

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

Award No. 39854  
Docket No. MW-37716  
09-3-NRAB-00003-030062  
(03-3-62)

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

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(CSX Transportation, Inc.)

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Carrier violated the Agreement when it failed to call and assign Foreman L. Moats for overtime service between Mile Posts 29 and 69 in the vicinity of Gorman, West Virginia on July 27, 28, 30, 31 and August 1, 2001 and instead called and assigned junior employe R. Brode [System File G25523801/12(01-0660) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Moats shall now be compensated for thirty-one and one-half (31.5) hours’ pay at his respective time and one-half 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.**

**Claimant L. Moats established and holds seniority as a Foreman in the Track Department dating from September 22, 1978. He was assigned and working eight hours per day Monday through Friday, with Saturday and Sunday designated as rest days, on Force 5D40 near Gorman, West Virginia, on the Western Maryland West Seniority District on the dates involved in this dispute.**

**It appears that the basic facts of this case are uncontested. Southern West Virginia was devastated by widespread flooding as a result of severe rainstorms in May – July 2001. The right-of-way on the Thomas Subdivision sustained extensive bridge and culvert damage. A 30-mile portion of the line was out of service due to the damaged bridges and culverts.**

**In addition to the local employees summoned to make repairs to the right-of-way, the Carrier used other employees. Due to the fact that R. Brode was already qualified on this subdivision and Claimant Moats was not so qualified, the Carrier assigned Brode to said repair work on July 27 – August 1, 2001.**

**According to the Organization, the Carrier refused to recognize the Claimant's seniority when it assigned Brode to the relevant work. The Organization claims that Moats was in fact qualified to perform the repair work. According to the Organization, the Carrier failed in its obligation to call the Claimant to perform the work and, therefore, the Claimant is entitled to overtime. The Organization claims that the Carrier was in error when it called Brode instead of the Claimant.**

**Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that it acted appropriately by utilizing Brode over the Claimant. This was an emergency situation, and as such, the Carrier is entitled to wide discretion in utilizing its workforces. In the instant**

case, the Carrier assigned Brode because he was qualified for the work and the Claimant was not.

**The Board finds that the Organization has been unable to meet its burden of proof to show that the Claimant should have been utilized for the relevant work. The Carrier proved that an emergency existed, which required that the Carrier utilize its discretion in selecting employees for overtime work.**

**While there is no question that the Claimant was senior to Brode, given the emergent nature of the situation, it was not contrary to the Agreement to assign Brode to these tasks. In Third Division Award 21477 involving another emergent situation, the Board held:**

**“Careful analysis of the record convinces us however that on April 4, 1974 an emergency condition did prevail due to the tornadoes and resultant destruction of facilities and equipment at Xenia, Ohio. The causal chain between this emergency at Xenia and the loading, transporting and unloading of poles and equipment from Logansport to the stricken area is direct, immediate and irrefutable. From the record before us we have no doubt that the work complained of at Logansport was performed by outside forces and signal employees from another district under the extraordinary condition of an emergency situation. We have long recognized the principle that a Carrier in an emergency has broader authority in assigning employees than under normal circumstances. Awards 20527, 19140, 16310, 15219, 14372, 13566, 12299, 9394 et. al. There was herein proven no abuse of discretion nor bad faith exercise of these emergency powers by Carrier.”**

**Thus, after a review of all the evidence, there has been no showing that the Carrier erred when it did not select the Claimant to work instead of Brode. The Board made a finding that an emergency existed and that the Carrier acted appropriately by selecting Brode over the Claimant.**

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**AWARD**

**Claim denied.**

**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 31st day of July 2009.**