

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43726
Docket No. MW-42763
19-3-NRAB-00003-140458**

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 assigned Surface and Lining Gang 3330 Machine Operators S. Biermaier and D. Isaacson to perform overtime work assisting with rail unloading operations on Saturday, May 24, 2013 instead of calling and assigning District T-7 Section Members R. Gordon and A. Stenen thereto (System File B-1331C-112/1588476 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Gordon and A. Stenen shall each be allowed ‘*** ten and one half (10.5) hours of overtime, as shown earlier in the claim, at the applicable 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.

As set forth above, this claim was initiated on behalf of the Claimants, employees in the Maintenance of Way and Structures Department, Track Subdepartment. At the time of the dispute, the Claimants were regularly assigned as permanent section gang forces in District T-7.

The Organization contends that the Carrier assigned overtime work consisting of unloading rail to other employees, when it should have been assigned to the Claimants. The Organization argues that the overtime work should have been assigned to the Claimants as the regularly-assigned section gang forces in the adjoining territory, rather than to the claimed against employees.

In support of its claim the Organization relies upon Rule 23 L and Rule 31 A:

“RULE 23 – WORK WEEK

- L. Work on unassigned days - Where work is required 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 shall otherwise not have 40 hours of work that week; in all other cases by the regular employee.

...

RULE 31 – CALLS

- A. Employees called to perform work not continuous with regular work period shall be allowed a minimum of two hours and forty minutes at rate and one half, and if held on duty in excess of two hours and forty minutes shall be compensated on a minute basis for all time worked. When necessary to call employees under this rule, the senior available employees in the gang shall be called."

The Carrier argues that the Organization has failed to identify basic

information about the claim in order to establish that the work was performed. The Organization has identified the work that was performed on overtime; who performed it, and the date on which it was performed. In its response to the claim Carrier provided a statement from its Director of Track Maintenance that did not deny that the work had been done but offered an explanation about why Employees Biermaier and Isaacson were assigned to perform the work instead of the Claimants. This evidence is sufficient to establish that the work was performed.

The Organization argues that the Claimants are entitled to the work as the employees regularly assigned to perform the work. The Organization presented the Claimant's statement that the work was part of his duties as a Foreman and was not part of the duties of the surfacing gang employees who were asked to perform the work. According to the Organization, the Carrier has not presented evidence to refute its prima facie case that the work belongs to the Claimants.

The Carrier argues that the Organization has not proven that Claimants have a claim to this work over the claimed-against employees. The Carrier contends that the Organization has not met its burden to show that the work belongs exclusively to the Claimants, as required in a jurisdictional dispute. The Carrier also notes that the claim cites no location, and argues that the Organization has not proven that the Claimants were assigned as regular employees to the territory where the work occurred.

In support of its position the Carrier provided a statement from the Director of Track Maintenance stating that the employees to whom the work was assigned were part of a service unit extra gang that travels the entire service unit performing work related to capital projects, like unloading rail. The Organization responded by presenting evidence purporting to show that the claimed against employees were assigned to the local surfacing gang.

The Organization asserts that the Claimants had a preference to overtime work on the territory adjoining their own work territory, which is where the disputed overtime work occurred. There is no probative evidence in the record supporting this assertion. In Third Division Award 26257, this Board ruled, "Assertions by the Organization are no substitute for proof according to substantial evidence criteria." The Organization has not established that the Claimants were entitled to claim the overtime work of the adjoining territory over the claimed -against employees.

Beyond the question of the adjoining territory, the record presents conflicting evidence regarding whether the work in question was work that was regularly performed by the Claimants, and not by the claimed-against employees. The Board concludes that there is an irreconcilable conflict of fact in regard to this determinative issue and the Board is not in a position to determine irreconcilable conflicts of fact. Third Division Award 37204.

In a jurisdictional dispute similar to the claim here, Third Division Award 32646, (Referee Gerald E. Wallin), this Board ruled,

“In work jurisdiction matters of this kind, the moving party bears a heavy burden of proof to establish the merits of its claim. Our review of the Agreement provisions cited by the Organization does not reveal any language that explicitly entitles Claimants to the work in dispute to the exclusion of all others. Moreover, there is no proof in the record to show such entitlement by custom, tradition or historical practice. Accordingly, we must conclude that the Organization has failed to sustain its further proof.”

Similarly, in this case the Organization has not established that the Claimants were entitled to this overtime work on an adjoining territory, to the exclusion of other employees (including the employees to whom the work was assigned), either by rule, or by custom and practice. In Third Division Award 41168, Referee Sherwood Malamud ruled, “The Organization bears the burden of proof to establish each element of its claim. (Third Division Award 31930).” The Board concludes that the Organization has failed to meet its burden to prove every element of its claim that the Carrier violated the Agreement when it failed to assign the overtime work in question to the Claimants, rather than to other employees, and the claim must be denied.

AWARD

Claim denied.

Form 1
Page 5

Award No. 43726
Docket No. MW-42763
19-3-NRAB-00003-140458

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.