

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43542
Docket No. MW-43042
19-3-NRAB-00003-150231**

The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens 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 following Claimant J. Foley’s displacement onto the position of truck operator, the Carrier failed to allow the Claimant to operate said vehicle and instead assigned junior employee I. Sandoval to operate said vehicle on January 20, 21, 23, 28 and 29, 2014 (System File UP936PA14/1601486 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Foley shall be allowed twenty (20) hours’ pay at his respective time and one-half rate and he shall be allowed his daily per diem allowance.”**

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 established and holds seniority as a truck operator in the Track Subdepartment as well as other classes within the Carrier's Maintenance of Way Department. On January 13, 2014, the Claimant exercised his seniority and displaced 6 TN Truck Operator I. Sandoval on Gang 9141. Sandoval remained on the gang because there was an additional open position on the work group. Sandoval continued to operate the 6 TN Truck while Claimant remained in the yard loading trucks. While driving the 6 TN truck, on January 20, 21, 23, 28 and 29, 2014, Sandoval performed 20 hours of overtime track service while driving in the state of Texas.

The Organization filed a claim on March 10, 2014, asserting that the Claimant, as the senior employee, should have been offered and assigned to perform the truck operator overtime service. The Carrier denied the claim on April 1, 2014, stating that the Claimant had advised Manager Daniels that he did not want to perform truck driving duties. The claim was further processed on property, but the parties were unable to reach resolution. It is now properly before this Board for final adjudication.

The Organization contends that the Claimant had displaced Sandoval as a truck operator of a 6 TN truck on Gang 9141, and he was, therefore, the regular employee to whom the overtime work should have accrued. The Organization further contends that Manager Daniel's statement that the Claimant had informed him that he did not want to drive a truck was refuted by the Claimant's own statement that he had never expressed this to Daniels. The Organization contends that these statements do not change the irrefutable fact that the Claimant displaced Sandoval and was, therefore, the regular employee assigned to the duties and was entitled to the work.

The Carrier contends that the work was properly assigned by Daniels. The Carrier contends that Claimant is one of ten employees who work in this location and they all perform the same type of work. The Carrier contends that all ten employees are truck drivers, but some perform yard work and some drive the trucks, without regard to seniority. The Carrier contends that on the days in question, Sandoval was assigned to drive a truck, so continued to perform those same duties after his regular shift and into overtime. The Carrier contends that the Claimant previously made clear to Daniels that he did not want to drive a truck if it resulted in mandatory overtime.

Rule 26(j) provides,

“(j) WORK ON UNASSIGNED DAYS. Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee.”

Therefore, if Sandoval was properly assigned to perform this work, he was entitled to the overtime work as the regular employee. The Carrier submitted a statement from Daniels,

“Mr. Foley and I discussed his job performance that was not acceptable. Due to him wanting to ONLY DRIVE 8 HOURS A DAY. At that time he PERSONALLY expressed his feelings of not wanting to drive. He wanted to stay in the yard and let someone else drive. There are 10 ea 6ton drivers at the track store. Five driving, and five working in the yard. FOUR of which have more seniority than Foley. None of them are driving a truck....”

The Organization submitted a statement from the Claimant disputing Daniels’ statement,

“I John Foley never had a discussion with Terrence Daniels about job performance and I never ever at any time stated I only wanted to work 8 hrs. I stated to Mr. Daniels on our daily conference call once that I stopped driving when my 8 hrs was up on the November 13th 2013 due to me having a dr appointment that particular day. When I bumped back into FW90 regional track store on January 13th I wasn’t given an option to drive. I was told by Mr. Daniels that I would be staying in the yard! Ivan Sandoval was giving me the keys after I advised him I was bumping in and at that time Mr Daniels advised Ivan Sandoval that he would still be driving and don’t give me the keys....”

Daniels’ statement that the Claimant expressed a reluctance to be assigned to drive a truck is contradicted by the Claimant’s statement that he said no such thing. As an appellate forum, this Board is not able to reconcile the inconsistent statements. Furthermore, the Carrier has the right to make assignments among the ten truck

drivers on Gang 9141, including assigning the Claimant to unloading trucks in the yard. After careful review of the record, this Board concludes that the Organization has failed to establish a violation of 26(j) of the Agreement.

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 27th day of March 2019.