

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44591
Docket No. MW-44753
22-3-NRAB-00003-180124**

The Third Division consisted of the regular members and in addition Referee James M. Darby when award was rendered.

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

**PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior employees F. Zuniga and J. Gilmore to perform overtime work (repairing track retarder) under the hump at Mile Post 2.1 in the Barstow Hump Yard on the Cajon Subdivision of the Southwest District 600 on August 13 and 14, 2016 instead of assigning Assistant Foreman N. Underwood thereto (System File 2418-SL33-16113/14-16-0510 BNS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant N. Underwood shall be compensated twenty-eight and one-half (28.5) hours at the 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.

The record shows that on August 13, 2016, a derailment occurred in the Barstow Hump Yard causing damage to the rail track retarder. A rail track retarder slows the speed of rolling rail cars allowing them to couple to each other safely. Since this device is an important piece of equipment in all hump yards, immediate repairs were required. Structures Supervisor Rhon Wilson contacted the closest Foreman in area, B&B Foreman Frank Rodriguez, and instructed him to call in employees assigned to his gang to assist with repairs. Due to the magnitude of the derailment, two additional employees were needed. Wilson then contacted the next closest B&B Foreman, Steven Prescott. Prescott called in employees belonging to the Victorville Structure Gang in seniority order. When he informed Claimant of the derailment and the need for assistance, it is undisputed that Claimant was out of town and did not report for the overtime work. Mr. Prescott then continued calling employees in seniority order and assigned Mr. Zingua and Gilmore to the claimed work until completion on August 14, 2016.

The Organization filed the instant claim seeking compensation for the Claimant as a result of the Carrier's failure to assign him the overtime work in question. The Carrier contends that the Claimant refused the work.

That same week, on August 18, 2016, the Claimant executed a Witness Statement which described his call with Prescott as follows:

Was not called in for work on Sunday and was told I was not needed for Saturday cause I was to [sic] far away and it was only a few hours of work but my crew worked all day.

As proof the Claimant rejected the work, the Carrier presents an email from Wilson dated September 29, 2016 (after the claim was filed) that states that "[t]he claimant was called and offered the overtime to which he stated that he was out of state for the whole weekend. He was not denied the work and he chose not to show up to the derailment."

Based on the foregoing, the Board must sustain the claim. The Claimant's signed witness statement, prepared shortly after the events in question, presents a probative, reliable version of the substance of his call with Prescott. To the contrary, Wilson's email was prepared over a month later, after the claim was filed. It is also undisputed that it was Prescott – not Wilson – who spoke to the Claimant. Furthermore, the Carrier has failed to rebut the Organization's contention that regardless of what was said during the August 13 phone conversation between the Claimant and Prescott, the Carrier failed to offer the August 14 overtime work to the Claimant. The Claimant had been placed under the mistaken impression that the "emergency" work was only going to last a couple of hours. It was only after he declined the August 13 offer that he discovered the overtime continued throughout the next day, August 14. Under the totality of these circumstances, the Board concludes that the Organization's contentions are meritorious and that Claimant should be compensated for the lost work.

Accordingly, for all these reasons the claim is sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of October 2021.