

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42478
Docket No. MW-42192
16-3-NRAB-00003-130142**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(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 rail repair and related work at Mile Post 610.00 on the La Toyah Subdivision on November 28, 2011, to Gang 2313 employees R. Balcazar, R. Tarango and J. Jones and instead assigned junior employees S. Lozano, O. Lujan and R. Ontiveros (System File UP998PA11/1563246 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Balcazar, R. Tarango and J. Jones shall now each be compensated for eight (8) hours at their respective time and one-half rates of pay and for two (2) hours at their respective double time 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.

By letter dated December 9, 2011, the Organization submitted a claim and grievance in behalf of the Claimants alleging that on November 28, 2011, the Manager of Track Maintenance called out Gang 2207 headquartered in Big Spring, Texas, consisting of a Track Foreman, a Truck Operator, and a Welder to replace a broken rail on the La Toyah Subdivision. According to the letter, Claimants are a Track Foreman, Truck Operator, and Trackman regularly assigned on Gang 2313 headquartered in Odessa, Texas, and are senior to the employees called out to work on the broken rail. The claim asked for eight hours at time and a half and two hours at double time and stated, "Claimants were available and could have done this work being that Claimants headquarters are much closer than Gang 2207."

The Carrier denied the claim by letter dated January 24, 2012, which included as an attachment a statement from the Manager of Track Maintenance. The denial was based on the following facts which, according to the Carrier's letter, were contained in the Manager's statement. The broken rail in question required special skills possessed by the welder assigned the work, who was a member of gang 3192 and not gang 2207. Also, the other two employees were closer to the location of the broken rail than the Claimants. In addition, on the date in question, November 28, 2011, the Claimants were fully employed working their regularly assigned hours in Big Spring, Texas, and would not have been compensated at the overtime or double time rates of pay had they performed the grieved work. Further, Claimants have declined the opportunity to work with welding gang 3192 in the past.

The Manager of Track Maintenance also said the following in his statement:

"I approach Track Foreman Ray Balcazar about assisting gang 3192 (Welding gang) in May 2010, he said he could not performed [sic] the job because of his carpeltunnel [sic] condition, which he has a claim against the Union Pacific Railroad. He claims that the day to day activities of the welders loading and unloading tools preparing the rail to performed [sic] thermite welds aggravated his carpeltunnel [sic] condition. I have a doctor accuse [sic] from him dated May 4, 2010 during the time his carpaltunnel condition was really giving him trouble. Track foreman Ray Balcazar requested to

operate the back hoe because this equipment place less stress on his carpaltunnel condition. Truck Operator Ricardo B. Tarango (0437696) Gang 2213 [sic] express to me he did not want to assist the welder on a regular basis, he wanted to work with his gang 2213 [sic]. I have been using a junior employe off gang 2207 for the last 7 months to meet the Fire Prevention Compliance. On November 28, 2011 Ray Balcazar and Ricardo Tarango were installing ties in the Big Spring yard with Ray Balcazar operating the UP backhoe as he requested and Ricardo Tarango insisting [sic] him. On November 28, 2011 Ray Balcazar and Richard Tarango went into overtime in Big Spring, TX installing ties in the Big Spring Yard. Trackman Jason C. Jones was working in Big Spring, TX with Ray Balcazar and Richard Tarango. Trackman Jason C. Jones (0449124) Gang (2207) was under his 60 days new hire probation period on November 28, 2011.”

By letter dated February 29, 2012, the Organization appealed the denial of its claim. Claimant Balcazar, the appeal letter stated, is a welder “and is probably the only welder that has completed Welding Track Components Class on this subdivision.” He was qualified to do the work, the appeal asserted. Claimant Tarango, according to the appeal letter, denied that he stated that he did not want to assist Welder Ontiveros on a regular basis and “insists that he is never called to work any overtime.” Claimant Jones, the Organization stated, “had the right to have been called to this work also by the mere fact that he was assigned to this headquartered gang.” Regarding the Manager of Track Maintenance’s statement that Claimant Balcazar’s gang was working overtime on November 28, 2011, the Organization asserted, the Manager “does not submit any proof that Claimant[s] were working overtime at the time that he called Welder Ontiveros to repair the broken rail.”

The Carrier replied by letter dated March 28, 2012, in which it continued to deny the claim and gave the following reasons why the work was not assigned to the Claimants: (1) Proximity: the assigned employees were closer to the location of the broken rail, and it needed to be addressed immediately to prevent possible service interruption; (2) Skills: the broken rail was 90 lbs stock rail, and a welder was needed to grind and build the switch point to match the new stock rail; (3) Continuous with straight-time work: the Manager became aware of the broken rail around 3:00 P.M. at which time he assigned its repair to the Welder, who was working 7:00 A.M. to 3:00 P.M., and who continued to perform the work on

overtime; (4) Available and Willing: Claimant Balcazar has provided a doctor's note that he cannot perform welding duties because of carpal tunnel syndrome and has been assigned to operate machines on a daily basis; Claimant Tarango has stated that he does not want to assist the Welders.

The Carrier pointed out that the Organization failed to provide any statement or documentation in support of the claim and argued that if the Organization were to provide a statement it would merely create a dispute of facts in which case the claim would have to be dismissed because of a failure of the Organization, as the moving party, to meet its burden of proof.

The Organization replied by letter dated November 6, 2012, which included as attachments statements dated 2/14/12 each by Claimants Balcazar and Tarango. Claimant Balcazar's statement said as follows:

"Ray Balcazar am a trk foreman on the Toyah sub from mp 448.7 – 654. And I made a time claim on November 28, 2011 on people with less seniority than me that have been getting called out several times on broken rails. I did approach [Manager of Track Maintenance] Johnny Taylor on May of 2010 that I did have carpal tunnel again. And I told him if I could do another craft and I never said I could not do any task out here on the railroad. And as we agreed on me working on the backhoe so we can get me out of repetitive motion that led to carpal tunnel. But I am qualified as a welder, foreman, fire watcher, & machine operator and still I have more seniority & I still don't get called out on broken rails. And as a statement I am not on the backhoe everyday, and when I'm not we are changing broken Rails & broken bars & pullaparts in the Yard only. If I can do it on the yard I can also do it in the mainline like gang 3192. Also if he so concerned about me he could of ask me to be the Fire Watcher for gang 3192 but he doesn't cause he needs experience on other gangs cause he has new hires and I'm stuck with them. PS And as a reminder Ray Balcazar is the only person in the Toyah sub that has completed the Welding Trk. Component class."

Claimant Tarango provided the following statement:

"I Ricardo Tarango employee # 0437696 have never confronted MTM Jonny Taylor about me having a problem working with

welder Roger Ontiveros on gang 3192. MTM Taylor has always picked his own people to help out Ontiveros. I have welder helper rights as of 2008, but did not get a bid on gang 3192 because of Hazmat. He was asked by several employees to change it. But Taylor said it required Hazmat on that gang. I have worked with gang 3192 welder Ontiveros on weekends when there is no other option and Taylor[‘]s main guys are not around.”

In its November 6, 2012, letter the Organization asserted that the broken rail was inside the yard and not on the Main Line “because there is no 90 lb. Rail on the Main Line.” Therefore, the Organization stated, any delay because of travel time to the site “would not have caused any service interruption or slow orders and/or impassable track.” Concerning the Carrier’s argument that the work here in question was assigned at 3:00 P.M. during regular hours and continued into overtime, the Organization contended that the Manager of Track Maintenance “knew that this repair work would carry into overtime and Claimants were on duty and should have been assigned this repair work that was on their regularly assigned territory.”

Taking into account the time when the Manager of Track Maintenance became aware of the broken rail in the Monahans Yard and the fact that the Welder and the other two employees assigned to the repair job were working on the Monahans Main Line, and not in the Yard, the Board is of the opinion that it was clear to the Manager of Track Maintenance from the beginning that the work here involved would be performed entirely on overtime and at a different location from where the employees were working on straight time. This is therefore not a situation where employees began disputed work on regular time that carried into overtime. This was work that began on overtime and was separate and apart from what the employees involved did during their regular work hours prior to commencing the overtime. These employees therefore had no priority claim to be assigned the work based on the work they performed that day prior to commencing the overtime assignment.

The Board believes, however, that the Carrier had the right to rely on the fact that Claimant Balcazar had requested to be excused from assignments that required repetitive motions. In his own signed statement Claimant Balcazar acknowledges that he and the Manager of Track Maintenance “agreed on me working on the backhoe so we can get me out of repetitive motion that led to carpal tunnel.” There is no challenge in the record to the Manager of Track Maintenance’s statement that

“[h]e [Claimant Balcazar] claims that the day to day activities of the welders loading and unloading tools preparing the rail to performed [sic] thermite welds aggravated his carpaltunnel condition.” Claimant Balcazar, moreover, does not dispute that he provided the Manager of Track Maintenance with a doctor’s note verifying his carpal tunnel condition. The Manager of Track Maintenance was entitled to rely on the doctor’s note and on what Claimant Balcazar had told him about his medical condition and his problem with performing welding duties when deciding on whom to assign the welding overtime assignment here in issue. There is no evidence in the record that Claimant Balcazar at any time prior to his present claim communicated to the Manager of Track Maintenance that he wished to be considered again for welding assignments. As previously noted, on the claim date itself, November 28, 2011, Claimant Balcazar’s regular assignment was operating a backhoe.

In his signed statement, however, Claimant Balcazar also wrote that he is not on the backhoe every day and, when not operating that machine, he is given yard assignments such as changing broken rails, broken bars, and pullaparts. “If I can do it on the yard,” he stated, “I can also do it in the mainline like gang 3192. Also if he [is] so concerned about me he could of ask me to be the Fire Watcher for gang 3192. . . .” The foregoing statement, to the extent it says that Claimant Balcazar has been assigned other duties from time to time in the yard besides operating a backhoe, is not contradicted in the record. Without more information about the assignments, the Board does not believe that these yard assignments to Claimant Balcazar canceled out his request to be relieved of assignments that could aggravate or irritate a carpal tunnel syndrome condition and the medical documentation he provided. Implicit in the quoted language, however, is the claim that the Fire Watcher job would not aggravate Claimant Balcazar’s carpal tunnel syndrome condition. Nor did the Carrier ever respond to Claimant Balcazar’s statement with the claim or argument that the duties of Fire Watcher would also have aggravated his carpal tunnel condition.

The assignments described in Claimant Balcazar’s statement show that his work with the Carrier after May, 2010, was not confined solely to the operation of a backhoe. These Carrier assignments to tasks other than backhoe operation that did not harm his carpal tunnel condition shifted the burden to the Carrier to come forward with some credible explanation why Claimant Balcazar could not have been offered the assignment of Fire Watcher for gang 3192 on the date in question since such an assignment also would not have aggravated his carpal tunnel condition any more than the operation of a backhoe.

There is no evidence in the record that Claimant Balcazar ever told the Manager of Track Maintenance that he did not want to be considered for overtime assignments that did not involve repetitive movements that could aggravate his carpal tunnel syndrome condition. The fact that, according to the Manager of Track Maintenance's written statement, Foreman Balcazar, in May, 2010, declined the Manager's invitation to assist gang 3192 on a regular basis because tasks such as loading and unloading tools and preparing the rail for thermite welds could harm his carpal tunnel condition did not provide reasonable grounds for the Manager to conclude in November 2011, that Mr. Balcazar would not want the opportunity to earn extra income by working as a Fire Watcher in a ten-hour overtime assignment assisting gang 3192. Claimant Balcazar's seniority entitled him to be offered that assignment.

In his written statement, the Manager of Track Maintenance wrote, "Truck Operator Tarango . . . express to me he did not want to assist the welder on a regular basis, he wanted to work with his gang 2213 [sic]." Claimant Tarango disputed that statement. He said in his own written statement, "I Ricardo Tarango . . . have never confronted MTM Jonny Taylor about me having a problem working with welder Roger Ontiveros on gang 3192." The Carrier argues that these differing statements constitute a "dispute in facts" and therefore the Organization has failed to meet its burden of proof. A careful reading of the Manager's statement, however, shows that he did not go beyond claiming that Mr. Tarango said that he did not want to assist the welder on a regular basis. Such a statement could not reasonably provide grounds for concluding that Mr. Tarango also would not want to be offered the opportunity to assist the welder for sporadic overtime assignments where he could earn a significant amount of extra income such as the November 28, 2011, assignment.

It is not disputed in the record that Claimant Tarango, as he wrote in his statement, has had welder helper rights since 2008. He was therefore qualified to assist the welder on gang 3192. Moreover, since there was a legal requirement to have three persons on the welding assignment, Claimant Tarango and Claimant Balcazar could have divided the work of assisting the welder between them so that any tasks that might harm Claimant Balcazar's carpal tunnel condition would be performed by Claimant Tarango. As already noted, for example, Claimant Balcazar suggested in his statement that he could be given the Fire Watcher assignment. The Carrier has not provided evidence that it had a contractually valid basis for selecting junior employees to assist the welding gang without first offering the overtime opportunities to the senior employees, Claimants Balcazar and Tarango.

The Manager of Track Maintenance also said in his written statement, “I called Roger Ontiveros, Track Foreman Saul Lozano, and Omar Lujen to repair the rail because at the time they were closer to the broken rail and I needed the Welder skills to complete the repair.” No Award or other decision has been cited which holds that a junior employee is to be given preference over a senior employee for an overtime track repair assignment in the senior employee’s normal territory and area of responsibility if the junior employee happens to be significantly closer to the location of the assignment at the time it arises. The Board can see where distance might be a legitimate consideration in an emergency situation or where passenger or freight traffic will be interfered until the repair is made. The Board need not rule on that question in this proceeding, however, because the broken rail in this case was in the Monehans Yard rather than on the Main Line. There is no evidence in this case that whether the repair was made an hour earlier or later would have made a difference in terms of passenger or freight service on the part of the Carrier.

In sum, the Carrier did not violate the Agreement in terms of the welding assignment to Roger Ontiveros on Gang 3192. It did violate the Agreement in terms of the assignment to junior employees Claimants Balcazar and Tarango to assist the welding gang. No violation occurred with regard to Claimant Jones.

AWARD

Claim sustained in accordance with the Findings.

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.