

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40963
Docket No. MW-40851
11-3-NRAB-00003-090145**

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 (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 failed and refused to assign Machine Operator C. Loch to overtime service to unload Gang 9101 machines and equipment at Houston, Texas, on October 31, 2007 and instead assigned junior employe J. Perales (System File T07-30/1489708 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Loch shall now be compensated for twelve (12) 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 holds seniority in the Roadway Machine Operator classification from March 18, 1993. When this dispute arose on October 31, 2007, and since 2000, the Claimant was assigned to System Rail Gang 9101. This Gang is a large mechanized mobile and high production gang that operates over a large geographic area.

Under a T-1 schedule, October 31 was a scheduled rest day. The Carrier scheduled 31 employees to work non-emergency overtime to unload Gang 9101's equipment on October 31. The Carrier scheduled J. Perales, who holds less seniority in the Roadway Machine Operator classification than the Claimant, for the overtime. The Claimant alerted his supervisor W. E. Loggins that he was available and wanted to work this overtime.

The Carrier explained the decision to schedule Perales rather than the Claimant in a statement provided by Manager of Track Programs Menchacha during the on-property processing of this claim:

“With regard to Mr. Loch’s claim, it is important to understand the mechanics involved with unloading a train. An off-track crane is used to accomplish the actual unloading of materials from the train. A particular group of individuals dedicated to the task of unloading trains and these particular individuals are ‘qualified’ to unload trains. When machinery is unloaded from the train, there is oftentimes a need to move that machinery from the point at which it was unloaded. Only a person qualified on that particular piece of machinery may move it. The only machine that Mr. Loch is qualified on is the ‘Fairmont Spike Puller.’ Mr. Loch is not an individual normally tasked with unloading trains. Additionally, there wasn’t a ‘Fairmont Spike Puller’ that required to be unloaded and moved on the date in question. This is why Mr. Loch was deemed unqualified to unload the train on this date.”

Once the Carrier challenges the Claimant's qualifications to perform the work scheduled for October 31, the burden shifted to the Organization to establish that the Claimant was qualified to perform the scheduled work. See Third Division Award 36902 wherein the Board stated:

"In line with consistent determinations made over many years, the Board finds that once the Carrier stated that the Claimant lacked the fitness and ability for the position, the burden of proof shifted to the Organization to demonstrate by sufficient probative evidence that the Carrier's actions were in error."

The Organization asserted that the Claimant was qualified, but it presented no evidence that the Claimant was qualified to operate equipment other than the Fairmont Spike Puller. The Organization presented no evidence to establish either that the Fairmont Spike Puller was unloaded on October 31, or that the Claimant was qualified to operate any of the pieces of equipment unloaded on October 31. The Board concludes that the Organization failed to meet its burden 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 April 2011.