

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43021
Docket No. MW-42379
18-3-NRAB-00003-130385**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
PARTIES TO DISPUTE: (IBT Rail Conference
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(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 and assign Eastern Division employe K. Malzner to fill the temporary vacancy of the regularly assigned Gang 4417 Flagging Foreman position held by Mr. R. Garrison headquartered at Jefferson City, Missouri on the Eastern Division on July 9, 2012 and continuing through July 13, 2012 and instead assigned Mr. P. Ragan, who holds no Eastern Division seniority (System File UP717BT12/1575522 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Malzner shall now be compensated at the respective and applicable rate of pay for all straight time and overtime hours expended by Mr. P. Ragan in the performance of the aforesaid work on the Eastern Division beginning July 9, 2012 and continuing through July 13, 2012."**

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.

This claim seeks 75 hours of overtime pay for the Claimant due to the Carrier's decision not to assign him to the flagging foreman position temporarily vacated on Gang 4417 during the week of July 9-13, 2102, in favor of System B & B Gang Foreman Ragan. At the time the Claimant was working on Eastern Division Section Gang 1706 as a Truck Operator. He had filled in and performed the flagging position on July 5 & 6, 2012. His records reveal that he worked, and was paid for, his regular assignment during the week of July 9, 2012. Ragan was on his rest days, so he was paid at the overtime rate for his work on this assignment. The Carrier's October 4, 2012 denial includes a statement from the Manager who was involved with the assignment, explaining that he gave the local service unit the first opportunity to support the work, as was his practice, but that the Claimant's supervisor indicated that he could not afford to give up any qualified employees that week, including the Claimant, as they were already assigned to higher priority work. The Manager's statement indicates that he then looked at other work groups, and found Ragan, who was available, qualified and had seniority which covered all Old MP territories.

The Organization asserts that the flagging position in issue was headquartered in Jefferson City, MO on the Eastern Division, and that Ragan's seniority does not allow him to work headquartered positions on that division. It relies on the Claimant's statements and those of his foreman concerning his assignment that week, establishing that it was for routine maintenance, and taking issue with the validity of the assertions made in the Manager's statement. The Organization notes that the Claimant only worked eight (8) hours a day that week, while Ragan worked 15 hours/day, showing a loss of seven (7) hours per day of overtime by the Claimant.

The Carrier argues that nothing in the Agreement prevents it from assigning a System B&B employee to relieve the flagging foreman work, that flagging duties are not exclusive to any class or craft, and that the Claimant had no demand right to the work, which was not his regular assignment. It contends that Ragan's Roster 5000 seniority (System B&B North) allows him to perform service at all locations within the Eastern Division, pointing to Rule 12 (c)(2), and notes that Ragan is senior to the Claimant. The Carrier states that the Claimant was not "immediately available" for the assignment, as required by Rule 2(c). It also maintains that the claim is excessive, since, if the Claimant had been assigned to the flagging duties, he would have performed them at his regular rate of pay, not at the overtime rate sought by the Organization.

A careful review of the record convinces the Board that the Organization has failed to sustain its burden of proof in this case. While there is no dispute about the Claimant's qualification to perform the flagging work, as he had done it the prior week, there is no proof establishing that the Claimant had a demand right to such flagging work under the Agreement. It has long been held that flagging duties are not exclusive to any class or craft. See, e.g. Third Division Awards 41103, 40327. The underlying basis for the claim is that Ragan lacked seniority to perform a headquartered job on the Eastern Division. However, the Organization did not rebut the Carrier's contention that his System B&B North (Roster 5000) seniority, permits him to perform service on the Jefferson subdivision and Eastern Division work. Finally, Rule 2(c) requires that a qualified employee be "immediately available" to fill a vacancy. The evidence of the Manager was that he was informed by the Claimant's supervisor that the Claimant was not available during the week of July 9-13, as he had already been assigned to other work. There is no dispute that he performed his regular job assignment on the claim dates. Therefore, we conclude that the Organization failed to show that the Agreement was violated by the Carrier's assignment of Ragan to perform the flagging foreman vacancy rather than the Claimant.

AWARD

Claim denied.

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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 March 2018.