

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40808
Docket No. MW-40729
10-3-NRAB-00003-0080615**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(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 Agreement was violated when the Carrier failed to call and assign Mr. F. Tsosie, III to perform overtime flagging duties at Mile Posts 24.0 and 25.0 on the Los Angeles Subdivision on April 21, 22, 23, 24, 25, 26 and 30, 2007 and at Mile Posts 499.9 and 498.2 on the Alhambra Subdivision on May 1, 2, 3, 4, 7, 8, 9, 10 and 11, 2007 and continuing and instead called and assigned junior employe R. Silva (Carrier’s File 1480179 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant F. Tsosie, III shall now ‘. . . be compensated seventy (70) hours at time and one-half (overtime) rate at his respective rate of pay because of the Agreement violations cited herein. Payment shall be in addition to any compensation he may have already received. Claim is being submitted as continuous until violation ceases to exist.’”**

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 and the junior employee were two of several members of Flagging Gang 8460. Their normal assignment was to provide flagging services to several other gangs working in the Los Angeles area. According to email statements provided by two Carrier Supervisors, when overtime flagging was needed, the gang Supervisor would call employees in seniority order and offer the overtime. If the Supervisor received no answer, he would move on to the next member of the gang and call him. The Claimant was called for overtime in seniority order and either did not answer or declined the work to provide care for his daughter.

According to a statement provided by the Claimant, he was not called for any of the overtime opportunities until beginning in July 2007, which was after the dates of the instant claim.

Given the state of the record before the Board, we are confronted by an irreconcilable conflict of material fact. It is well settled that when such conflicts are present, we have no proper means of resolving the dispute. As a result, we have no choice but to dismiss the Organization's claim for failure to fulfill its burden of proof. See, for example, Third Division Awards 26478, 37204, and 33895, as well as the Awards cited therein.

AWARD

Claim dismissed.

Form 1
Page 3

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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 15th day of December 2010.