

**Form 1**

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40328  
Docket No. MW-40526  
10-3-NRAB-00003-080360**

**The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(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 to call regularly assigned employee E. Taff for overtime service in replacing a frog at Mile Post 410.3 near Tindall, Missouri on the Trenton Subdivision on January 27, 2007 and instead called unassigned employee J. Davis (System File R-0731C-304/1470601 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. Taff shall now be compensated for five and one-half (5.5) hours at his applicable overtime 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.**

**On Saturday, January 27, 2007 the Carrier called Welder J. M. Davis to repair a frog at Mile Post 410.3 near Tindall, Missouri, on the Trenton Subdivision. Because Davis had been bumped by a more senior Welder on the previous day, he was unassigned on January 27.**

**Claimant Machine Operator E. Taff, as well as Davis, worked Monday through Friday January 22 - 26 on Gang 2918. Taff does not hold Welding seniority, nor does he have the skills to perform electric arc welding. The Organization argues that the Claimant should have been called as the regular employee, under Rule 23L, and as the senior employee on Gang 2918 on January 27, under Rule 31.**

**The Organization asserts that the frog was changed. It contends that no welding was performed. Significantly, the Organization's on-property handling of this claim does not include any statement from the Claimant as to the work performed on the frog on January 27. In spite of the fact that the Vice Chairman requested the Claimant to submit a statement, the Claimant provided no additional evidence that the frog was changed.**

**On the other hand, the Carrier presented a statement from Manager of Track Maintenance L. Lager who assigned a Welding gang to repair the frog. He wanted a Welder. J. M. Davis maintains seniority in the Welder classification. Furthermore, he has the skills to perform electric arc welding. The Claimant does not.**

**The record is devoid of any evidence whether any welding was actually performed or whether the frog was changed, because it was beyond repair. However, it is the Organization that bears the burden of proof in cases such as this. It must present sufficient evidence on the property to establish the basis for the claim presented. Here, the Carrier contends that an employee with welding qualifications was needed to perform the work on the frog. The Organization**

claims the frog was changed and no welding was performed while changing the frog. However, there is no evidence as to work that was performed. There is an irreconcilable factual dispute as to whether welding was needed for this work assignment. Third Division Award 37204 sets out the action and reasoning of the Board when confronted with a case in which there is an irreconcilable conflict in the facts presented by the Organization and the Carrier, as follows:

“As repeatedly noted by the Board in such circumstances, we function as an appellate body and have no way of resolving evidentiary conflicts of factual disputes. See, Third Division Awards 28790 and 21436. Because this dispute of fact prevents the Organization from sustaining its burden of proving that the Carrier violated the Agreement as alleged, the claim must be dismissed. See, Third Division 36406.”

**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 1st day of March 2010.**