

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40086
Docket No. MW-38413
08-3-NRAB-00003-040365
(04-3-365)**

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 Chicago and
(North Western Transportation Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow Trackman V. Wheeler to exercise seniority in displacing a junior employe on Gang 3476 on April 24, 2003 (System File 4RM-9447T/1368306 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant V. Wheeler shall now be compensated for ten (10) hours' pay at the applicable trackman's straight time 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.

In April 2003, Claimant V. Wheeler was regularly assigned to System Tie Gang 9071 as a Trackman. On Thursday, April 17, the Claimant was displaced from the Gang by a senior employee. Wednesday, April 23 was the Claimant's last work day on the Gang. Pursuant to Rule 13, the Claimant had 14 days to exercise his seniority over any available junior employee. On Friday, April 24, the Claimant contacted the GMS Clerk. The Claimant was advised that he could displace onto District T-4 In-track Welding Gang 3476 that was working a Monday through Thursday workweek at Dennison, Iowa. The Claimant was advised to speak with Supervisor K. Saunders for verification of the Gang's location. The Claimant received Saunders' office and pager number, and left a message for Saunders that included the Claimant's home phone number. The Claimant contended that he received no phone call from Saunders and on Monday, April 28, reported for work at Dennison, Iowa. However, the Gang had moved 55 miles east of Dennison. The Claimant contends that he did not receive proper information in time to allow him to report for duty prior to the start of the work day and, therefore, lost ten hours' straight time pay. This is the basis for the instant claim.

The Organization contends that the Carrier violated the Agreement by not compensating the Claimant for one day at the straight time rate of pay. According to the Organization, the Claimant did what he was required to do and when he did not hear from Saunders, he reported for work at Dennison, Iowa. He lost a days' pay through no fault of his own.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that Supervisor Saunders attempted on three different occasions to reach the Claimant at his home with no answer each time. Saunders indicated that there was no means by which to leave a message at the Claimant's home, such as an answering machine or voice mail. It is uncontested that at the time, the Claimant did not have a cell phone. Saunders provided two

statements to this effect. According to the Carrier, this case provides an irreconcilable dispute of fact and, therefore, the matter must be dismissed.

The Board concludes that the Organization has been unable to meet its burden to prove that the Claimant should have been allowed one days' pay for April 28, 2003. It is clear that based on the Claimant's and Saunders' statements, there is an irreconcilable dispute of fact. Unfortunately, the Board has no way to resolve such a matter. When such a dispute occurs, the Board has no choice but to dismiss the matter. See Third Division Awards 35855, 35497 and 33951.

AWARD

Claim dismissed.

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 19th day of November 2009.