

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42472
Docket No. MW-42057
16-3-NRAB-00003-120425**

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 call Mr. J. Ehlers for overtime track repair service at Mile Post 120.8 on the Jeff City Subdivision on July 24, 2011 and for overtime track repair service between Mile Posts 143 and 170 on the Sedalia Subdivision on August 2, 2011 and instead called junior employee M. Wilfong (System File UP718BT11/1558548 MPR).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Ehlers shall now be compensated for a total of 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.

The Claimant was the most senior Track Foreman on Gang 1711, a Section Gang whose duties included regular track maintenance. On Sunday, July 24, 2011, the Claimant's Maintenance Track Manager called in a foreman on the same gang with less seniority than Claimant to repair a broken rail. The repair took 8½ hours. On August 2, 2011, the same Manager assigned the junior foreman to perform 3½ hours of overtime work to tighten bolts at frogs and switches. The first assignment was in the Jefferson City subdivision in Sedalia, Maryland; and the second, in the Sedalia subdivision of that town. The Claimant submitted claim forms to the Organization regarding both assignments, and the Organization, by letter dated August 18, 2011, filed the present claim with the Carrier.

The Carrier answered the claim by letter dated October 14, 2011, to which an email statement from the Maintenance Track Manager was attached, explaining why he used the junior foreman for both overtime assignments. The letter, based on the Maintenance Track Manager's statement, asserted that the Claimant had spoken with the Manager and informed him that he did not want to be called for "day to day" calls for section type work. The Carrier stated that the Claimant had chosen to "lay behind the log." "The Claimant would have been given the opportunity to work overtime by virtue of his greater seniority," the Carrier declared, "but has conferred with Management and elected to not be called upon to perform the duties cited in your claim." The Carrier denied the claim.

The Organization appealed the denial by letter dated November 4, 2011. It noted that the Carrier had acknowledged that Claimant was the senior employee and would have been given the overtime assignments except that, according to the Carrier, he had elected not to be called upon to do the duties here in issue. The Organization stated that they "strongly disagree" with the Carrier's assertion and that "[a]t no time has the Claimant ever made a statement that he didn't want any overtime and we would challenge the Carrier and [the Maintenance Track Manager] to prove that he did." In its November 4 letter the Organization noted that the Maintenance Track Manager had said in his statement that a record of the Claimant's assertion that he was not interested in being on call or taking day to day calls for section-type work was noted on a Safety Conference EDR form and signed by the Claimant. "We as an Organization request copies of the alleged documentation," the Organization stated in its November 4 letter.

The Carrier replied by letter dated December 16, 2011. It stated that the Maintenance Track Manager's statement explained two points. The first point was that although Claimant was assigned to Gang 1711 his duties were to inspect and promote quality and production for the surfacing gang headquartered in Sedalia Yard; that this was explained to the Claimant both before he bid the job and in his one-on-one conversation with the Maintenance Track Manager after he was awarded the assignment. The second point was that he did not want to be subject to calls during off hours. The Carrier reiterated that Claimant was therefore "laying behind the log."

The Carrier further stated that the Organization failed to provide any statement or document from the Claimant on his own behalf. The statement provided by the Carrier, it asserted, "stands as fact." Even, however, if the Organization were to provide a statement, the Carrier continued, it "would merely create contradictory positions and thus create a dispute of facts." The Carrier cited awards which purportedly held that "when such a dispute of facts exists the claim must be dismissed due to the moving party failing to fulfill its burden of proof." Therefore, the Carrier concluded, "given the irreconcilable dispute in facts in this case, the Organization has also failed to meet its burden of proof" and "the claim must be denied."

This case begins with the burden on the Organization to make out a prima facie case in support of its claim. To meet that burden the Organization is required to introduce evidence that would support a finding that the work in question was of the kind that the gang Claimant was on normally performed; that as a member of the gang Claimant would normally be assigned such work on overtime; and that Claimant was more senior than the person who was assigned that work on overtime by the manager. There is no dispute that the track maintenance work involved was of the kind normally assigned to Gang 1711 and in the location where the gang maintains track. The Carrier's letter of October 14, 2011, acknowledges that in the normal course the Claimant was entitled to be offered this overtime work because he has greater seniority than the employee in the same classification who was offered and accepted the work. The Organization has therefore met its initial burden of showing that Claimant was entitled to be offered the overtime work before it was offered to the less senior foreman.

The Carrier, however, in answer to the claim, has offered an affirmative defense which, if proved, would defeat the claim and require the Board to deny it. The Carrier relies on a written statement obtained from the Track Maintenance

Manager who supervised Claimant and who said that the Claimant informed him that he was not interested in being on call or taking day-to-day calls for section-type work. In his written statement regarding what the Claimant allegedly told him, the Manager added, "Information was noted on Safety Conference EDR form and signed by both of us, copy on file in my office, will FAX." As observed in Third Division Award 42117 between these same parties, the burden is on the Carrier to establish the affirmative offense which it has asserted.

The Carrier has failed to meet its burden of establishing its affirmative defense that Claimant told the Maintenance Track Manager that he was not interested in being on call or taking day-to-day calls for section-type work. This Board makes that finding because the Organization has requested production of the documentation that the Claimant allegedly signed his name to, but the Carrier has failed to produce it. In the normal course the Organization's request for the documentation would have been transmitted by the Carrier to the Maintenance Track Manager who would have produced it if it existed. The fact that the documentation was not produced takes away any credibility that otherwise would have attached to the Manager's statement.

The Board does not believe that the Maintenance Track Manager intentionally lied to the Carrier. The more likely circumstances were that because the Claimant expressed satisfaction that his regular assignment would be to inspect and promote quality and production – and perhaps even expressed a preference for such work – the Manager assumed that the Claimant did not want to do section-type work and probably believed that he had signed notes so stating. One does not follow from the other, however, where overtime earnings are involved. Claimant's expression of a preference for a certain type of work as his regular assignment cannot be taken as a relinquishment or waiver of his right to be offered other types of work that he is qualified to perform when that work is being done on overtime at a premium rate. A waiver or relinquishment of such right must be express. There is no evidence of a waiver or surrender of the right to be offered such work on overtime in this case. The Organization, on the other hand, has met its burden by establishing that the work involved was regular work of the gang; that Claimant was qualified to perform the work; and that he was not offered the work although he had greater seniority than the employee who was offered it. The claim will be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 28th day of November 2016.