

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32414
Docket No. MW-32130
98-3-94-3-540**

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Chicago and North Western Transportation Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned fourteen (14) members of the RC 711 Interdivisional Rail Gang to repair track in Council Bluffs, Iowa on July 12, 1993, instead of assigning the section forces headquartered at Council Bluffs (System File 4LF-2543T/81-93-139).**
- (2) As a consequence of the violation referred to in Part (1) above, Foreman W. J. Wenninghoff, Assistant Foreman J. R. Paar and Machine Operator R. K. Jensen shall each be allowed pay for an equal proportionate share, at their respective straight time rates of pay, of the one hundred forty (140) man-hours expended by the members of the Interdivisional Rail Gang."**

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.

According to the on-property handling, the Organization asserts that on July 12, 1993, the Carrier assigned 14 members of the RC 711 Interdivisional Rail Gang to perform track repairs at Council Bluffs, Iowa (which consisted of manually surfacing a portion of the River Track situated between 29th and 27th Street) and to further make repairs to a derailment site located on Track No. 15 in the Council Bluffs Yard (which consisted of manually removing defective track ties and installing replacement ties). The total work performed by the RC 711 Interdivisional Rail Gang on that date came to 140 hours.

Claimants are section employees responsible for maintaining and repairing all Carrier track facilities located in Council Bluffs. Further, according to the Organization, the areas worked on by members of the RC 711 Interdivisional Rail Gang fall under Claimants' jurisdiction as does the type of work performed by that gang on the date covered by the claim.

The on-property handling next shows that according to the Carrier, Claimants were fully employed at the time the work was performed; the work performed by the RC 711 Interdivisional Rail Gang was done because flooding on the main line "restricted the gang from performing their usual duties" and "[d]ue to emergency conditions caused by the massive flooding the Carrier needed to augment certain crews, in order to keep its operations running."

In response to the Carrier's emergency assertions, on the property, the Organization asserted that the Council Bluffs Yard was not subject to any flood waters; the work performed by the RC 711 Interdivisional Rail Gang had nothing to do with high water or flood damage but was work that was normal and routine work customarily performed by section crews; and the derailment on July 12, 1993 was not critical to keeping the Carrier's operation running.

Rule 49 states that "Interdivisional gangs may be established to perform programmed rail and/or tie renewal and ballast work ... [but] will not be used in lieu of

regularly assigned section gangs to perform work customarily performed by said section gangs on their respective section territories." The Organization has shown that on the date covered by the claim the RC 711 Interdivisional Rail Gang was used "in lieu of regularly assigned section gangs to perform work customarily performed by said section gangs on their respective section territories."

The type of work performed by the RC 711 Interdivisional Rail Gang consisted of manually surfacing track and manually removing defective track ties and installing replacement ties. That is section gang work customarily performed by Claimants and was work performed within Claimants' section territory. The type of work performed by the RC 711 Interdivisional Rail Gang was not "programmed rail and/or tie renewal and ballast work" as contemplated by Rule 49. A violation of Rule 49 has therefore been shown.

With respect to the asserted "emergency", the Carrier has the burden of demonstrating the existence of the emergency. The Organization has refuted any assertion that an emergency existed. The Organization has shown that the Council Bluffs Yard was not subject to any flood waters and the disputed work had nothing to do with high water or flood damage, but was work that was normal and routine business customarily performed by section crews. The Organization has also shown that the derailment on July 12, 1993 was not critical to keeping the Carrier's operation running. The Carrier's burden to establish the existence of emergency conditions has not been met.

With respect to the remedy, Claimants clearly lost work opportunities. The function of a remedy where a violation of the Agreement has been demonstrated is to make affected employees whole. Claimants shall therefore be compensated for the lost work opportunities. This was work Claimants could have performed. Failure to afford relief of that nature only serves to allow the party violating the Agreement to benefit from that violation. It is not disputed that 140 hours were expended by the RC 711 Interdivisional Rail Gang on the work in question. To make Claimants whole, Claimants shall therefore each receive compensation for a proportionate share of those hours. Because the claim only seeks payment at the straight time rate, that is the rate to be applied to the hours awarded.

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 21st day of January 1998.