

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44599  
Docket No. MW-45456  
22-3-NRAB-00003-180663**

**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 failed to call Class 2 Welder M. Huelster to perform overtime work (extinguishing tie fires) between Mile Post 603.0 and Mile Post 605.0 on the Plainview Subdivision of Texas District 800 on February 28, 2017 through March 1, 2017 and instead assigned junior employees thereto (System File 2413-SL33-1728/14-17-0180 BNS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Huelster shall now be compensated for nine and one-half (9.5) 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 February 28, 2017, fires along BNSF's right-of-way resulted in ties catching fire damaging BNSF's track. Track Supervisor Cody Moore contacted several of the Lead Welders whose trucks had water tanks to put out those fires. One of the Lead Welders contacted was Mr. J. Gayton. Gayton contacted a number of mobile welders to perform the fire suppression overtime work, looking for fires along BNSF's right-of-way then putting them out. At the time, Claimant was working as a Class 2 Welder with a welding seniority date of July 13, 1987. The Organization filed the instant claim alleging that although the Claimant was senior to the mobile welders who performed the overtime work, the Carrier never called him to offer him the work in violation of Rule 33 of the Agreement.

In the first instance, the Carrier maintains that it did call the Claimant and offer him the involved overtime opportunity. In support of this claim, on October 9, 2017, during the on-property handling of this claim, the Carrier presented to the Organization a May 26, 2017, email from Roadmaster Kory King stating that "[t]his employee was offered the work and declined because he was having dinner with his daughter. John Gayton has the communications with him." Thereafter, on January 8, 2018, the Organization responded to this email as follows:

The email statement from the Roadmaster is false and self serving at best. This is an attempt to provide a false statement and place the burden upon the Scheduled employee, Mr. Gayton, stating he is the one who allegedly contacted the Claimant, whom denied the work due to having supper with his daughter. The email at this point would be nothing more than second hand information without a confirmation from Mr. Gayton to support the email as fact. Without supporting documentation from Mr. Gayton, that he indeed contacted the Claimant, then the email would not hold weight in the Carrier's argument. Mr. Case is a junior employee and should not have performed the Overtime services, instead it should have been the Claimant and this caused him to suffer a loss in work opportunity.

The record is devoid of any showing that the Carrier responded to the Organization's reply regarding Kirk's May 26 email. The Board agrees that the Carrier's second-hand evidence in support of the Claimant refusing the overtime work is not sufficiently probative or reliable to meet its affirmative defense in this case.<sup>1</sup>

Furthermore, the Carrier's remaining assertions cannot be sustained. The fact that the Claimant was not assigned to this overtime "work project," even if true, does not explain why a more junior employee (B. Case) who was also a mobile welder like the Claimant and not assigned to the "work project" would be given the work instead of the Claimant. In any event, this contractual argument, as well as the Carrier's claim this was an emergency situation, are undermined by the Carrier's unproved contention that it called the Claimant and offered him the work, but he declined it.

Accordingly, for all these reasons the claim is sustained. Claimant shall be compensated at straight-time for the lost overtime opportunity.

**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 29<sup>th</sup> day of October 2021.

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<sup>1</sup> The record contains a December 8, 2017, email from Gayton that on its face corroborates Kirk's earlier email. However, there is no showing that this email was ever provided to the Organization during the parties' on-property handling.