

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 39613  
Docket No. MW-38174  
09-3-NRAB-00003-040015  
(04-3-15)

**The Third Division consisted of the regular members and in addition Referee Martin F. Scheinman when award was rendered.**

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employes  
(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 call and assign Machine Operator R. Navarro to perform overtime service (operate a ballast regulator) working with Gang 9166 on September 27, 28, 29 and 30, 2002 and instead called and assigned junior employe D. Brumly. (System File MW-03-36/1346079 MPR)**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Navarro shall now be compensated for forty-four (44) 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 result here turns on specific facts. The record evidence developed on the property demonstrates that during the period relevant to the claim the Claimant worked a "compressed workweek" and, as a result, has several days of rest when he might be available to work overtime. There is no dispute that overtime opportunities should have been offered to him unless he indicated to his supervisor that he was not interested in working overtime during the relevant period.

The evidence further establishes that the Claimant was assigned to Gang 9166 in 2002, and was working a compressed workweek, with rest days from September 24 – September 30, 2002. It is uncontested that it was necessary for the Carrier to operate a ballast regulator and perform other work from September 27 – September 30, 2002.

According to the Carrier, overtime work was offered to Gangs 9166 (the Claimant's) 9176 and 9177. It references a statement in the record from the Supervisor that asserts "... each member of our work group would be asked prior to leaving to observe our off days if they would like to work. An operator by the name of A. Flores was the only volunteer each and every time we asked. ..." The Claimant asserted that he "... informed Supervisor Sosa that he was willing and available to perform the subject overtime, but was ignored by Supervisor Sosa. ..."

It is a well accepted principle that the Board must decide factual questions based on the evidence in the record. Where the burden to prove specific facts is on the Organization, as it is here, factual conflicts are resolved in favor of the Carrier. Here, the evidence produced by the Organization is simply insufficient to satisfy its burden of proof. The clear conflict is between the Organization's assertion that the Claimant specifically volunteered for overtime versus the Carrier's evidence that all employees were offered the opportunity and only one employee – not the Claimant – accepted the assignment.

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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 1st day of April 2009.**