

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No.41593
Docket No. MW-41781
13-3-NRAB-00003-110415**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(and North Western Transportation 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 Machine Operator R. Rainey to perform machine operator overtime service (operate dozer to push rip rap) in the vicinity of Mile Post 404 on the Trenton Subdivision on May 15 and 16, 2010 and instead assigned junior employe D. Owen (System File R-1031C-308/1538556 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Rainey shall now be compensated for sixteen (16) hours at his respective 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 Organization filed the instant claim on behalf of the Claimant, alleging that the Carrier violated the parties' Agreement when it failed to call the Claimant to perform overtime service on May 15 and 16, 2010, and instead assigned a junior employee to perform the work.

The Organization contends that the claim should be sustained in its entirety because (1) the Carrier violated the Agreement by failing to call the Claimant to perform rest-day overtime work and instead assigned the work to a junior employee (2) the Claimant was the regularly assigned senior employee of the pertinent gang and was available for this service (3) there is no merit or evidentiary support for the Carrier's defense, and (4) the Claimant is entitled to the requested remedy. The Carrier counters that the claim should be denied in its entirety because (1) the record shows that the junior employee did not operate any equipment on the dates in question, and (2) the Organization failed to meet its burden of proof.

The Board carefully reviewed the record evidence and finds that the Organization failed to meet its burden to prove that the Carrier violated the Agreement when it failed to call and assign the Claimant to perform Machine Operator overtime service (operate a dozer to push rip rap) and instead assigned a junior employee to perform the work.

It is clear that the Claimant was not called in to perform overtime on the dates in question. However, the work that the Carrier needed done was not to operate a dozer, but rather to flag for a contractor. The Carrier tendered a written statement from Louis Lager, which was sent to Shawn North in response to the claim, indicating that junior employee D. Owen was "flagging for contractor." Although the Organization provided a statement from an employee who indicated

that Owen was operating equipment when he observed him that day, that does not resolve the question as to the reason the Carrier brought Owen in to perform overtime that day. In order to rebut that position, it was incumbent upon the Organization to obtain a statement from junior employee Owen as to what work he was brought in to perform on overtime that day.

The Organization bears the burden of proof in this type of case. Once the Carrier came forward with evidence that the junior employee was not brought in to perform work which the Claimant was entitled to perform, but rather to flag for a contractor, it was incumbent upon the Organization to rebut that position with evidence. It did not do so. Therefore, 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 18th day of March 2013.