

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 38089
Docket No. MW-37213
07-3-02-3-140**

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 Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior employes R. Pedroza, E. Perez, J. Lua and G. Gallegos to perform regular and overtime service (unload ribbon rail) between Chowchilla, California and Turlock, California on October 10, 11 and 13, 2000 instead of assigning Mr. A. Nelson, Jr. (Carrier's File 1257459 SPW).**
- (2) As a consequence of the violation referenced in Part (1) above, Claimant A. Nelson, Jr. shall now be compensated for seven and one-half (7.5) 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.

It is undisputed that the Claimant was the senior Laborer on Gang 7864 at the time the claim arose. The gang was headquartered at Stockton, California. The Claimant had undergone shoulder surgery some time prior to the claim dates. Although he performed his regular duties on the gang, it is undisputed that his shoulder continued to bother him.

The Foreman of the gang was directed to select a partial crew from the gang to travel to the Merced District to unload a ribbon rail train between Chowchilla and Turlock, California. The remainder of the gang would stay behind to work with Gang 7249 in the Stockton area.

The record establishes that Foreman Martinez was concerned about the Claimant's ability to safely work the rail train assignment because of his shoulder condition. According to his written statement in the record, Martinez discussed the assignment with the Claimant and received the Claimant's agreement to have the junior employees work with the rail train. The statement quotes the Claimant as saying, "OK, dude, I understand."

Although the Claimant's own statement in the record casts the discussion with Martinez differently, it does not refute the content of Martinez' statement. Instead, according to the Claimant's statement, he was caught off guard by the discussion. Nonetheless, the Claimant admits he said, "Ya Dude I understand." The Claimant also admits replying affirmatively to questions about whether his shoulder had been bothering him.

The pivotal issue in this dispute is whether the Claimant had the opportunity to work the rail train and declined it. After careful review of the record, we find the evidence establishes that he did. It is undisputed that the Foreman discussed the assignment with the Claimant and that the Claimant did not raise any objection to the selection of the junior employees at the time of the discussion. Indeed, the record contains substantial evidence that the Claimant agreed with the planned

staffing of the rail train assignment. Even if the Claimant was caught off guard by the discussion as he contends, there is no evidence that he took any action whatsoever thereafter to let the Foreman know he wanted to work the rail train assignment. Thus, not only must the Claimant be viewed as having affirmatively declined the work opportunity in question, his silence after the discussion confirms his declination. Given these considerations, we find no violation of the Agreement as alleged in the claim.

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 21st day of February 2007.