

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43736
Docket No. MW-42813
19-3-NRAB-00003-140524**

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 Track Foreman J. Edges to perform overtime work inspecting track on the Harvard Subdivision between Mile Posts 63.00 to 87.00 on Saturday, June 22, 2013 instead of calling and assigning Track Inspector D. Kopp thereto (System File B-1331C-116/1590080 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Kopp shall be paid six (6) hours' pay at the applicable overtime rate.”**

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 Claimant, who has established and holds seniority as a Track Supervisor in the Maintenance of Way and Structures Department, Track Subdepartment.

The Organization claimed that on Saturday, June 22, 2013 the Carrier assigned Track Foreman J. Edges to perform overtime work inspecting track on the Harvard Subdivision. The work occurred in the territory where the Claimant was regularly assigned to perform the inspection work as the Track Supervisor. The Organization argues that the Claimant should have been called and offered the opportunity for the work before it was offered to Edges.

The Carrier argues that this was an emergency situation after a flash flood occurred in the area, affecting the Carrier's tracks. It was necessary to send a qualified employee to the location to ensure that it was safe for train operation, according to the Carrier. The Carrier argues that the Claimant was called to perform the overtime duties, and when he did not answer his phone, a Carrier Manager was forced to call another qualified employee.

The Organization argues that the Claimant was clearly entitled to the work under the applicable Rules. The Claimant is a Track Supervisor, part of the class of employees whose regular duties include patrolling and inspecting track and roadway, and performing work incidental to these duties. In support of its position the Organization relies upon various Rules to support its claim.

“RULE 3 – CLASSIFICATION OF WORK

- A. An employee below the rank of Assistant Roadmaster directing the work of Foreman and others as well as patrolling and inspecting track and roadway as well as work incidental thereto shall be classified as a Track Supervisor.**

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 Claimant was the Track Supervisor for this area. As the employee regularly assigned to perform the track inspection duties in this territory, he was the "regular employee" contemplated under Rule 23 who was entitled to be assigned this track inspection overtime work.

The Organization also cites Rule 31 in support of its claim. Because the Claimant was the employee regularly assigned to perform this work, as well as the senior available employee, he was entitled to the disputed overtime assignment ahead of junior employees and employees assigned within a different class. The Organization has established that the Carrier was contractually obligated to offer the Claimant the overtime assignment before calling employees working within a different classification.

The Carrier argues that an attempt was made to call the Claimant to offer him the work, and he did not answer. At that point, and given the emergency nature of the situation, the Carrier argues that it was within its rights to call the Track Foreman who performed the work. The Carrier provided an email from Supervisor Craig A. Knutson stating that he called the Claimant and did not reach him and so moved on to the next person. The Organization provided an email statement from the Claimant stating that he was home and did not receive a call.

The Organization argues that the Supervisor's email statement is not reliable because it was provided nearly six months after the incident. The Organization did not provide the Claimant's statement until November, however, even though the claim was filed in August and the Claimant's statement was dated in June. In addition, the statement from Manager T. Haseltine adds support to Supervisor Knutson's statement, noting that there were only two people to be called for this overtime work and the Track Inspector is called first.

The Board concludes that there is a fundamental dispute of facts in the on-property record as to whether the Claimant was called for the overtime. In that respect it is similar to Third Division Award 37204, (Referee Margo R. Newman), where this Board 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 disputed 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 case there is an irreconcilable dispute of material fact regarding the determinative issue of whether the Claimant was called for the overtime. The Board has no way of measuring the validity of the Claimant's statement against that of Supervisor Knutson. Therefore the Organization has not met its burden to demonstrate that the Carrier violated the Agreement when it assigned the Track Foreman to perform this overtime work instead of the Claimant. The claim must be denied.

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 18th day of June 2019.