

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41051
Docket No. MW-41157
11-3-NRAB-00003-090514**

The Third Division consisted of the regular members and in addition Referee William R. Miller 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 Agreement was violated when the Carrier failed to call and assign Mr. B. Prophet to overtime service beginning April 24 through April 30, 2008 and instead called and assigned junior employee D. Grant (Carrier's File 1506383 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Prophet shall now be paid for fifty-five (55) 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 facts indicate that during the period of April 24 through 30, 2008, the Carrier required the overtime services of an employee to assist another employee on the Oregon Division. At the time of the incident, the Claimant was assigned to System Gang 8500 as a Laborer. System Gang 8500 was working a "T-1" alternate work period schedule with accumulating rest days, which resulted in the aforementioned time period becoming the Claimant's rest days.

It is the position of the Organization that the Carrier failed to call the Claimant to perform overtime service between April 24 and April 30, and instead called and assigned junior employee D. Grant. It argued that the Claimant was readily available, fully qualified, and willing to perform the overtime service if he had been called. It asserted that before going on his rest days, he advised the Carrier to call him if any overtime arose and verified that his cell phone number was on file. It concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that the System Gang Managers announced the need for scheduled overtime to be worked during the rest period in question and Grant was the senior qualified employee who expressed a desire to work the overtime required. According to the Carrier, the Claimant did not elect to perform overtime service, because he did not volunteer for the work. It also alleged that historically the Claimant has always turned down overtime and this claim smacks of "laying behind the log," which has not been an acceptable premise by arbitrators. It closed by asking that the claim remain denied.

The Board thoroughly reviewed the record and is not persuaded by the Carrier's argument that this dispute involves the classic example of a Claimant "laying behind the log" with the hope of gaining compensation based upon the allegation that he was not called. Whether the Claimant may have always turned down overtime in the past is immaterial, because his seniority affords him the right to be called for all eligible overtime, after which it is his decision to decide whether

he wants to work or not work. Accordingly, the Claimant's past work history played no part in resolving this matter.

Instead, the resolution of this case comes down to its on-property handling and the statements of the principle parties to the incident. The Organization asserted that the Claimant made it known to his superiors that he would be available for any overtime that arose during his rest period, and offered as support of its position, a statement from the Claimant which stated, in pertinent part, the following:

"During rest days a junior man worked 55 hrs. of overtime as curve lubricator with the local section, without offering the overtime to the senior laborer first. That made clear last day of work to call with any overtime chance and double checked to see that my cell number was on file." (Emphasis added)

In rebuttal on the property the Carrier asserted that prior to System Gang 8500 observing its rest days (April 24 through April 30) Carrier Supervisors announced to the entire gang the need for scheduled overtime to be worked during the rest period and the Claimant failed to express any desire to work the overtime offered, whereas employee Grant was the senior qualified employee who expressed a desire to work the overtime required. To bolster its position, the Carrier offered a statement from Supervisor Widup who wrote, in pertinent part, the following:

"Mr. Prophet did not mention to myself, nor my immediate foreman of his intent to work on these off days. . . ."

The dispute comes down to conflicting statements. The Claimant stated that he told someone that he was interested in working overtime. If that statement had set forth the name of that person, the instant claim may have had a different outcome. On the other hand, the Claimant's Supervisor states that the Claimant told no one that he wanted to work and, according to the Carrier, if he had "spoken up" he would have been used for the overtime. In a similar dispute involving contradictory statements Third Division Award 33895 held, in pertinent part, as follows:

“The Board is confronted on this record with an irreconcilable conflict in material fact, set forth in diametrically opposed written statements from the two primary witnesses. In such situations of evidentiary gridlock, it is well settled that the Board must dismiss the claim on grounds that the moving party has failed to establish a prima facie case. See Third Division Awards 21423, 16780, 16450, 13330; Second Division Awards 7052, 6856; Public Law Board No. 4759, Award 3.” (Emphasis added)

The logic and reasoning of Third Division Award 33895 is directly on point with the case at hand and will be followed, because there is no way for the Board to verify the accuracy of either of the aforementioned statements, both of which must be accepted at face value. Therefore, the Board finds and holds that the claim must be dismissed.

AWARD

Claim dismissed.

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 23rd day of August 2011.