

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 38000
Docket No. MW-36758
06-3-01-3-246

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to allow or assign Assistant Foreman J. T. Arellano to perform overtime service (lookout/watch) on Track No. 3 at Mile Post 005.7 on January 13 and 14, 2000 and instead assigned junior Assistant Foreman C. Castleberry and junior employe J. Hernandez (Carrier's File 1228397 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. T. Arellano shall now ' . . . be compensated at his regular time and a half rate of pay of his assigned position in the amount of overtime hours consumed by Mr. Castleberry on January 13 and 14, which total twenty-one (21) hours, plus the overtime hours consumed by Mr. J. Hernandez on January 14, which are seven (7) hours. Thus coming to a grand total of twenty-eight (28) hours, as results of the violations as outlined herein."

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 claim arose when employees junior to the Claimant were used to provide track watch flagging over a four-day period of time when a broken water main threatened to wash out Track No. 3 at Carrier's East Los Angeles Yard.

The Claimant held seniority as a Foreman dating from April 15, 1968 during the relevant timeframe. Despite this seniority, the Claimant chose to hold an Assistant Foreman position on Gang 8162. A few days prior to the claim dates, the Carrier assigned the Claimant to supervise and coordinate the unloading of ballast trains on two main line tracks between Banning and Indio, California. This location was some 100 miles away from the East Los Angeles Yard, but it was within the limits of his seniority district. There is no dispute that the Carrier had the right to assign the Claimant to work with the ballast trains. However, it was while the Claimant was working with the ballast trains that the flagging work arose. The Claimant was not contacted to perform the flagging work back at the East Los Angeles Yard. Instead, he was kept on the ballast train assignment.

Although the claim alleged that some eleven different Agreement Rules were violated, including the Scope Rule, the Organization's Submission contended, on page 4, that only six of those Rules were controlling. None of these surviving six Rules included the Scope Rule. Indeed, the Organization's Submission said, on page 18, that scope coverage of the work was essentially "... immaterial insofar as the instant dispute is concerned. This dispute is very clearly a dispute over SENIORITY...."

As the record developed on the property, the Carrier denied the claim on two grounds: (1) the flagging work constituted an emergency and (2) the work was not covered by the Scope Rule; as a result, the work could be performed by employees in any craft as well as management. In this regard, the Carrier cited several prior Awards for two propositions: (1) that the work was not reserved to employees to

represented by the Organization and (2) that the Scope Rule of the applicable Agreement was a general Scope Rule that required the Organization to prove past customary, historical, and traditional performance. See, for examples, Third Division Awards 29052, 28011, 26548, and 25350.

While the Organization challenged the Carrier's assertion that the disputed work constituted emergency flagging, it did not contest any of the facts asserted by the Carrier that constituted the emergency. Indeed, the Organization's correspondence acknowledged that a 24-hour track watch was set up to cover the time period while the water main breakage threatened to wash out the track involved. As a result, there is no conflict in the material facts surrounding the claimed emergency. In evaluating those facts, we note that Rule 13 lists "flood" among the types of conditions that constitute an "emergency." In addition, we also note that Rule 25 (b) which is one of the six surviving Rules upon which the Organization relies, provides, in pertinent part, that ". . . Overtime in connection with emergencies will be handled by most readily available forces, with preference to the employees of designated territories when time permits." (Emphasis added.)

More importantly, however, is the Carrier's scope coverage defense. It is axiomatic that before seniority Rules can be applied to the work in question, the work must be shown to be reserved to scope-covered employees via the Scope Rule. On this record, the Organization failed to establish that flagging work is within the scope of the Agreement. Without such scope coverage, we must find that the seniority Rules are inapplicable. Accordingly, the Carrier was not restricted in assigning the work as it did.

Given the foregoing considerations, we must deny the claim.

AWARD

Claim denied.

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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 25th day of October 2006.