

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40338
Docket No. MW-40261
10-3-NRAB-00003-080025**

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier called and assigned junior Extra Gang Foremen N. Lucero and V. Hernandez to perform overtime service at Mile Post 35.0 to Mile Post 36.0 on the Moffitt Tunnel Sub-division of the Wyoming Division on May 14, 2006, instead of senior Extra Gang Foreman L. Martellaro (System File D-06-16/1457543).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Martellaro shall now be compensated for five (5) hours 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 Organization filed the instant claim on the Claimant's behalf, alleging that the Carrier violated the parties' Agreement on two occasions when it assigned two junior Extra Gang Foremen to perform overtime service, instead of the more senior Claimant.

The Organization initially contends that there is no dispute that the Claimant and the two more junior Extra Gang Foremen all were fully qualified, regularly assigned Extra Gang Track Sub-Department Foremen at the location involved here. All of these employees typically perform the general maintenance of track structure, roadway, and other incidental track work daily.

The Organization maintains that Rule 26(h) does not apply here because this situation did not involve an employee who otherwise would not have 40 hours of work for the weeks in question. The Organization asserts that all three of these individuals were fully qualified and available, but the Claimant was the regular employee with a clear contractual preference to the rest day overtime at issue by virtue of his superior seniority in the Foreman class, compared with Lucero and Hernandez. The Organization argues that the Carrier's disregard of the Claimant's seniority in this instance plainly violated the Agreement and resulted in the Claimant's loss of a valuable rest day overtime work opportunity.

The Organization points to a number of Awards that sustained claims for improper assignment of rest day overtime. The Organization submits that the Board long has recognized that overtime must be assigned based on the general principle of seniority. Applying this principle to the instant case, it is clear that the Carrier violated the Agreement when it failed to properly call and assign the rest day overtime at issue to the senior qualified Foreman, the Claimant, at 9:00 A.M. on Sunday, May 14, 2006.

As for the Carrier's assertion that it called the Claimant in seniority order for the rest day overtime work, the Organization insists that there is no evidence to

support this assertion. Moreover, the Claimant soundly refuted the Carrier's contention by stating that management did not leave any sort of message for the Claimant, and that the Claimant would not have been advised of this overtime work opportunity if Track Inspector T. Rupp had not called him at 2:00 P.M. on Sunday, May 14, 2006.

Addressing the Carrier's allegation that emergency circumstances existed on May 14, 2006, the Organization emphasizes that the Carrier presented only hearsay evidence on this point. Moreover, the Carrier's statement about the alleged emergency refutes the Carrier's own contention that the Claimant was called in seniority order. The Organization submits that the fact that the Carrier failed to submit telephone records or call logs is fatal to its affirmative defense. Citing a number of prior Awards, the Organization points out that mere assertions are not acceptable support for an affirmative defense, nor do they constitute valid proof. The Organization contends that the Carrier presented no credible evidence to support its affirmative defense.

The Organization goes on to maintain that the Carrier's failure to present pertinent documentary evidence in its sole possession to support its assertions invites the application of the negative inference rule. The Organization insists that the Carrier's failure/refusal to present such evidence leads to the inexorable conclusion that the evidence would not support its asserted defense, which collapses for lack of support. Accordingly, the Organization submits that the only conclusion that may be reached under these circumstances is that the Claimant was not called in seniority order, and whatever documentation exists would not support the Carrier's assertions.

The Organization points out that the Carrier has not disputed that Track Inspector Rupp was the person who contacted the Claimant at 2:00 P.M. on Sunday, May 14, 2006, to inform the Claimant that rest day overtime services were being performed by two junior Extra Gang Foremen. The Organization therefore asserts that there is no truth to the Carrier's assertion that the Claimant made himself unavailable for rest day overtime work, as demonstrated by the fact that the Claimant promptly reported for duty once he was informed of the overtime work opportunity.

The Organization suggests that the Carrier recognized its violation of the Agreement by failing to call the Claimant for this overtime work opportunity and then attempted to mitigate its monetary liability by alleging that the derailment constituted an emergency. The Organization maintains, however, that the Carrier presented no evidence that an emergency did, in fact, exist, or that the Claimant had been called in seniority order. The Organization argues that numerous Awards uphold the principle that even in an emergency, the Carrier is obligated to call/assign the senior employee. The Carrier violated the Agreement by failing to call the Claimant, the senior qualified Foreman.

As for any argument that the Claimant was not qualified to perform the overtime work in question, the Organization asserts that this simply is false. The Claimant routinely performed extra gang Foreman duties, he was senior to those initially called/assigned, and he would have competently performed the duties just as he did from 2:00 P.M. to 8:00 P.M. on the claim date.

The Organization then argues that there is no merit to the Carrier's assertion that any additional compensation to the Claimant would constitute a windfall. The remedy requested is not a penalty, but appropriate compensation for the overtime work opportunity to which the Claimant was entitled and would have competently performed, were it not for the Carrier's violation of the Agreement.

The Organization ultimately contends that the instant claim should be sustained in its entirety.

The Carrier initially contends that it has consistently asserted that the Claimant was called in an effort to afford him work on an overtime basis, but no contact was made until later in the afternoon on the date in question. Pointing to the statement from Manager Unbehaun, the Carrier asserts that this establishes that the Carrier made a good-faith effort to contact the Claimant, but it was not able to contact the Claimant until later in the afternoon. The Carrier points out that it fundamentally disagrees with the Organization's allegation that the Carrier failed to offer the work in question to the Claimant.

The Carrier emphasizes that because of the direct conflict in the parties' assertion of fact, the Board is not in a position to decide who is correct. Pointing to

prior Awards, the Carrier asserts that where an irreconcilable dispute in facts exists, the Board has no choice but to deny the claim.

The Carrier submits that it is incumbent upon the Organization to prove that the Claimant was deprived of wages as a result of an Agreement violation by the Carrier. To meet its burden, the Organization must prove not only that the Claimant made himself available, but also that the Carrier failed to make an attempt to call him for the work in dispute. The Carrier argues that the Organization failed to make either of these showings, so the Claimant is not entitled to any payment in this case.

The Carrier ultimately contends that the instant claim should be denied in its entirety.

The Board concludes that the Organization failed to meet its burden of proof that the Carrier violated the Agreement when it assigned two junior extra gang Foremen to perform overtime service between Mile Post 35.0 and Mile Post 36.0 on May 14, 2006. Therefore, the claim must be denied.

Our careful review of the record reveals that the Carrier was dealing with an emergency derailment and needed employees to work on the project. The Carrier called employees in seniority order and failed to get a response from the Claimant. It continued down the seniority list of employees and eventually had junior employees Lucero and Hernandez perform the overtime service at the derailment. The telephone calls to the employees took place in the morning, but the Carrier was unable to reach the Claimant until later that afternoon. Once the Claimant was reached by telephone, he came in to work and performed work.

It is fundamental that when there is an emergency situation, the Carrier has a broad latitude in assigning overtime work. The Carrier in this case did state that it made telephone calls to the employees in seniority order and was unable to reach the Claimant until later in the day. The fact that the Carrier had junior employees report earlier to take care of this emergency derailment does not in any way lead to a finding that the Carrier violated the parties' Agreement.

It is fundamental that the Organization bears the burden of proof in cases of this kind. The Organization failed to meet its burden of proof. The fact is that the Claimant was not home and did not get the message until later in the day. Therefore, the claim must be denied.

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 March 2010.