

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42250
Docket No. MW-41883
16-3-NRAB-00003-120183**

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 Carrier violated the Agreement when it failed to call regularly assigned Flagging Foreman W. Boykins to perform overtime flagging service at Mile Post 43.25 on the Lufkin Subdivision on December 12, 2010 and instead called and assigned junior employee R. White (System File UP-501-JF-11/1546021 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Boykins shall now be paid for twelve (12) hours at his respective 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 December 12, 2010, the Carrier assigned a Foreman, who was junior in seniority to the Claimant, to provide flagging protection for contractor forces performing track work in Cleveland, Texas, for 12 hours on Sunday, December 12, 2010. Both the Claimant and the junior employee are Foremen headquartered at the same Division. The Claimant's regular assignment was that of Flagging Foreman, and the junior employee's regular assignment was as a Bridge Tender.

The Carrier does not dispute that the Claimant, based on his greater seniority, was entitled to be offered the overtime work prior to the junior employee. However, it contends that, prior to offering the work to the junior employee, Track Supervisor Tamrah Dean called the Claimant but he did not answer his cell phone and did not return her call. The Organization filed its claim with the Carrier by letter dated January 7, 2011, addressed to Engineering Supervisor North, and Supervisor Dean provided Engineering Supervisor North with the following email dated January 14, 2011:

**"Tamrah G. Dean/UPC
Date: 01/14/2011
To: Shawn M. North
Subject: Response to Claim # M11-MOP003**

Flagman Harris was not able to cover his assigned flagging job the weekend of 12//11/10 and 12/12/10. I therefore called the flagmen in seniority order on 12/10/10. Mr. Boykins did not answer his cell phone and did not return the call. In order to let the contractor know how to plan his work, I kept searching to find someone to cover this vacancy that flagman Harris created."

Both in its answer to the initial claim and in its response to the Organization's appeal, the Carrier noted that the Organization did not produce any evidence that the Claimant was not offered the work opportunity in question. After the claim was conferenced by the Parties on August 12, 2011, in a letter dated August 30, 2011, confirming the conference previously held, the Organization asserted, "The Carrier has never submitted any documentation that shows that Ms. Dean ever contacted the Claimant." The Organization throughout has maintained that the Carrier did not afford the Claimant an opportunity to perform the work.

In Third Division Award 36977, citing Third Division Award 31930, the Board held that when a factual assertion relied on by the Organization in support of its claim is denied by an assertion by the Carrier, it becomes “. . . the Organization's burden to prove its assertion by submission of probative evidence.” In the instant case, not only did the Carrier deny the Organization's assertion that the Claimant was not afforded an opportunity to perform the overtime work in question, but it also provided probative evidence of that fact in the form of an email statement by Supervisor Dean. Study of the record shows that the Organization failed to provide any statement by the Claimant or other probative evidence to counter the evidence of the Carrier that the Claimant was called in order to offer him the opportunity to work the overtime in question, but he did not answer his cell phone or return the call.

It follows that the Organization failed to prove a fact essential to meeting its burden of proof - namely, that the Claimant was not afforded the opportunity to work the overtime in question. Its claim must therefore be denied. See Third Division Award 27895. Compare Third Division Award 33440 (the Organization's version of a disputed determinative factual issue was credited over the Carrier's where the Organization's version was supported by a written statement provided by a witness and the Carrier's version was supported by “only a bare assertion to the contrary by the Senior Manager Employee Relations.”)

The Organization argues, however, that the proof provided by the Carrier that the Claimant was called for the overtime work is insufficient, because it was in the form of an “unauthenticated e-mail purportedly from one of its supervisors, alleging that [the] Claimant had been called and thus offered the overtime which the Carrier acknowledges was his due.” The Organization cites Third Division Award 39935 involving these same Parties in which the Carrier relied on an email to show that the work in question required a Track Inspector and that the claimants were not qualified to perform that work. The Board described the email as “. . . an unsigned document, purporting to be an email by Manager Kula, that he had been instructed by an unnamed individual to call a Track Inspector to inspect track.”

The Board held that the email was insufficient proof that track inspection was necessary on the date in question. It cited evidence that the actual work performed was shoveling snow and chipping ice and noted that there was no statement from the Track Inspector as to his duties on that day. The Board then declared, “The vague and unsigned document submitted by the Carrier is not sufficient to create a material difference of fact as to these matters.” The word “vague” obviously refers

to the contents of the email, not to the efficacy of email as a medium for communicating a statement as evidence in support of a Party's position. Nor is there any statement by the Board that email is per se an unacceptable form to communicate a statement to be used as supporting evidence.

By contrast in Third Division Award 36977 involving these same Parties the Organization supported its position with a handwritten letter signed by both claimants. The Carrier buttressed its position with an unsigned email written by the MTM (Manager of Track Maintenance.) Therein the Board held:

“ . . . Both of these documents have essentially equal evidentiary standing before the Board. Although unsigned, the MTM's email, if typed by the MTM, is an effective statement offsetting the statement of the Claimants. Thus, the Carrier is deemed to have countered the Organization's evidence on this point.”

Similarly, in Third Division Award 37204 between these same Parties the Board found two emails from the Carrier's Supervisors written within a month of the incident sufficient to offset a written statement from the Claimant and create “. . . an irreconcilable dispute of material fact with respect to the determinative issue of whether the Claimant was offered the opportunity to work the disputed overtime.”

For some years now email has been the most common means of communication both in the business world and among the public in general. Its wide acceptance attests to its efficiency and reliability. In the Board's opinion so long as the email appears regular on its face and contains the name of the sender and the name of the recipient it should be accepted as authentic absent evidence of fraud or other irregularity. Supervisor Dean's January 14, 2011 email transmission meets these criteria and, in accordance with the prior cited Awards, will be accepted by the Board as her statement and evidence in support of the Carrier's position.

The Organization further argues that “. . . [t]he Carrier's failure/refusal to provide the Organization with the Carrier phone records, in particular, which were directly relevant to the disputed issue, leaves one with the impression that such documentation would not have supported the Carrier's stated position.” (Emphasis added by the Organization). The record does not show any request made of the Carrier by the Organization for documentation in support of Supervisor Dean's statement. The first reference to documentation on the part of the Organization

appears in its post-conference letter dated August 30, 2011, to the Carrier in which it states, "The Carrier has never submitted any documentation that shows that Ms. Dean ever contacted the Claimant." That letter, however, did not request that post-conference documentation be provided. The evidence does not establish that the Carrier ever refused to provide documentation to the Organization. Nor may the failure of the Carrier to provide documentation serve as a basis for sustaining the claim where documentation was never requested of it, and the Organization has failed to provide any evidence, as opposed to mere bare assertion, contradicting Supervisor Dean's statement that she called the Claimant to cover the flagging assignment in question, but he did not answer his cell phone and did not return the call. 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.