

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42475  
Docket No. MW-42099  
16-3-NRAB-00003-130026**

**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 allow Gangs 9182 and 9153 employes M. Banks, A. Cooper, B. Corbitt, K. Jackson, T. Jones, B. Lewis, M. Martin, J. Munoz, S. Nettles, D. Stephens, L. Wiseman and R. Young to work overtime on September 1, 2011 and continuing through September 5, 2011 and instead assigned junior and/or other tie gang employes to perform said work (System File UP988PA11/1559369 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants M. Banks, A. Cooper, B. Corbitt, K. Jackson, T. Jones, B. Lewis, M. Martin, J. Munoz, S. Nettles, D. Stephens, L. Wiseman and R. Young shall now each be compensated for a total of fifty-five (55) hours at their respective time and one-half rates 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 September 17, 2011, the Organization filed a claim and grievance with the Carrier in behalf of employees of Gangs 9182 and 9153. Those gangs had worked every day in August, 2011, to clear up a large amount of slow orders. According to the claim and grievance the employees on the two gangs were told that both gangs were shutting down September 1—5, 2011, so that employees could rest and that they would resume work on September 6, 2011. What happened, however, the Organization alleged, was that each day September 1—5, 2011, the Carrier brought in operators off of a tie gang who worked 11 hours each day on the Claimants' assigned machines performing the same kind of work that Claimants had done throughout the preceding August. Claimants, the Organization asserted, "were never asked if they wanted to continue working on these days" and "state that they wanted to work these days but were never asked to." By not offering and permitting the Claimants to perform this work, the Organization claimed, the Carrier violated various contractual Rules and were required to compensate each of the Claimants a total of 55 hours at the rate of time and a half.

The Carrier replied by letter dated November 4, 2011, which denied any contract violation and included attached statements from the Manager who supervised the Claimants and a foreman who worked together with the Claimants. The Manager's statement, in the form of an email to the Carrier's Engineering Supervisor who wrote the Carrier's November 4, 2011, response to the claim and grievance, stated in full as follows:

"This claim is not accurate. Each of the employees were all notified in advance that work was going to be performed on the days in question of the claim. Each employee was notified by the Foreman Ed Stojanik and confirmed again by the Asst. foreman prior to the work that those that wanted to work could b [sic] but know [sic] one except 2 or 3 employees volunteered to work. I will attach the statement by the foreman in which he notified all in advance and this was the response. Mr. Stojanik was the foreman in charge at this time. This claim should be denied in it's [sic] entirety."

The attached statement by the foreman dated September 9, 2011 said that at 8:46 A.M. on August 29, 2011, the Manager said that the Cat Gangs were working through

the month of September; that anyone who needed to be off could do so; and that the Foreman had to make a list of people wanting to work; and a second list of people who wanted to be off and the days they wanted to be off. All employees were to be informed that Tie-Gang Operator replacements would be filling in vacant positions. According to the Foreman's statement, at a job briefing at 7:00 A.M. on August 30th he told everyone that he needed the list of people wanting to be off and the days that they wanted off. No one wanted to work September 1—5, the Foreman's statement said, except for one employee who worked the 1st through the 5th and a second employee, who worked the 2nd through the 5th. At 9:10 A.M. on August 31, the Foreman's statement said, everyone was instructed to get their personal items off of their machines so that nothing would be missing when they returned to work on September 6. Everybody was notified, according to the statement, that the Tie-Gang operators would be working their jobs to let them have some time off.

The Carrier's November 4, 2011, letter asserted that the Manager's statement showed that the work was offered to the Claimants but that they did not volunteer to perform it, and the other employees were assigned to perform the work. The Carrier's letter also noted the failure of the Organization to provide any documentation in support of its claim. Attention was directed by the Carrier to the Foreman's statement which, according to the Carrier, said that each of the Claimants was offered the opportunity to work on the days in dispute. The Carrier denied the claim.

By letter dated November 23, 2011, the Organization appealed the Carrier's denial of the claim. The Organization reiterated the facts as stated in its initial claim letter. It argued that the Manager, whose statement the Carrier relied on, was not present when the employees were allegedly asked for volunteers to work on the claim dates and therefore the statement had no merit regarding the claim. The Foreman's statement, the Organization asserted, contradicted itself. As the Board understands the Organization's letter, the apparent contradiction was that the employees were told that the Cat Gangs would be working through the month of September, but then the Foreman told everyone at the 7:00 A.M. job briefing on August 30 that he needed a list of people who wanted to be off and the days they wanted off. "He did not get a list of who did not want to work," the Organization argues, "because Claimants had already been advise[d] they were working thru the month of September."

The Organization interpreted one part of the Foreman's statement as indicating that "Foreman Stojanik made a decision in which he told Claimants to take off Sept. 1st – 5th." The Organization further notes, however, that the foreman stated that no one wanted to work from September 1 through 5 except for two employees. The Organization contends that if those two employees signed a list indicating that they

wanted to work, the Foreman should have provided the list. “Just because he [the foreman] said that they did not want to work,” the Organization declares, “does [not] mean that Claimants did not want to work.” The Organization enclosed signed statements from the Claimants which the Organization described as “stating that they were not asked to work on the above claim dates.”

The Carrier responded by letter dated December 29, 2011. It first raised a new argument that employees who performed the work did so on straight time and constituted a separate shift. “There is no provision in the agreement, which requires the Carrier to pay employees overtime,” the Carrier argued, “when other employees are available and qualified to perform the same work on their regular straight-time hours.” The Carrier then returned to the argument made in its previous letter denying the claim. It cited the statements of the Manager and the Foreman which, it contended, established that “Claimants were offered the opportunity to work the claim days.” It noted that two employees, whom it named, worked on the days in question as evidence that the work was in fact offered to the Claimants. Time records of the employees who worked were provided to the Organization showing the dates and hours worked by each of the employees. Further, the Carrier argued, the contradictory statements of the parties created a “dispute of facts.” The Carrier cited Third Division Awards that held that when a dispute of fact exists, the party with the burden of proof on the factual issue cannot prevail. Since the Organization was the moving party on the issue, the Carrier asserted, the claim had to be dismissed because the Organization could not fulfill its burden of proof.

The fact that two employees did in fact work on the days in question is strong evidence, the Board believes, that the Claimants were given the opportunity to work on the days in question. There is no evidence in the record that those two employees were given an opportunity to work on the days that was not also made available to the Claimants. The Board has read all of the statements provided by the Claimants. The Board notes that one of these statements says that Gangs 9182 and 9153 were informed that they would all be off the 1st through the 5th of September per the instructions of the Manager. The statement then continued: “When it came down to the said dates a few select employees of said gangs were allowed to work these days.” The Board finds that statement corroborative of the Carrier’s position that although originally the employees were told that there would be no work from September 1st to 5th, the Carrier reversed itself on that point and allowed those who wanted to work to work. The Board finds it unlikely that the Carrier would have permitted only “a few select” employees to work. It is more probable that the Carrier gave the same opportunity to all of the employees on these gangs.

The Organization argues that the Foreman's statement does not clearly state that the employees on the relevant gangs were given the opportunity to work on September 1st-5th. The first paragraph of the Foreman's statement, however, clearly states that the Manager notified him "that the Cat Gangs were working thru the month of September" but that anyone who needed to be off could do so. The notification meant that Gangs 9182 and 9153 would now be working all of September but those who needed to be off could take off. The assertion in the second paragraph of the Foreman's statement that no one wanted to work September 1st through 5th except for the two employees that he named, when read together with the first paragraph of his statement, indicated that the employees were all given the opportunity to work but only two chose to do so. The Foreman's statement corroborates the Manager's statement that all employees were notified in advance that work was going to be performed on the days in question. It is not likely that the Foreman would not have followed his Manager's instructions. The fact that two employees from the pertinent Gangs worked on the relevant dates indicates that all of the employees were given the opportunity to work. Nor is it surprising that more than two did not avail themselves of the opportunity considering the facts that they had worked 31 consecutive days in August and that they were allowed to take off on these days if they wanted to.

The Board does not find the Organization's evidence in this case to be more persuasive than the Carrier's. Since the Organization has the burden of proof on its claim, it cannot prevail in this matter. 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 28th day of November 2016.