

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 40417  
Docket No. MW-39950  
10-3-NRAB-00003-070084  
(07-3-84)**

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 Southern  
( Pacific Transportation Company [Western Lines])

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Deming Subdivision and junior employees P. Villegas and J. Lopez to overtime service at Mile Post 1156 on the Lordsburg Subdivision on November 21 and 22, 2005 instead of Lordsburg Subdivision employee H. Moreno (Carrier’s File 1442468 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant H. Moreno shall now be paid for eleven (11) hours at his overtime rate of pay and for sixteen (16) hours at his double 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.

The Claimant, was assigned and working as a Laborer Gang 7368, has seniority dating to March 24, 1971. The instant claim involves overtime work that occurred on November 21 and 22, 2005.

The Organization maintains that the Carrier violated the Agreement when it assigned two junior employees to perform overtime work. According to the January 13, 2006 correspondence of the General Chairman, the two junior employees were:

“ . . . to stand by for possible broken rails at Mile Post 1156, on the Lordsburg Subdivision. Not only are the two employees junior in seniority to the Claimant, but they are assigned to Gang 8610 headquartered at Deming, NM on the Deming Subdivision. These two employees had to cross over seniority district lines in order to perform this work. This was not an emergency situation.”

According to the Organization, not only were the two employees junior to the Claimant, but the seniority district lines were violated when they were assigned the overtime work.

The Carrier counters that the two employees were working on a ballast regulator and a truck – work for which they were qualified and the Claimant was not. Further, the employees did not “stand by for a broken rail.” Rather, the employees were working on a bridge that had been destroyed in a fire. According to the Carrier, the Claimant was not qualified for the work and the two employees were not assigned as the Organization now claims. The Carrier further contends that the matter presents an irreconcilable conflict in material fact and must therefore be dismissed.

The Board carefully examined the record evidence. The Carrier produced documentation that the two junior employees were assigned to a Casualty Work Order at MP 1156 for the repair of 75 feet of timber bridge. Further, they were listed as working as a Ballast Regulator Operator and a Truck Driver – for neither of which the Claimant was qualified.

In his letter dated March 30, 2006, the General Chairman stated, in pertinent part:

“Despite what [MTM] may have informed Ms. Allen, it is easy to claim that [the junior employees] worked as a ballast regulator job and a truck driver job on paper, but out in the field it’s a different story. Although [the junior employees] show being paid at their respected class of time, it does not diminish or prove that they actually worked in that capacity. Being paid . . . does not automatically mean that they worked exclusively in those positions.”

In the final analysis, despite the General Chairman’s contentions, allegation is not evidence and conjecture is not proof. The burden here is on the Organization to establish a prima facie violation of the Agreement. The Carrier provided documentary evidence that the two junior employees were assigned to the bridge repair on jobs for which the Claimant was not qualified. The Organization has not refuted the Carrier’s evidence. Accordingly, the Organization’s claim must fail for lack of proof.

**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.