

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37718
Docket No. MW-36633
06-3-01-3-161

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

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 Mr. A. V. Felix to overtime service (providing protection for a contractor under bridge at Mile Post 495.21 at Compton, California) on November 25 and 26, 1999 and instead called and assigned Mr. J. A. Meza who was on vacation at such time (Carrier's File 122675 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. V. Felix shall now be compensated for twenty-four (24) hours' pay 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.

The Claimant established seniority in the Maintenance of Way and Structures Department dating from May 10, 1988. On the dates involved in this matter, the Claimant was assigned as a Welder on Gang 8041. Prior to November 25 and 26, 1999, Bridge and Building Gang 8041 was performing work in the vicinity of which the Carrier needed an employee to provide flagging for a contractor who was constructing a bridge on November 25 and 26. The Manager of Bridge Maintenance assigned Gang 8041 Foreman J. A. Meza to perform the overtime flagging work. At the time of this assignment, Meza was on vacation.

The Organization submitted a claim contending that the Carrier violated the Agreement by not selecting the Claimant to provide flag protection. According to the Organization, it was improper to assign a vacationing employee to the position when the Claimant was available and should have been so assigned. The Organization requests that the Claimant be compensated 24 hours at the overtime rate.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that pursuant to Rule 18 it has the discretion to select the "regular" employee. It is the Carrier's position that Meza was the regular employee. The fact that he was on vacation is irrelevant to the inquiry.

Rule 18(k) specifically provides:

"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 40 hours of work that week; in all other cases by the regular employee."

The Board finds that the Organization has been unable to meet its burden to prove that the Claimant should have been awarded the assignment. The Carrier has shown that Meza was the most senior regularly assigned employee and, therefore, he was entitled to the assignment.

As to the Organization's affirmative defenses, the Board cannot find that the Organization has been able to meet its burden of proof. At issue in this case is the fact that Meza was on vacation at the time of the incident. The Board notes that the event took place during the Thanksgiving holiday. At the time of the assignment, the Claimant was observing the Thanksgiving holiday and, therefore, both employees were off work when Meza was called. It is uncontested that had Meza not been on vacation, no objection would have been raised regarding Meza's overtime assignment.

There is no question that Meza was senior to the Claimant and that Meza was on vacation at the time of the assignment. According to the Carrier, "Barring any agreement language to the contrary, it is a managerial right to determine who is the 'regular employee' as the term is used in . . . Rule 18(k)." In addition, as indicated in Third Division Award 28011:

"The Scope Rule upon which the Organization relies is a general classification rule. . . . As such, the rule does not provide exclusive grants of work to the specific classification of jobs. Accordingly, for this Board to support such exclusivity, the Organization must show, though historical custom and practice, that welding work has been reserved to employees holding seniority in that classification. The Carrier has asserted that the opposite is true, and the Organization has not effectively refuted this position."

Thus, after a review of all the evidence, there has been no showing that the Carrier erred when it did not select the Claimant for the overtime assignment on November 25 and 26, 1999.

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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 23rd day of February 2006.