Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37619
Docket No. MW-36652
05-3-01-3-189

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 Employes
(
(CP Rail System (former Delaware and Hudson
(Railway Company)

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 Trackman L. Gipson to overtime trackman service between Mile Posts A24 and A39 in the vicinity of Saratoga, New York on April 9, 2000 and instead called and assigned junior employe J. Blanchfield (Carrier's File 8-00146 DHR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant L. Gipson shall now be compensated for eleven (11) 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.

The basic facts in this case do not appear to be in dispute. Claimant L. W. Gipson, who holds seniority as a Trackman, was assigned and working as such headquartered at Kenwood, New York, on the date involved in this dispute.

On Sunday, April 9, 2000, the Carrier required the services of Trackmen to perform snow removal on the Canadian Main between Mile Posts A24 and A39 at Saratoga, New York. The Carrier attempted to contact the Claimant to request that he perform said work. However, the Claimant insists that he was never contacted. It is uncontested that the Carrier assigned Boom Truck Operator J. Blanchfield that day (his rest day) for overtime service. Blanchfield is junior to the Claimant. On April 9, 2000, Blanchfield expended 11 hours in the performance of his overtime work.

The Organization claims that this is a very straightforward case. According to the Organization, the Carrier refused to recognize the Claimant's seniority when it assigned Blanchfield to work the overtime on November 9, 2000. According to the Organization, the Carrier failed in its obligation to call the Claimant to perform the work during the "alleged" emergency and therefore, the Claimant is entitled to 11 hours at the appropriate rate of pay. In addition, the Organization claims that there was no actual emergency and, therefore, the Carrier was in error when it called Blanchfield 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 contacting Blanchfield on April 9, 2000. First, the Carrier contends that there was a bona fide emergency and the record on the property shows the same. The Carrier contends that the Organization cannot meet its burden to prove that the Claimant was home and available for work on the day in question. Conversely, the Carrier argues that it proved that an attempt was made to contact the Claimant by telephone, but that the Claimant did not respond.

The issue in this case is simple. The Organization claims that the Carrier failed to contact the Claimant and that there was no bona fide emergency. Conversely, the Carrier asserts that it attempted to contact the Claimant and that a true emergency existed. Therefore, because the Claimant was unavailable, it was

appropriate to contact Blanchfield. The burden of proof in this matter is on the Organization.

We carefully reviewed all evidence regarding whether the Organization proved that the Claimant was denied the opportunity to work overtime on April 9, 2000. We cannot find that sufficient evidence has been presented to prove that the Carrier was in violation of Rule 11.8 that provides:

> "Employes 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 order of their seniority."

We also note that in Third Division Awards 32420, the Board held that in making assignments:

> ". . . It is well-established that in emergency situations the Carrier has latitude to use its discretion in the assignment of forces. Third Division Awards 28683, 28643, 28142, 10965. That doctrine applies in this case."

In the instant case, we find, based on the evidence adduced on the property, that the Carrier did not violate the Agreement. First, we find that an emergency situation did exist on the day in question. In addition, the Carrier presented credible evidence to show that it fulfilled its obligations under Rule 11.8 by attempting to contact the Claimant. Unfortunately, the Claimant did not respond. Insufficient evidence was presented by the Organization to adequately rebut the contention that the Carrier attempted to contact the Claimant. Based on these conclusions, we find that the Organization has not met its burden of proof and the claim is therefore denied.

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 19th day of October 2005.