

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40397  
Docket No. MW-40704  
10-3-NRAB-00003-080514**

**The Third Division consisted of the regular members and in addition Referee Sherwood Malamud 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 failed to call and assign Messrs. J. Herbst and A. Schneider to track laborer overtime service (install ties) on February 24 and 25, 2007 and instead called and assigned junior employes G. Bishop, III and D. Crowe (System File R-0735U-303/1475495).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Herbst and A. Schneider shall now each be compensated for thirteen (13) hours at their respective time and one-half rates 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.

Claimant A. Schneider holds a Laborer seniority date of September 6, 1977. Claimant J. Herbst holds a Laborer seniority date of May 28, 1980. It is undisputed that Schneider is senior to G. Bishop, III and Herbst is senior to D. Crowe. All four employees were assigned to System Tie Gang 9067 on February 23 – 26, 2007. On Saturday February 24 and Sunday February 25 (Tie Gang 9067 rest days) Bishop and Crowe each worked 13 hours of overtime. The Claimants assert that they were available, qualified and willing to perform the tie installation work performed on these two rest days.

On the property, Schneider submitted the following statement in support of his claim:

**“At book of rules class when I, A. E. Schneider asked Mr. Hofer 9067 Supervisor about the two Rest Days his reply was to show up at Boone Co. Monday February 26 2007 at normal starting time.”**

Supervisor Hofer submitted the following statement on the property:

**“At the time, the 9067 tie gang was working a five-eights work week in the Pueblo CO area. There was no overtime approved for the 9067 tie gang to work through the weekend. With just a two day weekend, that being the dates in question, it was obviously prohibitive for round-trip travel to home for many on the gang. Switch Gang 9077 however, was working a compressed half schedule already. Inasmuch that the switch gang was to be working that weekend, Switch Gang Supervisor Martie Campos asked for volunteers off the tie gang to help the switch gang in their efforts. Despite getting many more volunteers than expected, Mr. Herbst and Mr. Schneider were not amongst those who opted to show up for the overtime work.”**

The Organization argues that the unrefuted facts are sufficient to support its claim. The Claimants are senior. The Carrier is obliged by Rule to ensure that senior employees are asked to work available overtime. There is no requirement that senior employees volunteer or call to the attention of supervision an interest in working a particular overtime opportunity. See Third Division Award 35962. Standing alone, the Board may interpret Supervisor Hofer's statement to indicate that a general offer to work overtime on the two rest days was made to Laborers on Tie Gang 9067. Senior employees Schneider and Herbst were not specifically asked to work the rest day overtime.

However, Hofer's statement does not stand alone. Claimant Schneider asserts that he specifically asked Supervisor Hofer if there was going to be any overtime work over the February 24 - 25 weekend. Claimant Herbst corroborates Schneider's account. Dugan submitted a statement on the property that Tie Gang 9067 employees were not offered any overtime work. Dugan asserts that several Tie Gang 9067 employees initiated the request to work overtime on the involved rest days.

**Manager of Track Programs Neuner submitted the following statement on the property:**

**“Claimants were asked if they wanted to work along with several other employees on the gang; each declined the opportunity to work the rest days. Therefore the junior employees were given the opportunity.”**

The Board finds from the record established on the property that the accounts of supervision and the Claimants and their corroborating witness cannot be reconciled on the factual event central to resolving this dispute. Were the Claimants asked to work the overtime? The Claimants assert that they were not asked. Supervision contends that they were asked.

Third Division Award 33895 governs the disposition of this case. The rationale follows:

**“The Board is confronted on this record with an irreconcilable conflict in material fact, set forth in diametrically opposed written statements from the two primary witnesses. In such situations of evidentiary gridlock, it is well settled that the Board must dismiss the claim on the grounds that the moving party has failed to establish a *prima facie* case.”**

Third Division Award 33487 and Public Law Board No. 2960, Award 154 came to the same conclusion. As an appellate body, the Board cannot resolve such conflicts over material facts. Accordingly, the instant claim is 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 25th day of March 2010.**