

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42192
Docket No. MW-41971
15-3-NRAB-00003-120314**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(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 call and assign Gang 9034 Tamper Operators P. Bellows and R. Botello to perform overtime service at CPW 130 on December 26, 2010 and again on December 28, 2010 and instead called and assigned junior Operators D. Wood and C. Shultz (System File D-1135U-201/1551692).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants P. Bellows and R. Botello shall now ‘. . . be allowed compensation to equal the overtime hours worked by the junior employees operating the surfacing equipment. ***’”**

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 claim arose after the Carrier allegedly assigned two junior employees to work overtime on December 26, 28 and 29, 2010, following a derailment near Bridgeport, Nebraska. All four employees were assigned to Gang 9034 as Track Machine Operators, and there is no dispute that the employees who were allegedly assigned to perform the overtime were less senior than the Claimants. Under ordinary circumstances, this would mean that the Claimants were entitled to be assigned the overtime in preference to the junior employees. However, the Carrier's defense here is that the Claimants had previously indicated to management that they were not interested in going as far as Bridgeport to work; despite that, management attempted to call them following the derailment. When they did not answer the telephone, management continued down the seniority list until it got to employees who answered the telephone and were willing to accept the assignment.

This is a case where there is an irreconcilable dispute of material facts: the statements in the record before the Board from Claimant Bellows and from Track Supervisor Christopher Jensen cannot both be true. Jensen wrote:

“Two operators were needed. Before this date, I brought it up to the entire gang. Paul Bellows and Ron Botello made it perfectly clear they did not want to go all the way out to Bridgeport. The only operators that were willing to go were Chad Schultz and Dennis Woods. Chad and Dennis were already out at Bridgeport on those machines. When the call came, I called the other operators. The ones that answered my call did not want to go and Ron and Paul did not answer or respond to my message. Chad and Dennis were up to doing the job.”

In contrast, Claimant Paul Bellows submitted a statement reading:

“I was never asked to go work in the Bridgeport area for any kind of work. The other two operators, Chad Schultz and Dennis Woods, were told they were needed in that area to work. When asked why those two were going to the Bridgeport area to work, we were told that Chris wanted the two senior operators to stay on the CAT.

When the derailment happened, I never received a phone call, nor a message as stated by Chris Jensen asking me to work it. I was available and willing to work when it happened.

As the phone records show, I received calls all day December 26th, 2010, the day the other operators received notification from Chris Jensen. I have enclosed phone documentation with this appeal.”

Unfortunately, the telephone records attached to the Claimant's statement are not entirely clear: it appears that the records only include calls that were answered, not calls that were not answered (i.e., all calls have some number of minutes associated with them; there is no "missed calls" log).

There is no evidence in the record from Claimant Botello.

Whether the Claimants were called to work the overtime is a material fact in this case. However, the record includes diametrically opposed statements regarding that critical fact, and there is no reliable objective evidence that the Board could use to deduce which is the more credible statement. Moreover, because the Board sits as an appellate body, it is extraordinarily difficult for the Board to make the determinations of credibility that are possible in a de novo hearing. Accordingly, in cases where there are irreconcilable disputes about material facts, the Board is required to dismiss the claim, and it must do so here.

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.