

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39935
Docket No. MW-39023
09-3-NRAB-00003-050105
(05-3-105)**

The Third Division consisted of the regular members and in addition Referee Jacalyn J. Zimmerman when award was rendered.

**(Brotherhood of Maintenance of Way Employes Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad 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 Section 6114 Foreman G. Purkey and Sectionman M. Cantu to perform overtime service (clean spring frogs) on Section 6114 territory between McCammon, Idaho and Pocatello, Idaho on January 11, 2004, and instead called and assigned Track Inspector R. Cardona and Section 6113 Sectionman R. Sparks (System File J-0435-51/1391006).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants G. Purkey and M. Cantu shall now each be compensated for eleven (11) hours at their respective time and one-half rates 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 dispute in this case revolves around the assignment of overtime work on Sunday, January 11, 2004. At the relevant times, the Claimants were assigned to and maintained McCammon Section 6114 during their regular workweek. On the date at issue, the Carrier called and assigned Track Inspector R. P. Cardona and Gang 6113 Sectionman R. C. Sparks to clean snow buildup from spring rail frogs on the Claimants' territory, between McCammon, Idaho, and Pocatello, Idaho.

The Organization contends that the Carrier's action violates Rule 26(h) of the parties' Agreement, which provides:

"WORK ON ALL UNASSIGNED DAYS. Where work is required by the Company to be performed on a day, which is not a part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee."

The Organization asserts that because the Claimants were the regular employees within the meaning of the Rule, they were entitled to preference for the overtime work and the Carrier's failure to assign it to them violated the parties' Agreement.

The Carrier does not dispute that the Claimants were the regular employees for maintenance work on this territory. Rather, the Carrier asserts that its decision to assign the work to other employees was justified because it was faced with an emergency situation, as a winter snowstorm had caused excessive snow buildup on the spring rail frogs, which interfered with the basic functioning of the apparatus and could have been the potential cause of several derailments.

The on-property handling shows that in its response to the claim, the Carrier cited the emergency, and stated that it had called numerous employees, but only those who ultimately did the work responded. In its response to the Organization's appeal of the denial of the claim, the Carrier added that the necessary work was track inspection, work the Claimants were not qualified to perform, and any cleaning or snow removal that occurred was incidental to the fundamental inspection process.

In support of these contentions, the Carrier produced an unsigned e-mail, dated February 3, 2004, with the name of Manager D. Kula at the top, stating that he had

been “instructed to call track inspectors to inspect track, that Claimant Purkey was not on the designated list of employees to inspect track, and that numerous employees had been called that morning by cell phone and Mr. Sparks was the only one to answer his telephone.” The Carrier also asserted that Cardona was the Track Inspector who regularly patrolled track in the area and was, therefore, the regular employee pursuant to Rule 26(h). The Carrier further stated that it was common for Track Inspectors to make immediate remedial repairs when unsafe conditions were found, and it was also common for a Track Inspector to be accompanied by a Laborer. The Carrier contends that there is no Agreement support for calling a Section Foreman for Track Inspector’s work, and this was not part of Claimant Purkey’s regular assignment. The record also includes a FRA Track Inspection & Defect Report for January 11, 2004, showing that Cardona performed a special inspection on the Pocatello Subdivision on that date.

The Organization countered that there was no emergency, because it had snowed for some time before the work was performed and there was no evidence that train traffic was stopped or hindered on any mainlines in the Pocatello area. In addition, the Organization contended that even if there was an emergency, the Claimants were as available as the employees utilized, because they lived in the area and were readily available. The record includes statements from both Claimants to this effect, which added that they were at home and available on the date at issue.

The record also includes a signed statement from Sparks, indicating that he had been called by Kula, and instructed to go to work with Track Inspector Cardona, cleaning spring rail frogs. The statement recited that he and the Track Inspector shoveled snow and chipped ice from the spring rail frogs for 11 hours.

The Carrier does not dispute that the Claimants were the regular employees entitled to maintenance work on the territory at issue, and there is no serious contention that the Carrier called them for the work. Thus, the Organization made out a prima facie case in support of the Agreement violation, and it was incumbent upon the Carrier to provide probative evidence in support of its affirmative defenses. This it failed to do.

The Carrier presented no evidence to support its contention that it was faced with an emergency situation. Further, as the Organization states, even if there had been an emergency, the Carrier failed to demonstrate why it was necessary to call employees other than the Claimants, who lived in the area and were readily available.

As for the Carrier's assertion that at least one Track Inspector was required, and that the Claimants were not qualified to perform that work, this contention is supported only by an unsigned document, purporting to be an e-mail by Manager Kula, that he had been instructed by an unnamed individual to call a Track Inspector to inspect track. This is insufficient to prove that track inspection was actually necessary on the date in question. Furthermore, the signed statement of employee Sparks demonstrates that the actual work performed by the two employees, for 11 hours, was shoveling snow and chipping ice, not work simply incidental to necessary track inspection, as the Carrier contends, and there was no statement from the Track Inspector as to his duties that day. The vague and unsigned document submitted by the Carrier is not sufficient to create a material difference of fact as to these matters. Because the Carrier failed to provide probative evidence in support of its affirmative defenses, the claim must be sustained.

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 31st day of August 2009.