

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25449

Docket Number MW-25447

Eugene T. Herbert, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way **Employees**
(The Chesapeake and Ohio Railway Company
(Southern Region)

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 August 11, 1982 instead of calling and using **Trackman** P. L. Meadows who was senior, available and willing to perform that service (System File **C-TC-1401-MG-3634**).

(2) Because of the aforesaid violation, **Trackman** P. L. Meadows shall be allowed eight (8) hours of pay at his time and one-half rate and eight (8) hours of pay at his double time rate.

OPINION OF BOARD: On August 11, 1982, a derailment occurred in the yard at **Hinton**, West Virginia. Force 1124, which **was** responsible for the normal maintenance of the trackage at the derailment site, was called out by the Foreman in **an** effort to return the track to service. The Foreman then determined that additional personnel were required for this purpose and proceeded to call and utilize **several employees** from Force 1106 junior to Claimant who, himself, is a member of that Force.

Rule 29 reads as follows:

"**When** necessary to work employees continuous with and in advance of the regular **tour**, not continuous with the regular tour, and on rest days and holidays when the employee **is not regularly** assigned to work on holidays, senior employees on the particular gang or force, if qualified, will be given preference if they **are** available."

Carrier's defense rests on Understanding 1 pertaining to Rule 29, which states:

"**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**."

While the Organization has the burden of proving a Rule violation, once it does so the burden shifts to Carrier to provide evidence that the Rule was not applicable under the circumstances Of the particular case or that an exception to the Rule was otherwise justified.

Here, there is no dispute that Claimant's seniority rights were infringed. **However**, the Carrier asserts an emergency condition which, under the aforecited Understanding 1, would permit it to call and use the most readily available employe irrespective of **seniority**.

while the record shows the Organization to have denied the existence of an emergency in only the **most general sense, a determination** as to whether such **a condition** actually existed must depend on the evidence of probative value submitted by Carrier. **Carrier here asserts that "a serious derailment. occasioned its "urgent need to obtain assistance".** But mere **assertion** does not constitute proof. No evidence was adduced on the property which would support the necessity to "get an employee without delay and **without respect to whether** the senior employee is being gotten*. Indeed, the record indicates that **Carrier's Foreman** took action seemingly inconsistent with **the** existence of a true emergency. He stated that he telephoned Claimant but did not ask the Operator to break in on the line when he found it was busy. Thereafter, the **Foreman** claims to have driven to Claimant's residence **in** a futile search **for** him. These facts do not support Carrier's contention that an emergency condition, such as contemplated in Understanding 1, existed.

Accordingly the Board finds that Understanding 1 was not shown to be applicable in this case. As there was **convincing** evidence that Claimant was indeed available to work to clear the track, he was therefore entitled to be given preference over junior employes in Force 1106 for **that assignment**. Such efforts as **were** made to contact him do not, **in** this case, satisfy Carrier's obligation to use reasonable efforts to determine the availability of a senior employe.

As to compensation, there is no reason to disbelieve Carrier's statement that employes on Force 1106 worked on the derailment for a total of twelve, **rather** than sixteen overtime hours. Accordingly Claimant should be allowed eight **(8)** hours of pay at his time and one-half **rate** and four **(4)** hours of **pay** at his double time rate.

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 Employes involved **in** this dispute are respectively Carrier and Employes '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 violated.

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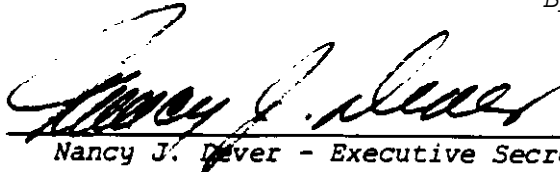
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Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD **ADJUSTMENT** BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 23rd day of May 1985.