

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40416
Docket No. MW-39870
10-3-NRAB-00003-070029
(07-3-29)**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(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 the Agreement when the Carrier failed to call regularly assigned Welder J. Sensenich in connection with overtime service (welding rail repair) at Mile Post 41.4 on the Trenton Subdivision on October 7, 2005 and instead called and assigned Surfacing Gang Foreman G. Chaney (System File 2SW-2142T/1439707 CNW)
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Sensenich shall now be compensated for five (5) 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 Claimant was assigned and working as a Track Welder on Gang 2910. During the period at issue, the Claimant was working a Monday through Thursday workweek of four ten hour days.

On Friday, October 7, 2005, there was a broken rail reported at MP 41.4, on the Trenton Subdivision near Mill Grove, Missouri. The carrier assigned Surfacing Gang Foreman G. Chaney, Boom Truck Operator McGuinness and Welder Owens. It is undisputed that five hours of overtime work was incurred during the repair of the broken rail.

The Organization maintains that the Carrier violated Rule 23(L) when it called out Foreman Chaney for the overtime work and did not call the Claimant for rail welding overtime work.

Rule 23(L) provides:

“Work on unassigned days – Where work is required to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who shall otherwise not have 40 hours of work in that week, in all other cases by the regular employee.”

The Carrier responded initially that not only was there an emergency situation, but also that the Claimant was junior to the employees who were called out to perform the rail repair. The Carrier appears to have abandoned its emergency defense and relies upon the seniority of the employees who were called out to perform the overtime work. In relying on the seniority comparison of the employees who were called out to perform the rail repair, the Carrier contends that there has been no Organization allegation that the Foreman did anything other than normal Foreman duties. There is no allegation that anyone other than Welder Owens welded the broken rail.

After carefully examining the record evidence, the Board notes that all three employees, Surfacing Gang Foreman Chaney, Boom Truck Operator McGuinness and Welder Owens, were all senior to the Claimant. The Board also notes that there is no reference in the record to any Organization claim that the assigned Foreman performed any work other than the duties of a Foreman. There is no allegation that anyone other than the assigned Welder performed the disputed work. There is also no Rule 23(L) allegation that the Claimant had less than 40 hours in that week.

Welder Owens was one of the regular employees who could have been called and was called to perform the rail repair. Welder Owens, like the other two members of the repair crew, are all senior to the Claimant. The Organization can point to no Rule that requires the Carrier not to assign a Foreman to a rail repair overtime assignment. The Foreman and Boom Truck Operator each perform separate duties. The Board notes that the Carrier has discretion in making assignments. That discretion is limited by the Agreement, and of course, the applicable laws and regulations that are not at issue in this claim. See generally, Third Division Award 37437 and the citations contained therein.

It is axiomatic that the burden to prove this claim is upon the Organization. As discussed above, the Organization failed to meet that burden and, accordingly, 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 14th day of May 2010.