

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 36977
Docket No. MW-36500
04-3-00-3-749**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

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

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Surfacing Gang 3106 Foreman R. Rios and Machine Operator S. M. Limon for overtime service (operate tamper and ballast regulator and related foreman work) for track surfacing work performed between Mile Posts 764.08 and 764.09 on July 21, 1999 and instead assigned junior employees C. Vasquez and M. Malik (System File MW-00-21/1212987 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Rios and S. M. Limon shall now each be compensated for eleven (11) hours' pay at their respective time and one-half rates 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.

As the Statement of Claim indicates, junior employees worked overtime on July 21, 1999. The Organization maintains that the Claimants should have been offered the overtime opportunity. Although the claim requests 11 hours of compensation based on the signed statement of the Claimants, the Carrier provided time records that showed only eight and five hours, respectively, were worked by the junior employees.

The Organization cited a number of Agreement Rules in support of its contention that the Claimants, by virtue of their greater seniority, were entitled to the overtime opportunity. The Carrier did not actually take exception to the Organization's view of the normal operation of the cited Rules. Instead, the Carrier relied upon two primary contentions. First, it maintained that the work involved repair to a washout after scheduled working hours. Second, it asserted that neither Claimant had provided a contact telephone number whereby the Claimants could be reached to offer them the overtime opportunity.

This claim must be resolved on well established, albeit technical, evidentiary principles. The claim asserted that the disputed work was known well in advance. Being planned work, the Claimants should have been provided the overtime opportunity in seniority order. A handwritten letter signed by both Claimants asserted that "Our MTM [Manager of Track Maintenance] and every track inspector and Foreman have our after hours phone #."

As noted, the Carrier did not contest the application of the Rules cited by the Organization. Instead, it asserted that the work resulted from a washout and took place after normal working hours. It raised contentions associated with the existence of an emergency situation. Secondly, it provided an unsigned e-mail

written by the MTM that said, "the employees making claim did not and to this date have not given me a phone number where they might be contacted after work hours...."

Because the claim initially asserted the work was known in advance and was planned, when the Carrier effectively refuted the assertion, it became the Organization's burden to prove its assertion by submission of probative evidence. See Third Division Award 31930. Our review of the record does not find that the Organization ever provided such proof. Thus, the Organization must be deemed to have failed to satisfy its burden of proof concerning this element of the claim.

According to the statement signed by the Claimants, they asserted that the MTM had their contact phone numbers. However, the e-mail by the MTM says that he did not. Both of these documents have essentially equal evidentiary standing before the Board. Although unsigned, the MTM's e-mail, if typed by the MTM, is an effective statement offsetting the statement of the Claimants. Thus, the Carrier is deemed to have countered the Organization's evidence on this point.

As an appellate body, the Board has no effective ability to weigh conflicting evidence and resolve such factual issues. Consequently, the dispute over whether contact phone numbers were or were not provided is an irreconcilable question of fact that the Board cannot resolve. As a result, the party with the burden of proof must be deemed to have failed in satisfying that requirement. In this case, the party saddled with that burden is the Organization. Thus, we must find that the claim has not been proven in this critical respect.

Given the foregoing findings, there is an insufficient basis upon which to sustain the claim.

AWARD

Claim denied.

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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 21st day of April 2004.