

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42115  
Docket No. MW-42161  
15-3-NRAB-00003-130111**

**The Third Division consisted of the regular members and in addition Referee Patrick Halter 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 offer Roadway Equipment Operator D. Stanbrough the overtime duties associated with undercutting and cribbing in the vicinity of Hanover, Kansas on the Marysville Subdivision on August 13 and 14, 2011 and instead assigned junior employe J. Thavenet (System File D-1135U-210/1561529).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Stanbrough shall now be compensated for twenty-one (21) 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 was assigned to and worked as a CBH Operator on Gang 0041 during the month of August 2011. When performing his regularly assigned duties of undercutting, cribbing and related track projects, the Claimant's assigned equipment is a crawler backhoe (CBH 0705). On Saturday, August 13, 2011, the Carrier assigned a junior employee to operate CBH 0705 and perform the duties regularly assigned to the Claimant for 11 and one-half hours and for nine and one-half hours on Sunday, August 14, 2011. These are overtime hours because the junior employee and the Claimant were observing rest days on this weekend.

According to the Organization, the Claimant's supervisor (Manager of Track Maintenance) did not contact the Claimant, as the senior employee, to offer him the work opportunity. On September 28, 2011, the Organization filed a claim alleging numerous Rules violations and requesting a monetary remedy.

On November 22, 2011, the Carrier denied the claim stating, among other reasons, that the MTM offered the weekend work opportunity to the Claimant, but it was declined because the Claimant was unavailable due to another commitment.

On January 17, 2012, the Organization appealed the claim denial stating that the Claimant was available, but he never received a telephone call from the MTM. The Claimant became aware of this work opportunity upon returning to work following his rest days. Included with the appeal was the Claimant's statement dated December 19, 2011 which reads, in relevant part, as follows:

**"What [MTM] Smith is recalling is that I requested the weekend of Labor Day weekend off (Sept. 3, 4, 5) . . . and the following 4 Sundays after that for my daughter's softball schedule. At no time did I ever refuse to work a weekend for [MTM] Smith when asked.**

**I was on compressed halves at the time of the weekend overtime in question – schedule T1. My gang was on rest days from Aug. 9-15. The person who worked my machine that weekend was on a 5-8 schedule. [MTM] Smith was working with Jim Thavenet the week of Aug. 8-12. (I was on my rest days at this time) and asked him to work the weekend of 13-14th. At no time did [MTM] Smith call me**

or attempt to call me on my rest days and ask me to work that weekend.”

On March 2, 2012, the Carrier denied the appeal stating that it offered any overtime work associated with the Claimant’s regular assignment to the Claimant, but he declined the offer. Also, the burden of proof resides with the Organization to establish the facts that prove a Rules violation, but it failed to do so. Included with the declination letter was the MTM’s November 23, 2011 email, which reads as follows:

“I ask[ed] Mr. Stanbrough to work overtime in person. He said that he could not [because] he had [an]other prior commitment. So I went to one of my other gangs to have a qualified operator to run a John Deere 200 under cutter.”

On May 8, 2012, a conference convened without a resolution or understanding.

Volumes of Third Division Awards have held that the Organization, as the moving party in a claim, must establish the facts proving a Rules violation. The Board finds that the Organization established that the Claimant, as the senior employee, would be offered the overtime opportunity on the claimed dates prior to any offer extended to a junior employee. The Board must determine a dispositive fact in this claim. That is, whether there was an offer to the Claimant.

The MTM contends that he personally extended the offer to the Claimant, but the Claimant declined the offer, whereas the Claimant contends that he did not receive a telephone call from the MTM offering overtime on the claimed dates. The dueling statements are accepted for what they state. Nevertheless, a dispositive finding on this matter favorable for the claim cannot be drawn from the on-property evidentiary record. As stated in Third Division Award 33626 “[t]he record thus presents us with an irreconcilable dispute as to the facts. As an appellate body, we are not in a position to take testimony, evaluate witness credibility and resolve such factual disputes. Faced with such a situation, we have no choice but to dismiss the claim. See e.g., Third Division Award 33416.” In line with that precedent, the Board must dismiss the instant claim.

Form 1  
Page 4

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**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 13th day of July 2015.