

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33937
Docket No. MW-32383
00-3-95-3-237**

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employes
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Pittsburgh Seniority District employees R. Rawlings, R. Granis and Formena M. Drbison from the Niles, Ohio Subdivision to perform work (repair a broken rail) at Mile Post 36.8 on the Youngstown Seniority District on December 8, 1993, instead of calling and assigning Youngstown Seniority District employees W. Miller, M. Carney and C. Berry to perform said work (System Docket MW-3352).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants W. Miller, M. Carney and C. Berry shall each be allowed six (6) hours' pay at their respective time and one-half rates.”**

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.

Foreman W. Miller, Vehicle Operator M. Carney and Vehicle Operator C. Berry (Claimants) are headquartered at Pittsburgh, Pennsylvania. The Claimants each hold seniority on the Youngstown Seniority District.

On December 8, 1993, a broken rail occurred on the main line at M.P. 36.8 on the Youngstown Seniority District. The Carrier assigned the work to Foreman Track Patrol M. Drabison, Electric Welder M. Rawlings, and Welder R. Granis, each of whom lived six to eight miles from the work site, rather than to Claimants Carney, Berry and Miller who resided 25, 65 and 75 miles, respectively, from the work site. Mr. Drabison holds seniority on the Youngstown Seniority District, however, at the time this dispute arose he was assigned to the Niles Subdivision. Messrs. Rawlings and Granis hold seniority on the Pittsburgh Seniority District. Each was paid six hours at their respective overtime rates for the work at issue here.

On January 10, 1994, the Vice Chairman submitted a claim on behalf of Claimant Miller, who is senior to Drabison, alleging that he should have been called for the December 8 overtime. The Vice Chairman also submitted claims on behalf of Claimants Berry and Carney who have seniority on the Youngstown District where the broken rail occurred, and were senior to Rawlings and Granis, who have seniority on the Pittsburgh Seniority District. The claim sought payment of six hours' pay at the overtime rate for the alleged violation of Appendix "C," and Rules 4 and 17.

Appendix C, referenced in Rule 4, contains various maps which outline the separate geographical seniority districts. Agreement Rules 4 and 17 read, in pertinent part:

"Rule 4 - Seniority

Section 1. Seniority date.

- (a) Except as provided in Rule 3, Section 5, seniority begins at the time the employee's pay starts.**

* * *

Section 5. Seniority districts

- (a) The operating division seniority districts shown in Appendix 'C' and the following separate seniority districts are established:

Section 6. Seniority rosters.

- (a) A roster, revised as of January 1 and to be posted March 1, showing the employee's seniority date in the appropriate seniority district will be posted within such seniority district at headquarter points where employees are required to report for work. Copies of all rosters will be furnished the General Chairman and the involved local representative(s).

Rule 17 - PREFERENCE FOR OVERTIME WORK

Employees will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them during the course of their work week or day in the order of their seniority."

The Carrier denied the claim, contending that the broken rail on the main line causing a delay in trains was an "emergency condition" that required "the fastest possible response" and thus justified using the "closest available employees." The Carrier further contended that Claimant Carney was on vacation on the claim date, and was therefore, unavailable for the work in dispute. Finally, "without precedent or prejudice to the position of either party" the Carrier allowed Claimant Berry six hours at his then applicable straight time rate.

The Organization made out a prima facie case that the Carrier violated the Claimants' Rule 17 overtime preference rights by mis-assignment across Rule 4 seniority district boundaries. See Awards 41 and 81 of Special Board of Adjustment

No. 1016 and Third Division Awards 24662, 29381 and 30181 involving these same parties. The Carrier's burden of persuasion on its affirmative defense of "emergency conditions" is not met by mere assertion and the record facts do not support a conclusion that this was a true "emergency." See Third Division Awards 14321, 20223, 20310, 23853 and 29742. Finally, the Organization effectively refuted the contentions that Claimant Carney was unavailable or that damages at the overtime rate were inappropriate to remedy the proven violation of Rule 17. See Third Division Awards 30181 and 30987 for on-property precedent. (The Carrier is authorized to offset the six hours at straight time already paid Claimant Berry.)

AWARD

Claim sustained in accordance with the Findings.

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 22nd day of February, 2000.