

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42182  
Docket No. MW-41629  
15-3-NRAB-00003-110288**

**The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 assign Mr. D. Swane to provide on-track safety protection for a contractor operating a Hy-Tracker machine on the Gila Subdivision between Mile Posts 894 and 897.5 on February 8, 2010 and instead assigned junior employee G. Jameson (System File R-1035U-306/1533795).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Swane shall now be compensated for thirteen (13) hours at his applicable overtime 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.**

On Monday, February 8, 2010, the Carrier decided to assign a Maintenance of Way employee to perform overtime flagging duties in connection with on-track grade work being performed by a contractor operating a hy-tracker machine between Mile Posts 894 and 897.5 on the Gila Subdivision. At the time of the overtime assignment that gave rise to this claim, the Claimant was assigned as a Foreman on Gang 8579. One of the job duties he regularly performed was flagging. The employee to whom the overtime work was assigned, R. T. Jameson, holds seniority as a System Semi-Truck Operator and was regularly assigned as such on Gang 8575. Flagging is not one of the usual and customary job duties of a Semi-Truck Operator. Instead of calling the Claimant to perform the overtime, the Carrier instead assigned the work to Jameson, who expended a total of 13 hours on the assignment, all of which were paid at the time and one-half rate of pay.

The Organization filed this claim alleging that the Claimant, as the senior employee regularly assigned to perform flagging duties, was entitled to be called for the overtime work before it was assigned to Jameson. The Carrier responded that Jameson had been assigned to perform flagging duties and the overtime was merely a carryover from his straight-time assignment.

If in fact Jameson was assigned to flag for the contractor during his straight time hours, Rule 35 of the Agreement would permit the Carrier to assign the overtime to him as a continuation of his straight-time assignment in lieu of calling in another employee, regardless of seniority. The record includes both a statement from the Claimant that the hy-tracker was assigned to his Gang – No. 8579 – and the overtime should have been assigned to someone on Gang 8579 – not Gang 8575. The record also includes two statements from Track Supervisor Brian Zelasney. The first, dated March 30, 2010, stated: “The machine in question is not assigned to Mr. Swane’s gang, therefore there is no obligation to have him work the overtime to do the flagging. . . .” The second statement, dated February 16, 2011, is more specific:

“In the said case involving Mr. Jameson flagging for a contracted machine. Mr. Jameson has and was providing the flagging for the contracted hytracker machine, during straight time and overtime hours. Which is assigned to no one particular gang.” [Sic]

The statements from the Claimant and Track Supervisor Zelasney are absolutely contradictory, and there is no independent objective evidence to corroborate either one of them. As such, the Board is presented with an irreconcilable conflict in material facts, to wit, whether the hy-tracker was working with Gang 8579

or Gang 8575. Moreover, the Organization did not present any evidence to dispute the Carrier's representation that Jameson had been assigned the overtime continuous with his assignment that day. In view of the foregoing, the Board is constrained to dismiss the claim.

**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 28th day of October 2015.