

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41103
Docket No. MW-40912
11-3-NRAB-00003-090154**

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 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 Flagging Gang 8883 Foreman A. Castillo to perform flagging for the protection of a contractor performing work at Mile Post 77.22 on the Coast Subdivision on August 7, 2007 and instead called and assigned junior employee R. Sousa (Carrier’s File 1489228 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Castillo shall now ‘. . . be paid an equal amount of hours, straight time and overtime, that were worked by Mr. R. Sousa on the date identified herein which shall be no less than eight (8) hours straight time and three (3) hours of overtime. Payment shall be in addition to any compensation Claimant may have already received.’”**

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 Organization claims that the Carrier violated the Claimant's seniority rights when, on Tuesday, August 7, 2007, it failed to assign him to perform flagging protection for a contractor performing asphalt work. In support of its position, the Organization argues that (1) the work in question was located on the Claimant's territory, (2) he is senior to the employee assigned (R. Sousa) and (3) the Claimant spends 98% of his time flagging. The Organization claims the Claimant's seniority required the Carrier assign the flagging work to the Claimant on August 7 for both the straight and overtime work.

The Carrier contends that it assigned Surfacing Gang 7193 Foreman R. Sousa to perform the flagging work because that gang was working in the area of the asphalt work. Once assigned to perform the straight time work on that day, the overtime arose out of the assignment, thus Sousa was the regular employee to perform the overtime as a continuation of the work he was performing during his regular assignment. The Claimant is not part of Gang 7193 and was not working in the area of the asphalt contractor. Rather, he was assigned elsewhere performing flagging work on the claim date.

The Carrier contends that flagging work is performed by employees in various classifications. It argues that the Organization failed to establish the Claimant's preferred status to perform the work in question.

The Board concurs with the Carrier's analysis. There is flagging work for more than one individual on this territory. No contractual basis has been demonstrated that would have required the Carrier to assign the Claimant to the claimed work instead of the work he performed. Neither has any contractual basis been demonstrated that would allow the Claimant to pick his assignment for the

day. Moreover, Sousa was the regular employee to perform the overtime as a continuation of the work he was performing during his regularly assigned hours. The Board concludes, therefore, that the Organization has not met its burden of proof to demonstrate that the Carrier's action violated the Claimant's seniority rights or the Agreement.

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 18th day of October 2011.