

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25250  
Docket Number MW-25265

**Marty E. Zusman, Referee**

(Brotherhood of Maintenance of Way **Employees**

PARTIES TO DISPUTE: (

(The Chesapeake and Ohio Railway **Company**

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

(1) The Carrier violated the Agreement when it assigned junior **trackmen** to perform overtime service on March 8, 1982 instead of calling and using **Trackman** C. M. Chapman, Jr. who was senior, available and willing to **perform** that service (System File C-TC-1288/MG-34851.

(2) Because of the aforesaid violation, **Trackman** C. M. Chapman, Jr. shall be allowed six and one-half (6-1/2) hours of pay at his time and one half rate.

OPINION OF BOARD: At approximately 5:05 p.m. on March 8, 1982, five minutes after Claimant, **Trackman** C. M. Chapman, Jr., was released from service, a second derailment occurred at South Charleston, West Virginia. Two junior employees were called out to clear the second derailment. The Organization on March 24, 1982, filed a claim alleging numerous rules violations on the part of the Carrier in failing to call out the Claimant who was senior employee.

The issue in the instant case centers on whether Carrier was in contravention of Rule 29 which allows Carrier to use without respect to seniority any available employee when emergency conditions prevail. The Carrier and Organization dispute whether an emergency existed. Rule 29 in pertinent part states in reference to using the senior employee:

"This rule is not to apply when some emergency condition makes it necessary to get an employee without delay and without respect to whether the senior employee is being gotten. In emergencies the most readily available employee will be called and used."

In support of Carrier action the **Manager** Engineering responded to the Organization's claim in a letter of April 29, 1982, stating that the junior employees were used "due to the emergency conditions. The Yard was tied up...". The General Chairman responded on June 23, 1982, stating in pertinent part that it was an "alleged emergency condition" and claimed "that as soon as all of the employees left, Foreman Stephenson came by, decided to **work** on the derailment" and further that "if there was no emergency situation on the other alleged derailment mentioned, we do not see whereby there would have been an emergency situation in the second derailment". Carrier official responded that it "was considered an emergency by Carrier" and further that "the Carrier is granted greater latitude in the assignment of employees during emergency situations". If the Carrier was in contravention of Rule 29 and no emergency existed, then failure to work Claimant was in violation of the Agreement. If an emergency existed then Carrier did not violate the Agreement.

The National Railroad Adjustment Board has held repeatedly that the weight of the evidence for any claim is the responsibility of the moving party (Third Division Awards 19506, 24965). The Organization claims that the Claimant was available, that neither of the junior men "had worked that day" and most importantly that there was no emergency. The Carrier in taking the affirmative defense and claiming an emergency provides sufficient **documentation** for its position of this and other factors. That a second derailment occurred is not contested. Nor is it contested that it occurred moments after the Claimant signed off. Even further, it is not disputed that the Claimant immediately left the property and as such it would be patently meaningless to place a call to Claimant for immediate work. The Carrier also documents that it used the most available employees including **Trackman** Snyder, who had also worked that day with Claimant, and **Trackman** Fletcher who happened to be on Carrier property. There is no probative evidence that anyone was called by telephone to work the second derailment. From an evidentiary position, one of those employees began work at 5:30 p.m. **No** other evidence exists to document the immediacy of the **response**, but the **immediacy** of the response is asserted by the Carrier, substantiated by the record, and not disputed by the Organization.

In Award 10965 an emergency was defined as "an unforeseen combination of circumstances which calls for immediate action", **Carrier** not only asserted **an** emergency in that 'the yard was tied up', but utilized immediate action in its assignment of personnel, who were on the property, without convincing contradiction. In addition, from the record it appears that Fletcher was on Carrier property and that the Claimant was not immediately available. This Board finds such argument persuasive with respect to Carrier action and holds that an emergency situation prevailed. As such, Carrier was not in contravention of the Agreement.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the **Employees** involved in this dispute are respectively Carrier and **Employees** within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

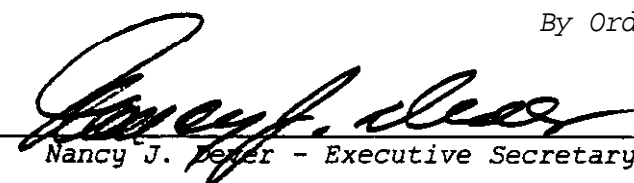
That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dexter - Executive Secretary

Dated at Chicago, Illinois, this 31st day of January 1985.