

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41651
Docket No. MW-41769
13-3-NRAB-00003-110394

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 offer and assign overtime service on May 16, 17, 18 and 19, 2010 to Mr. A. Dupree and instead assigned junior employe L. Chambers (System File UP924PA10/1538513 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Dupree shall now be compensated for forty-four (44) 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 a junior Trackman, rather than the Claimant, to work rest day overtime, and is premised upon the seniority provision in Rule 1(c) and the Work on Unassigned Days Rule 25(j). The Claimant was regularly assigned as a Trackman on Switch Gang 9199, working a T-2 schedule, as was junior Trackman L. Chambers. Supervisor A. Johnson assigned Chambers to overtime work assisting Tie Gang 9169 on May 16—19, 2010, the normal rests days of Gang 9199.

Included with the Organization's appeal asserting that the Claimant was never offered the opportunity to work this overtime was a signed statement from the Claimant indicating that he approached Supervisor Johnson, after roll call one morning in Huffman, Texas, and asked him why Gang 9199 could not work overtime, because they had never been offered that opportunity, and Johnson replied that overtime was for the Tie Gang workers only, and that no Switch Gang workers would be able to work overtime. The Claimant denied being offered this overtime opportunity. The Organization also submitted a signed statement from junior Trackman Chambers, dated August 24, 2010, confirming what the Claimant said about Johnson's position that switch gangs could not work overtime and that Gang 9199 never received any overtime, and explaining that the reason why he was offered the work in dispute was because he was forced to work with Gang 9169 while still assigned to Gang 9199.

Supporting the Carrier's denial of the claim on the basis that the Claimant was offered the overtime opportunity but refused, is an email statement dated June 18, 2010 from Manager of Track Programs Gerald Noll, referencing an earlier claim filed by the Claimant for overtime he had been assured by the Supervisor had been offered to him, and asserting that he personally visited the gangs (Tie, Switch and Surfacing) where Supervisors Johnson and Caddel got up on the podium with all gang members present, including the Claimant, and asked for volunteers to stay over and work overtime during the period of May 16—19, 2010, and that the Claimant did not volunteer, but employees who did so were offered the overtime in seniority order. Additionally, a statement from Supervisor Johnson was submitted indicating that he did ask for volunteers for this overtime assignment and that the

Claimant did not raise his hand. Both the Manager and Supervisor stated that the Claimant was offered this overtime opportunity but chose not to work.

The Organization argues that the Claimant had preference to that rest day overtime assignment on the basis of his seniority, that he was not offered the opportunity to work this overtime assignment, and that Supervisor Johnson chose junior Trackman Chambers instead. It asserts that there is no authoritative support for the Carrier's defense that the Claimant was offered the overtime opportunity because the statements of Noll and Johnson are insufficient to rebut the firsthand account given by the Claimant and Chambers, 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 both the Manager's and Supervisor's statements, thereby permitting the Carrier to assign it to a junior employee. It asserts that the Organization 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 and declination of the overtime work that requires the claim to be dismissed, relying on Third Division Awards 30591, 33626, 33951 and 37204.

Unlike the situation in an earlier claim filed by the Claimant concerning similar overtime assigned to Chambers in early May 2010 (Third Division Award 41649) a careful review of the record convinces the Board that this case does present an irreconcilable dispute of material fact with respect to the determinative issue of whether the Claimant was offered the opportunity to work the disputed overtime and failed to volunteer. We have no way of measuring the validity of the statements submitted by the Organization against those submitted by the Carrier, because both are firsthand accounts of the critical issue of the offer of this overtime opportunity. As repeatedly noted by the Board in such circumstances, we function as an appellate body and have no way of resolving evidentiary conflicts or factual disputes. See, Third Division Awards 30591 and 37204. Because this dispute of fact prevents the Organization from sustaining its burden of proving that the Carrier violated the Agreement as alleged, the claim must be dismissed. See, Third Division Awards 33626 and 33951.

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AWARD

Claim dismissed.

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.