

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42249
Docket No. MW-41850
16-3-NRAB-00003-120157**

The Third Division consisted of the regular members and in addition Referee Sinclair Kossoff when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(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 December 9 and 10, 2010 to Mr. M. Danford and instead assigned junior employee G. Castro (System File UPLW438-10/1545107 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Danford shall now be compensated for twenty-two (22) 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 operate an anchor squeezer machine on Western District Tie Gang No. 9161 under Track Supervisor Jordan Morgan in December 2010. Junior employee George Castro was assigned to work on Western District Tie Gang No. 9162 under Track Supervisor W. Younger. The Claimant was working his last scheduled workday on December 8 before his rest days beginning on December 9, 2010. Overtime was offered by Supervisor Younger on December 8 for surfacing work to be performed on December 9 and 10, 2010, including operation of the anchor squeezer machine. Junior employee Castro was allowed to operate the anchor squeezer machine on overtime for a total of 22 hours on December 9 and 10, 2010, which was the machine regularly operated by the Claimant.

On December 23, 2010, the Organization submitted a claim to the Carrier seeking payment to the Claimant for 22 hours at his overtime rate of pay, alleging a violation of the Claimant's seniority rights. The Organization asserted that Track Supervisor Morgan was at a staff meeting leaving Supervisor Younger in control and thereby allowing his junior employees to get the overtime.

The Carrier, by letter dated February 16, 2011, denied the claim on the basis Supervisor Younger stated that the Claimant “. . . along with the rest of the gang was offered to be utilized for the work on the claimed dates,” but that the only person who raised his hand and volunteered to operate the anchor squeezer machine was the junior employee. The Carrier, in its response to the Organization, included a copy of the following email communication from Supervisor Younger to the Engineering Supervisor:

“12/28/2010

Subject: Response to Claim # M 10-MOP278

No sir he was asked I told everyone at job briefing that surfacing gangs would be working two to three days to catch up on surfacing and particularly asked for a[n] anchor squeezer operator the only person to raise their hand was Mr. Castro, Mr. Danford did not raise his hand to work I worked everyone that raised their hand or asked to work claim should be denied[.]”

In its denial letter the Carrier asserted, “Neither the Claimant nor the Organization has produced any evidence that [the] Claimant was not offered the

work opportunity in question when the Carrier chose to utilize an employee for the grieved work.”

The Organization appealed the denial of the claim by letter dated March 1, 2011. The appeal disputed the Carrier's assertion that Track Supervisor Younger offered the work in the Claimant's presence, but that the Claimant did not raise his hand to volunteer to operate the anchor squeezer. Specifically, the Organization asserted, “Mr. Younger was not present at Gang 9161 roll call on December 8, 2010. Gangs 9161 and 9162 were one (1) mile apart and Supervisor Younger was taking care of his gang employees.” The Organization also added the argument that the employee who performs the work on his assigned work days has the right for any overtime using his machine.

The Carrier responded to the appeal by letter dated April 8, 2011. The Carrier again remarked that “. . . the Organization has failed to provide any documentation in support . . .” of its statement that the Claimant was not offered the overtime. Even, however, had the Organization provided documentation, the Carrier argued, that would have created an irreconcilable dispute of facts. In such situations, the Carrier contended, the claim must be dismissed due to the failure of the moving party to meet its burden of proof. The Carrier denied the appeal.

A signed statement from the Claimant with a “RECIEVED” stamp by the Organization dated April 4, 2011, was introduced into evidence by each of the Parties as an exhibit to their respective Submission. The Carrier stated in its Submission that the Claimant's statement was first presented to the Carrier by the Organization during conference on August 12, 2011. The Organization has not disputed that representation. The Claimant's statement said as follows:

“I Martin Danford took vacation Dec. 1 through Dec 5 2010. Came back to work on Dec. 6 2010. Ran my assigned mach. AASQ9208 on Gang 9161 Dec. 6, 7, 8 Jordan Morgan was at a staff meeting. At that time I showed up at 9161 roll call. I heard they were working overtime 9th 10th and maybe the 11 of Dec. Did not see Bill Younger. Did not have Bill Younger phone number. He did not come to Gang 9161 roll call. At that time I told someone to tell him I would work. He did not ask me or did I see him. I was told George Castro ran AASQ9208 Dec. 9 & 10.”

Supervisor Younger states that he told everyone at the job briefing that the gang would be working two or three days of overtime to catch up on surfacing and particularly asked for an Anchor Squeezer Operator. He asserts that the only person who raised his hand was the junior employee and that the Claimant did not raise his hand. The Claimant's signed statement, however, states that he was present at the Gang 9161 roll call on the pertinent date that the overtime in question would have been assigned and that Supervisor Younger was not present at that roll call. He further stated that his own supervisor, Jordan Morgan, was at a staff meeting at the time of the roll call. In light of the Organization's contention in its original claim letter that the Claimant was a member of Gang No. 9161 and was not present at the job briefing when Supervisor Younger, who supervised Gang No. 9162, offered the overtime in question, it was incumbent on the Carrier to present evidence to explain how Supervisor Younger's job briefing could have included the Claimant, who was a member of Gang No. 9161.

The Carrier failed to present any such evidence. In normal circumstances that would have been a sufficient basis for sustaining the instant claim in light of the fact that the Claimant had given a signed statement that Supervisor Younger did not come to the Gang No. 9161 roll call on the date that the overtime in question was offered. That would have been sufficient proof that the Carrier skipped over a senior eligible employee in offering the work to the junior employee.

In his written statement, however, the Claimant also admitted that he "... heard they were working overtime 9, 10 and maybe the 11 of Dec." Instead of making it his business to communicate to Supervisor Younger or his own Supervisor that he wanted to work the available overtime, the Claimant, according to his signed statement, told someone to tell Supervisor Younger that he would work the overtime. His explanation for not doing more to communicate his willingness to work the overtime was that he did not see the Supervisor or have his phone number.

No Award has been cited to the Board, and the Board is not aware of any case, where a claimant, who was improperly passed over for available overtime; had timely knowledge of said overtime; did not inform any member of supervision or management that he wished to work such overtime; but, nevertheless, had his claim for payment of the overtime sustained. Having knowledge of the available overtime, it was incumbent upon the Claimant to make a good faith, reasonable effort to inform Supervisor Younger, his own Supervisor, or some other appropriate Supervisor or Manager that he wanted to work the available overtime. He did not fulfill that responsibility by telling some unidentified person to tell Supervisor

Younger that he would work the available overtime. Accordingly, the claim will be denied.

AWARD

Claim denied.

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 29th day of February 2016.