

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41638
Docket No. MW-41354
13-3-NRAB-00003-100191

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(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 did not call and assign Mr. J. Pederson to perform overtime service in connection with moving a vehicle from San Antonio, Texas to Uvalde, Texas on January 27, 2009 and instead called and assigned junior employee L. Garcia (System File UP963PA09/1516598 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Pederson shall now be compensated for seven (7) hours at his respective time and one-half 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.

This is a preference for overtime dispute arising from the Carrier's assignment of Foreman Garcia from Gang 2884, rather than Claimant Pederson, a Foreman on Gang 2887, to drive the Director's personal vehicle from its location in San Antonio, Texas, to Uvalde, Texas, where it was needed on January 27, 2009, and is premised upon the seniority provisions in Rule 1(c) and 2, as well as Rule 29(f) and the Scope Rule. There is no dispute that Claimant Pederson is senior to Garcia on the Foreman roster, and that this assignment was not a continuation of the normal duties of either employee. On the claim date, the Claimant was working as a Flagging Foreman.

The Organization argues that (1) the Claimant had preference to this overtime assignment on the basis of his seniority (2) he was not offered the opportunity to work it and (3) Supervisor Torres chose a junior Foreman instead. It asserts that once the Carrier decided to use a Foreman for this assignment, it was obligated to respect seniority within that class, even if the employee chosen was from a different gang, citing Third Division Awards 13883 and 23386. The Organization takes issue with the characterization of this assignment as an "emergency," and notes that, even if it were, the Carrier must still make a reasonable attempt to assign the work by seniority. The Organization maintains that the Claimant is entitled to be compensated for the monetary loss suffered, as requested in the claim.

The Carrier contends that the Organization failed to meet its burden of proving a violation of any Agreement provision. It notes that the work involved moving the personal vehicle of the Director 96 miles to the location where the Detector Car he was working with was tying up for the night, and that it has the right to use any qualified employee to move a personal vehicle because such work has not been shown to be a BMW scope-covered activity. The Carrier argues that it is not restricted with respect to how it assigns specific work to its gangs, pointing to the statement of Foreman Torres explaining that he did not ask the Claimant who was performing flagging work at the time that he got the Director's call, which he took to be an emergency. It asserts that the Organization failed to point to any provision of the Agreement indicating that the Claimant had entitlement to the disputed non scope-covered work in preference to the employee who was assigned. On the property the Carrier also took issue with the

remedy requested; it contended that it was excessive and unwarranted, and noted that the Claimant was fully employed at the time and suffered no loss of earnings.

A careful review of the record convinces the Board that the Organization failed to meet its burden of proving a violation of the Agreement. Citing the Scope Rule (which has been held to be general in nature, see Third Division Award 29007; Public Law Board No. 6621, Case 56) along with Rules 1 and 2 dealing with acquiring seniority rights, is insufficient to establish that the Claimant's seniority gave him preference to an overtime assignment involving work that was not a continuation of his normal duties and was not assigned to any member of his gang. The work of moving the personal vehicle of the Director could have been accomplished by any number of people, including those not covered by the Agreement. It is not truck driving work encompassed within the Scope Rule or historically or customarily performed by BMW-represented employees. Once that fact is acknowledged, it is difficult to agree with the Organization's contention that because the Supervisor assigned it to an individual in the Foreman classification, who apparently was more available than the Claimant, the Claimant's superior seniority gave him an Agreement preference to such assignment. Regardless of whether this was seen by the Supervisor as an "emergency," it is the Organization's burden to prove that such "work" is reserved to the Claimant by some provision of the Agreement. It failed to meet that burden. 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 24th day of April 2013.