

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40868
Docket No. MW-39017
11-3-NRAB-00003-050008
(05-3-8)**

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

**(Brotherhood of Maintenance of Way Employees 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 Foreman G. Purkey to perform overtime service in connection with his regular assignment (provide protection for Heble Construction) at McCammon, Idaho on October 4, 2003 and instead assigned said duties to Manager Track Maintenance D. Kula (System File J-0335-65/1385374).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Purkey shall now be compensated for three (3) hours 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 (Foreman G. Purkey) states that Manager of Track Maintenance (MTM) D. Kula spiked and tagged a switch on his Section 6114 on the Idaho Sub-division on a rest day, Saturday, October 4, 2003. In addition, the Claimant states that MTM Kula provided protection for Heble Construction while the contractor loaded rail into CNW 340339, CNW 340128, CNW 340309 and DRGW 50458.

MTM Kula submitted the following statement during the on-property processing of this claim:

“MTM at McCammon at 3:30 p.m. on October 3 cars were sitting in track and MTM did spike and tag track. Account contractor was working at McCammon before said time and Mr. Purkey was instructed to spike and tag switches if he noticed car were there. . . Did meet with contractor on the morning of October 4 to discuss what work was to be done at McCammon and Idaho Falls. . . Switch was not tagged on October 4. Claim should be denied account switch was locked out during normal working hours on October 3.”

During the Referee Hearing on November 17, 2010, the Carrier asserted that the Claimant left to return to his headquarters in Pocatello at 3:15 P.M. MTM Kula states that he spiked and tagged the switch at 3:30 P.M. on October 3, during normal hours, but after the Claimant timely left to clock out for his headquarters in Pocatello, Idaho.

The Organization cited Third Division Awards 24435, 31955 and 31957, which sustained claims when personnel not covered by the Agreement, such as, Managers or Supervisors, performed scope-covered work. However, this argument was not a basis for the claim or one presented on the property. Therefore, the Board does not address this argument in this Award.

The Organization argues that this rest day work at overtime rates should have been assigned to the Claimant under Rule 26 (h). He was the regular employee. The Carrier refuted the gravamen of the claim that MTM Kula spiked and tagged the switch on October 4. MTM Kula spiked and tagged the switch on October 3, during regular work hours after the Claimant had left to return to his headquarters in Pocatello.

The Claimant asserts additional Carrier activity on October 4 serves as a basis for his claim. As the regular employee performing this work, he should have provided protection for the contractor's forces on October 4. He was home and available to work on October 4. Protection was afforded the contractor's forces on October 4 while they loaded scrap rail into railroad cars.

MTM Kula denies that he spiked and tagged the switch on October 4. He does not deny providing protection to the contractor's forces on October 4. The Board must take an uncontested affirmative statement to be true. The Board concludes that MTM Kula provided protection for the contractor's forces on October 4. As the regular employee performing that work in the prior workweek, Rule 26 (h) identifies the Claimant as the regular employee who should have been called out to provide protection for the contractor's forces. See Third Division Awards 7958 and 28236.

Foreman Purkey seeks three hours' pay at his time and one-half rate. Because there is no evidence in the record as to how much time it took MTM Kula to spike and tag the switch, the Board has no basis for reducing the claim by the amount of time it took to spike and tag the switch. Accordingly, the Claimant is entitled to three hours' pay at the overtime rate, as claimed.

AWARD

Claim sustained.

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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 7th day of February 2011.