

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 42198  
Docket No. 42019  
15-3-NRAB-00003-120376

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. R. Macchione to overtime service within the territory of Section Gang #5411 commencing on April 6, 2011 and continuing through April 13, 2011 and instead assigned Mr. H. Cordova (System File D-11-23/1555718).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Macchione shall now ‘. . . be compensated for sixty-four (64) hours of overtime wage loss suffered at his respective overtime rate of pay at \$36.54 per hour, for a sum total of \$2,338.56.’” (Emphasis in original).

**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 claim for improper assignment of overtime. Beginning April 6 and continuing through April 13, 2011, the Carrier assigned Relief Track Inspector Henry Cordova to pilot a rail grinding train across territory assigned to Gang No. 5411. The Rail Grinding Gang was assigned to work from 8:00 P.M. to 8:00 A.M. Claimant R. Macchione is a Section Foreman on Gang No. 5411, with greater seniority than Cordova, and he filed this claim for overtime, alleging that he should have been assigned the work instead of Cordova. The Carrier did not contact Macchione about performing the work until April 12, 2011, when he had to decline due to a previously scheduled doctor's appointment on that date.

According to the Organization, Section Foremen such as the Claimant, have historically performed this work and, as such, the Claimant was entitled to be assigned the work before it was offered to Cordova, who is a Relief Track Inspector whose job duties do not normally include piloting a rail grinding train. The Claimant made his availability to perform the work known to the Carrier and was ready, willing and able to work the overtime. The Carrier's defenses have changed over time, robbing them of credibility; moreover, some of its defenses are illogical.

The Carrier argues that in a jurisdictional case like this, the Board has held that the Organization has a very heavy burden of proof, and that the Organization failed to meet that burden to establish that the Claimant was entitled to be assigned the work in dispute over the employee to whom it was assigned. There is no proof that Section Foremen have historically piloted rail grinding trains to the exclusion of other classifications and crafts; in fact, the record includes a statement from Manager of Track Maintenance Peyton to the contrary, which the Organization failed to rebut.

This claim must fail for lack of evidence. There is no dispute that the Claimant was qualified to perform the work at issue, or that he was senior to the employee to whom it was assigned. But that is not enough to establish his entitlement to the work in preference to the individual to whom it was assigned. The Organization asserted that historically Section Foremen have regularly performed the work of piloting rail grinding trains across various territories, but it submitted no actual evidence in support of that position. Moreover, while it may be true that Section Foremen have done the work in the past – indeed, the Board acknowledges that that has probably occurred, and frequently – merely having performed the work is not enough to establish entitlement to it if other classifications of employees have also been assigned the work. The evidence from MTM Peyton is that:

**“Any qualified person can pilot the Rail Grinder. In fact, we have used other employees, crafts and people without the BMWED craft [to] pilot the rail grinder across the system. This is not and never has been a part of the foreman duties. No actual work was performed simply escorting the rail grinding train across the system.”<sup>1</sup>**

**The Organization argues a position based solely on the terms of the Parties’ Agreement, but without providing actual evidence that would support its interpretation of the Agreement as applied to the facts of this case. The only actual evidence in the record from the Organization is the Claimant’s statement, which does not address the work at hand – piloting the rail grinding train – as work that Section Foremen are entitled to perform in preference to other classifications of employees. It appears that the Claimant believes he should have been assigned the work simply because he has more seniority than the person to whom it was assigned.**

**Seniority alone is not enough to sustain the claim if the Carrier has traditionally assigned the work to different classifications and crafts. Here, MTM Peyton’s second statement asserts that. His second statement is, actually, supported by his first statement, in which he wrote: “I also gave older Welders and Ralph Macchione options to take [the] rail grinder but got no response from Ralph.” This sentence implies that Peyton offered the job to different employees in different classifications, which is consistent with his later statement that the work was historically assigned to a variety of classifications and crafts. In addition, the record does not indicate whether the work was assigned to Cordova strictly on an overtime basis. The facts in the record are simply not developed enough for the Board to conclude that the Organization met its burden of proof,<sup>2</sup> and, therefore, the claim must be denied.**

### **AWARD**

**Claim denied.**

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<sup>1</sup> The Organization objected that this statement, Peyton’s second, was palpably not credible because it offered a different reason for the Carrier’s failure to assign the work to the Claimant than his first statement. The fact that a Supervisor submits two statements does not, by itself, establish a lack of credibility. Peyton’s statements are not inconsistent or mutually exclusive, and the Board finds both of them credible.

<sup>2</sup> See Third Division Award 38087 and Public Law Board No. 6302, Award 12 regarding the level of proof required of the Organization in cases like this.

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**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.**