

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41649
Docket No. MW-41722
13-3-NRAB-00003-110339**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 to offer and assign overtime service on May 1, 2 and 3, 2010 to Mr. A. Dupree and instead assigned junior employee L. Chambers (System File UP923PA10/1536815 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant A. Dupree shall now be compensated for thirty (30) 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.

This is a preference for overtime dispute arising from the Carrier's assignment of a junior Trackman, rather than the Claimant, to work rest day overtime, and is premised upon the seniority provision in Rule 1(c) and the Work on Unassigned Days Rule 25(j).

The record reveals that the Claimant was regularly assigned as a Trackman on Switch Gang 9199, working a T-2 schedule, as was junior Trackman L. Chambers. Supervisor A. Johnson determined that Tie Gang 9169, working a T-1 schedule, was short-handed and he assigned Chambers to overtime work assisting that gang on May 1, 2 and 3, 2010, the normal rests days of Gang 9199. Supporting the Carrier's denial of the claim on the basis that the Claimant was offered the overtime opportunity but refused, is an unsigned email statement dated June 18, 2010 from Manager of Track Programs Gerald Noll asserting that numerous employees were asked to stay over and work this overtime, including the Claimant, but that he stated that he had "other things going on," and declined the overtime work.

Included with the Organization's appeal asserting that the Claimant was never offered the opportunity to work this overtime was a signed statement from the Claimant dated August 17, 2010 disputing this information. The Claimant's statement specifies that he approached his supervisor, Alvin Johnson, after roll call one morning in Huffman, Texas, and asked him why Gang 9199 could not work overtime, inasmuch as they had never been offered that opportunity, and Johnson replied that overtime was for the Tie Gang workers only, and that no Switch Gang workers would be able to work overtime. The Claimant denied being offered this overtime opportunity, and stated that Noll had never approached him with an offer of overtime work at any time. At the conference held regarding this claim, the Organization also submitted a signed statement from junior Trackman Chambers, dated August 24, 2010, confirming what the Claimant said about Johnson's position that switch gangs could not work overtime and that Gang 9199 never received any overtime, and explaining that the reason why he was offered the work in dispute was because he was forced to work with Gang 9169 while still assigned to Gang 9199. Chambers also stated that the Claimant never turned down any overtime work, because none was offered to Gang 9199, who were all more than willing to take it.

The Organization argues that, once the Carrier decided to assign a Switch Gang 9199 Trackman to work with Tie Gang 9169 on overtime, the Claimant had

preference to that rest day overtime assignment on the basis of his seniority, that he was not offered the opportunity to work this overtime assignment, and that Supervisor Johnson chose junior Trackman Chambers instead. It asserts that there is no authoritative support for the Carrier's defense that the Claimant was offered the overtime opportunity because the general, hearsay statement of Noll is insufficient to rebut the firsthand account given by the Claimant and Chambers, or to create an irreconcilable dispute in fact, citing Third Division Awards 30209, 30774, 39935, and 40406. The Organization maintains that the Claimant is entitled to be compensated for the monetary loss suffered, as requested in the claim.

The Carrier contends that the Claimant was offered the overtime opportunity and declined the work, as set forth in the Manager's statement, thereby permitting the Carrier to assign it to a junior employee. It asserts that the Organization failed to sustain its burden of proving a violation of the Agreement, and, at best, there is an irreconcilable dispute in fact concerning the offer and declination of the overtime work that requires the claim to be dismissed, relying on Third Division Awards 26478, 33895, 36977 and 37204. The Carrier also argued on the property that the claim was excessive because the Claimant was compensated for 11 hours of employee training on May 1, 2010, and was therefore unavailable for work on that day.

A careful review of the record convinces the Board that the Organization met its burden of proving a violation of the seniority provisions of the Agreement when the Carrier assigned junior Switch Gang 9199 Trackman Chambers to the disputed overtime work helping Tie Gang 9169 on May 1, 2 and 3, 2010, rather than the Claimant, the senior Trackman on that gang. This case turns on the sufficiency of evidence proffered by each party in support of the critical issue of whether the Claimant was, in fact, offered the overtime assignment. The record contains an unsigned email from Manager Noll contending that the Claimant, among others, was offered the assignment and that he refused. There is no first hand evidence in the record supporting such offer, which allegedly came from Supervisor Johnson. On the other hand, both the signed statements of the Claimant and Chambers set forth clearly that Supervisor Johnson told Switch Gang 9199 that they were not going to get any overtime work, which was going to be given to Tie Gang employees, and that the Claimant was never offered, nor declined, an opportunity to work the disputed overtime. The hearsay statement relied upon by the Carrier is insufficient to prove either its affirmative defense that the Claimant was offered the work, or to create an irreconcilable dispute of fact requiring dismissal. See, Third Division

Awards 39935 and 40406. Under such circumstances, the Claimant is entitled to compensation for his lost overtime work opportunity. The Carrier disputed the amount requested, asserting that the Claimant was already compensated for 11 hours on May 1, 2010 for employee training. Upon proof of this fact, this amount shall be deducted from the remedy requested herein.

AWARD

Claim sustained in accordance with the Findings.

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 24th day of April 2013.