

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29531
Docket No. MW-29015
93-3-89-3-435

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employees
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned three (3) Track Subdepartment employees instead of Bridge and Building Subdepartment employees to install a concrete and wood loading dock at Caliente, Nevada from April 11, 1988 through April 23, 1988 (System File S-24/880405).

(2) As a consequence of the aforesaid violation, Bridge and Building Subdepartment employees N. D. Carter, D. A. Holt, D. C. Jones, J. Ashley, Jr., L. F. Rowsell and M. D. Roper shall each be allowed pay for forty (40) hours at their respective straight time rates and four (4) at their respective time and one-half overtime rates."

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The Claimants hold seniority in the Bridge and Building Subdepartment. The Organization contends that they should have been assigned the work of "installing a concrete and wood loading dock at Caliente, Nevada" which, according to the Organization, was assigned to three employees of the Track Subdepartment, who were identified in the initial Claim as "a division truck driver, welder, and welder helper." The work was performed between April 11 through April 23, 1988.

The initial reply of the Superintendent was that the claim was denied because the Claimants "were working and receiving compensation from Union Pacific Railroad during the claim period April 11-23, 1988." The reply concluded as follows:

"Inasmuch as D. A. Holt was not working and was not called to perform work on the Caliente unloading dock, your claim is sustained. Mr. Holt is entitled to compensation as follows:

11 days - Work Order 43825
33910 Bridge"

A review of the parties' Submissions and the on-property correspondence leads to the conclusion the Carrier accepted the Organization's view that the work should have properly been assigned to Bridge and Building Subdepartment employees. The question remains whether compensation is due in light of the fact that all the Claimants except one were fully employed during the period at issue.

The Board finds no merit in the Carrier's contention that the form of the Claim varied as it progressed. Minor variance in Rules citation as to alleged violation is not sufficient to invalidate the Claim. Likewise, the Board finds of little significance that the Organization did not supply the names of the Track Department employees until late in the Claim handling procedure. At the earlier stage, the Superintendent apparently had no difficulty in recognizing who performed the work. The Board also finds no merit in the Organization's contention that the Claim was not properly denied because of the apparently inadvertent omission of one Claimant's name as the correspondence progressed.

One other matter requires comment. When the Claim reached the Carrier's highest designated officer, he stated, without documentary support, that all the Claimants except one were "working on this project at Caliente." This was denied in a further letter from the Organization, attaching a signed statement from the Claimants.

The Carrier's contention is an affirmative defense. To be accepted, it requires more than mere assertion. The Board determines that if, within 30 days of the date of this Award, the Carrier can substantiate to the Organization's satisfaction that the Claimants were working on the Caliente loading dock at the time at issue, the Claim will be denied.

Otherwise, there is no basis on which the Claim should not be sustained. Returning to the question of compensation, the Board concludes that the Rule violation herein warrants sustaining of the Claim as submitted. In this instance, the Board concurs with innumerable previous Awards which hold that working status of the Claimants is an insufficient defense. The Board finds, however, that compensation should be at straight-time rather than the punitive rate for overtime hours worked by the Track Subdepartment employees.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 3rd day of February 1993.