

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40412
Docket No. MW-39624
10-3-NRAB-00003-060419
(06-3-419)**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

PARTIES TO DISPUTE: (**Brotherhood of Maintenance of Way Employes Division -
(IBT Rail Conference
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Palestine Seniority Division employees assigned to Gangs 3060 and 3098 to perform Maintenance of Way Department work (replacing ties and related work) between Mile Posts 5.00 and 6.00 on the Cline Branch line on the Del Rio Division on June 20, 21 and 22, 2005, instead of Del Rio Seniority Division employees R. Flores, III, M. Mata, F. Rubio, J. Salinas, S. Deleon, J. Rodriguez, N. Gutierrez, H. Sandoval, J. Resendez, E. Garcia, A. Hinojosa, B. Martinez and R. Hill (System File MW-05-95/1429841 MPR).**
- (2) As a consequence of the aforesaid violation, Del Rio Division employees R. Flores, III, M. Mata, F. Rubio, J. Salinas, S. Deleon, J. Rodriguez, N. Gutierrez, H. Sandoval, J. Resendez, E. Garcia, A. Hinojosa, B. Martinez and R. Hill shall now each be compensated for twenty-four (24) hours at their respective straight time 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 Organization maintains that the seniority of employees is restricted to their respective seniority districts. According to the Organization, the Carrier violated the Agreement when it assigned Gangs 3060 and 3098 of the Palestine Seniority Division to perform routine work on the Del Rio Seniority Division. The Organization does not dispute that the Carrier has the right to respond to an emergency. Rather, the Organization argues that an emergency no longer existed when the Carrier assigned these gangs to perform work outside of their seniority district. The burden is on the Carrier to establish that an emergency existed and the Carrier cannot show that an emergency existed here.

The Carrier cites to numerous Awards in support of its contention that it has broad latitude in an emergency and can assign work across seniority divisions when the emergency warrants. According to the Carrier, this was an emergency situation and Gangs 3060 and 3098 were assigned to assist in the emergency. Further, the Claimants in the instant matter were fully employed and, therefore, are not entitled to be compensated even if there was a violation. In support of its argument, the Organization points to 21 Awards dating since 1961 that address the Carrier's violation of the seniority district issue. The Organization also points out that the Awards consistently reject the "fully-employed" defense to escape liability.

In support of its position, the Carrier points to numerous Awards for the proposition that it can assign employees as-needed when there is an emergency. Because it was an emergency, the assignment was not a violation of the Agreement.

The Board carefully examined the record evidence. There is no dispute that the Carrier used Gangs 3060 and 3098 of the Palestine Seniority Division to perform work on the Del Rio Seniority Division on June 20, 21 and 22, 2005. The Carrier defends that an emergency warranted the assignment across seniority districts. The Board has repeatedly held that the emergency defense is an affirmative defense. See e.g., Third Division Award 35590 and Awards cited therein. The Carrier has the burden of establishing an affirmative defense and, in the instant matter, the Carrier has not met the burden.

While the Organization does not dispute that a derailment occurred on June 17, the Organization also provided a detailed statement from the Foreman who was working the derailment with the out-of-district gangs. Foreman Flores notified Carrier officials when the track was back in service. He also stated that the crews remained during the following week and installed ties in the district.

In Third Division Award 33937, the Board stated, in pertinent part, “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. The same holds true in the instant matter where the simple assertion of an ‘emergency’ mentioned merely a derailment that occurred. No further details, save for a milepost, are contained in the record. The Organization points out that if an emergency existed, it made perfect sense for the out-of-district crews to work on June 17. However, those crews were off for two days on June 18 and 19 and then returned to work in the area – after the emergency had ended. Simply saying that an emergency existed does not establish the affirmative defense. Allowing the crews not to work for two days and then calling them back does not lend support to the claimed affirmative defense of emergency. There are innumerable Awards in support of the Carrier’s right to respond to emergency conditions. However, in asserting the defense, the Carrier must establish the existence of an emergency. Third Division Award 39852. The Carrier has not done so in the instant matter.

In Third Division Award 35732, the Board reviewed a number of Awards and stated that “[T]he Board has held that such lost work opportunity is compensable and that the issuance of a monetary award is warranted to discourage recidivist violations by the Carrier.” The Board, citing to other Third Division Awards, found

that the proper remedy was payment to the Claimants for all time consumed by the improper forces performing the mis-assigned work.

Consistent with the above, the Board sustains the instant claim. Compensatory damages are required to make the affected employees whole for the loss of work opportunities which occurred when the out-of-district gangs performed the work of Del Rio Seniority Division employees.

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 14th day of May 2010.