

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40813
Docket No. MW-40761
10-3-NRAB-00003-080657**

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

PARTIES TO DISPUTE: (**(Brotherhood of Maintenance of Way Employes**
(**Union Pacific Railroad Company (former**
(**Missouri Pacific Railroad Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned the employes of Texas District Tie Gangs 9167, 9166, 9176, and 3837 to replace ties on the Southern District Tie Gang territory between Mile Posts 51.00 and 27.00 on the Navasota Subdivision starting on April 9 through April 15, 2007, instead of Southern District Tie Gang Roster employes (System File MW-07-80/1483226 MPR).**
- (2) As a consequence of the aforesaid violation, Claimants K. Mallet, R. Foley, R. Ruffin, G. Housos, N. Noska, G. Haby, H. Sanchez, R. Richard, D. Schmidt, A. Joseph, A. Morgan, W. Nelson, J. Zeno, R. Castille, J. Garcia, M. Vasbinder, S. Sanchez, T. Bingham, R. Smith, W. Drews, K. Kelso, H. Singleton, P. Lejeune, W. Menard, E. Thomas, N. Sinegal, Jr., R. Leleux, J. Bob, Sr., D. Gilder, G. Almeida, J. Castro, J. Bergeron, J. Mc Gowen, P. Posas, H. Demouchette, B. Harris, P. Griffin, C. Nash, J. Myers, W. Cunningham, H. Batiste, M. Franklin, Jr., K. Nunn, A. Gobert, D. Lindsey, M. Drews, L. O. Quain, B. O. Quain, D. Carter, A. Boudreaux, R. Warren, R. Salazar, M. Perez, III, T. Basco, A. Baker, B. Adams, J. Varner, J. Alphin, W. Haywood, Jr., J. Williams, J. Berrera, J. Hodge, R. Lucio, B. Killingsworth, A. Fox, A. O’Conner, III, J. Alvarez, R. Willis, G. Curtis, A. Murray, L. Heslip, R. Green, L. Robinson, D. Finister, J. Richardson, W. Bone, R. Sandoval, M. Johnson, T. Jones, J. Poole, G. Johnson, J. Rowley,**

R. Channel, B. Suter, J. Rowley, L. Adams, L. Johns, Jr., E. Holliday, L. Isaac, L. Wanko, L. Brooks, F. Garner, T. Reney, I. Dimas, C. Royer, A. Stevens, S. Moore, J. Hudson, J. Jenkins, R. Smith, W. Fluitt and R. Gregory shall now each be compensated for seventy (70) hours at their respective overtime 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.

The instant dispute presents a somewhat novel remedy issue. According to the record, the Carrier admitted its scheduler inadvertently assigned Texas District tie gangs to replace ties on the Southern District tie gang territory in violation of a seniority district boundary. The violation occurred in April 2007 during the date-range noted in the Statement of Claim.

The claim seeks 70 hours of pay for each Claimant at the applicable overtime rate. The Carrier, however, submits that there is no justification for the overtime rate. In addition, the Carrier’s position is that it should only have to pay for the hours that two tie gangs actually had track time and could have been performing work in violation of the seniority rights of the Southern District Claimants. The Carrier provided evidence that two tie gangs only worked 29.75 hours and 30.5 hours, respectively. Although both parties cited prior Awards in support of their respective positions, none of them appears to deal squarely with the remedy issue in controversy. Accordingly, the issue appears to be one of first impression.

After thorough consideration of the evidence and contentions of the parties, we are persuaded to reach the following conclusions. First, the record does not

establish that the scheduler's incorrect assignment was intentional; according to information in the record, the Board is persuaded that the scheduler made an inadvertent error. Second, no proper basis has been demonstrated for payment at overtime rates. In this regard, the Board is mindful of the fact that the Organization, as the moving party, has the burden of proof to establish the basis for its claim. Proper support for the overtime contention has not been found in the record.

We also considered a hypothetical situation as part of our analysis. We asked ourselves if the scheduler's error had been caught before the Texas District tie gangs actually performed any work on the Southern District territory, would there have been a violation? In other words, if the Texas District tie gangs had assembled on the Southern District territory and merely began preparations to perform work but were actually stopped short of doing so, would there have been a violation? In that situation, it appears the Carrier would have, nonetheless, been obligated to pay the Texas District employees for the time spent "out of bounds" on the Southern District, but would their mere presence there constitute a violation if no actual work was performed? We conclude there would not have been a violation under those circumstances. As a result, under the unique facts before the Board, we find that the proper measure of the remedy is the number of hours actually spent performing work in violation of the Agreement.

Given the foregoing discussion, those Claimants who were not unavailable for work due to vacations or similar absences during the dates the work was performed (April 11 - 14, 2007) should be paid additional straight time compensation in accordance with the Carrier's position. The claim is partially sustained to this extent.

AWARD

Claim sustained in accordance with the Findings.

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ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2010.