

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41648  
Docket No. MW-41643  
13-3-NRAB-00003-110331**

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

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(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 failed to allow and assign Machine Operator E. Beza to perform machine operator overtime service in moving the Cat Tamper from the work site at La Grange, Texas to the next work site at Settagast Yard in Houston, Texas on March 7, 2010 and instead assigned junior employe A. Palomo (System File UP-205-WF10/1537339 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. Beza shall now be compensated for twenty-one (21) 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.

This dispute arises from the Carrier's failure to assign the Claimant to perform Machine Operator overtime service moving the Cat Tamper from one work site to the next on March 7, 2010, and its assignment of a junior employee to perform the scheduled rest day overtime instead, and is premised upon Rule 25(j) which provides, in pertinent part:

**“WORK ON UNASSIGNED DAYS. Where work is required by the Carrier to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee.”**

The record reveals that the Claimant was regularly assigned as a Machine Operator on Gang 9498, working a T-9 schedule, operating the Cat Tamper. There is no dispute that the Claimant is senior to Machine Operator Palomo who was assigned the overtime work in question. March 7, 2010, the date of the overtime assignment, was the first rest day following the Claimant's work schedule and the rest day immediately preceding Palomo's regular T-2 work schedule. Supporting the Carrier's denial of the claim on the basis that the Claimant was offered the overtime opportunity but refused, is an unsigned email statement dated May 19, 2010 from Manager of Track Programs Gerald Noll asserting that Supervisor Diaz asked the Claimant and his Foreman to stay over a day and move the Cat Tamper on Friday, March 5, but that both declined, asking if the other shift would be able to come in a day early to move the equipment.

Included with the Organization's appeal asserting that the Claimant was never offered the opportunity to work this scheduled overtime was a signed statement from the Claimant dated July 21, 2010 disputing this information. The Claimant's statement specifies that Supervisor Diaz had a conference with him and Foreman Rivera on February 28, 2010, stating that they had to finish all work left behind so that they could travel the Cat Tamper on March 6, that the work group was authorized to work overtime on March 5 in order to complete the work, and that arrangements were being made to move the Tamper on March 6. The

Claimant's statement goes on to say that after completing the work on March 5, he and his Foreman called Diaz to ask about traveling with the Tamper and were told that the arrangements had fallen through and that the regular shift would move it on their first day of scheduled work. The Claimant denied being offered this overtime opportunity stating that he always makes himself available for such work when it is offered.

The Organization argues that the Claimant was the senior regularly assigned employee who was entitled to the overtime work in dispute, that he was not offered the opportunity to work this planned overtime assignment, and that Supervisor Diaz chose a junior employee instead. It asserts that there is no authoritative support for the Carrier's defense that the Claimant was offered the overtime opportunity because the hearsay statement of Noll is insufficient to rebut the firsthand account given by the Claimant or to create an irreconcilable dispute in fact, citing Third Division Awards 30209, 30774, 39935 and 40406. 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 Claimant was offered the overtime opportunity and declined the work, as set forth in the Manager's statement, thereby permitting the Carrier to assign it to the junior employee who also was regularly assigned to perform the work. It asserts that the Organization has failed to sustain its burden of proving a violation of the Agreement, and, at best, there is an irreconcilable dispute in fact concerning the offer of the overtime work that requires the claim to be dismissed.

A careful review of the record convinces the Board that the Organization met its burden of proving a violation of Rule 25(j) of the Agreement when the Carrier failed to assign the Claimant—the senior regular employee—to the disputed planned overtime work moving the Cat Tamper on March 7, 2010. This case turns on the sufficiency of evidence proffered by each party in support of the critical issue of whether the Claimant was, in fact, offered the overtime assignment. The record contains an unsigned email from Manager Noll contending that Supervisor Diaz offered the Claimant the assignment and that the Claimant refused. There is no first hand evidence in the record supporting such offer. On the other hand, the Claimant's statement was detailed concerning what occurred, and establishes that initially he was offered the opportunity to move the Cat Tamper on March 6, 2010 if all work was completed by the gang during March 5 overtime, but was subsequently

told that that assignment had fallen through and that the equipment would be moved by the next gang during their regular work schedule. This is not what occurred. There was no offer of overtime work to the Claimant on March 7. The hearsay statement relied upon by the Carrier is insufficient to prove either its affirmative defense that the Claimant was offered the work, or to create an irreconcilable dispute of fact requiring dismissal. Third Division Awards 39935 and 40406. Under such circumstances, the Claimant is entitled to compensation for his lost overtime work opportunity. The Carrier did not dispute the amount requested.

**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 24th day of April 2013.