August 12, 2010. That appeal was again sent from the Colorado Springs office by General Chairman Morgan. The record reveals that the Carrier denied that appeal by letter dated October 8, 2010, addressed to General Chairman Wayne Morrow whose office is in Lyman, Wyoming. Morrow was clearly not the person who filed the appeal. He was not even located in the same state as General Chairman Morgan who did file the claim as well as the appeal. Consequently, ". . . whoever filed the claim or grievance (the employee or his representative)" was not notified within 60 days that the appeal was being disallowed. Pursuant to Rule 49(a)(1) the Board has no choice but to allow the claim as presented.

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 18th day of March 2013.