

**PUBLIC LAW BOARD NO. 7101
CASE NO. 17**

PARTIES TO THE DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(and
(
(Union Pacific Railroad Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to assign or allow Gang 4904 Foreman J. Bagley to perform overtime service in connection with his gang working on a bridge at Mile Post 78.62 near Grove, Kansas on August 15, 2003 (System File W-0335-180/1383479)
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Bagley shall be ... be allowed compensation equal to the amount he would have received absent the violation of the Agreement. That is, Claimant Bagley must be allowed eleven (11) hours pay at his respective overtime rate of pay and per-diem for the days of August 15, 16, and 17, 2003 as compensation for this violation of the Agreement.

The Carrier has declined this claim."

FINDINGS:

The Board, upon consideration of the entire record and all of the evidence, finds that the parties are Carrier and Employee within the meaning of the Railway Labor Act, as amended; that this Board is duly constituted by Agreement; this Board has jurisdiction over the dispute involved herein; and that the parties were given due notice of the Hearing held.

Claimant J. Bagley has established and holds seniority as a Group 1 Steel Erection Foreman on the Eastern District dating from May 11, 1992. He was regularly assigned as such on Gang 4902 when the instant dispute arose. Gang 4902

was regularly scheduled to work four ten hour days Monday through Thursday, with Fridays, Saturdays and Sundays designated as rest days.

During the work week immediately preceding Friday, August 15, 2003, Gang 4902 worked with, and on the same schedule as, Gang 4904 repairing the bridge at Mile Post 78.62 in Grove, Kansas. Early in the week, it was determined that both Gangs 4902 and 4904 would be required to work overtime on what was normally their rest day, Friday, August 15, 2003. Claimant, for whom the Carrier had purchased a non-refundable ticket to return home on August 14, 2003, was given a choice. He could either use the ticket or remain at the job site and work overtime. According to the Carrier, he chose to return home.

The Organization submitted a Claim contending that the Carrier had violated the Agreement when the Carrier did not allow Claimant to work overtime on August 15, 2003. According to the Organization, because Claimant offered to work overtime and change his return home to the following weekend, he should have been granted the overtime on August 15, 2003. The Organization claims that he was compelled to go home and therefore, lost out on the overtime. As a result of this alleged violation, the Organization requests that Claimant be compensated for 11 hours of overtime.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier first contends that it acted within its Management Rights to assign the overtime to another Foreman. In addition, it contends that Claimant was given a choice to either work the overtime and forfeit his ticket home or to return home. He chose to return home. While Claimant indicated that he offered to change his ticket, work the overtime and go home the following weekend, this is rebutted by the evidence presented by the Carrier. Claimant was not entitled to said work. According to the Carrier, it acted properly and no remedy is appropriate.

In the instant case, this Board cannot find that the Organization has been able to meet its burden of proof to show that Claimant should have been assigned to the overtime on August 15, 2003. Beyond its Management Rights argument, based on the evidence, it does appear that Claimant, who had a non-refundable ticket, was given a choice of either forfeiting his ticket and working the overtime, or to return home. The evidence provided by the Carrier shows that Claimant chose to return home. However, the Organization contends that based on Claimant's statement, he chose to change his ticket and go home the following weekend. However, the Organization contends that this request was denied by the Carrier and Claimant was compelled to return home. Even under these circumstances, this creates a dispute in facts that cannot be resolved by the Referee.

Arbitrator Marx opined in a similar dispute of facts:

**The Board is faced with virtually irreconcilable statements of fact – whether the Extra Gang Laborers were simply performing routine Sectionman work installing ties or whether they were used in conjunction with System Gang work of a nature differing from routine track maintenance. While names of such Extra Gang Laborers were eventually provided, this provided no opportunity for timely discussion of such conflicting assertions. In this circumstance, the Board is without sufficient guidance to resolve the matter.
Third Division Award No. 29533 (Marx, Referee)**

In the instant case, after a review of all the evidence, this Board finds that there has been no sufficient showing that the Carrier erred when Claimant did not work overtime on August 15, 2003. The Claim is denied.

AWARD

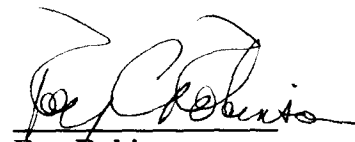
Claim denied.

Steven
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Digitally signed by Steven Bierig

Steven M. Bierig
Chairperson and Neutral Member


Dominic Ring
Carrier Member
5-6-09


Roy Robinson
Organization Member

Dated at Chicago, Illinois this 16th day of April 2009.