

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43721  
Docket No. MW-42748  
19-3-NRAB-00003-140442**

**The Third Division consisted of the regular members and in addition Referee Jeanne M. Vonhof when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (**

**(Union Pacific Railroad Company (former Chicago  
and North Western Transportation 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 Mr. M. Ganzer to overtime service on May 18, 2013 operating a dump truck to haul tie plates and instead assigned employee M. Homann thereto (System File B-1331C-111/1587264 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Ganzer shall now be compensated for ten (10) hours at his applicable 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.

In this claim the Organization argues that the Carrier violated the Agreement when it failed to offer and assign an overtime opportunity to the Claimant, and instead assigned the work to a junior employee. On May 18, 2013 the Carrier required an employee to operate a 10-yard dump truck from St. Paul, Minnesota to Iowa Falls, Iowa to pick up tie plates and return them back to St. Paul. The Organization provided a statement from Employee M. Homann stating that he performed the work, working 10 hours of overtime. There is sufficient evidence in the record to establish that the work was performed by junior Employee Homann.

The Organization argues that the Claimant had a contractual right to perform the work over a junior employee. The Claimant is a regularly assigned common class machine operator. Under Rules 4, 5, 7 and 31 the Organization established that the work fell under the Claimant's classification and that the Claimant was the senior employee in his classification. Rule 31 states, in relevant part,

"When necessary to call employees under this rule, the senior available employees in the gang shall be called."

The Organization has established that the Claimant was the senior available employee and that he should have been offered the work before the junior employee who performed it.

The Carrier argues that the Claimant was presented with the opportunity to perform the planned overtime work, but rejected the offer. The Carrier provided a statement from Manager David R. Knapp, stating that on the weekend in question employees were given an opportunity to work on a volunteer basis, and that the work in question was one of the tasks mentioned. The Claimant was offered the overtime weekend work and did not accept it, according to the Manager.

The Organization argues that the Carrier has not met its burden of establishing that the work was offered to the Claimant. The Organization challenges the reliability of the Manager's statement because it was made five months after the assignment was made. The Organization also argues that the junior employee who performed the work stated that he was called in on Saturday to perform it, which disproves the Manager's statement that the work was pre-planned before the weekend.

The conflicting statements demonstrate a genuine dispute regarding a determinative issue in this claim, whether the Claimant was offered the overtime work. In order to refute the Manager's statement, the Organization relies upon the Claimant's statement and an undated statement from the employee who performed the work, which was submitted at around the same time as the Manager's statement. The Board concludes that these contradictory statements offered by the parties create an irreconcilable dispute of fact.

The Board is not able to resolve genuine factual disputes. In a similar case in Third Division Award 37204, (Referee Margo R. Newman), this Board has ruled,

"A careful review of the record convinces the Board that this case does present an irreconcilable dispute of material fact with respect to the determinative issue of whether the Claimant was offered the opportunity to work the disputed overtime. We have no way of measuring the validity of the Claimant's statement or that of Supervisor Davis. As repeatedly noted by the Board in such circumstances, we function as an appellate body and have no way of resolving evidentiary conflicts or factual disputes. See Third Division Awards 28790 and 21436. Because this dispute of fact prevents the Organization from sustaining its burden of proving that the Carrier violated the Agreement as alleged, the claim must be dismissed. See Third Division Award 36406."

Similarly, in this claim, the dispute in the facts cannot be resolved by this Board, and prevents the Organization from sustaining its burden of proving that the Carrier violated the Agreement as alleged. On this basis the claim must 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 18th day of June 2019.