

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40415
Docket No. MW-39869
10-3-NRAB-00003-070028
(07-3-28)**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Chicago
(and North Western Transportation 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 Seniority District B-2 employees J. Short, S. Bishop, J. Sensenich, D. Murphy, S. Johnson, E. Lindloff, P. Asleson and D. Austin to perform cleanup and repair work on a bridge on the Firestone Industrial Track in Des Moines, Iowa and instead called and assigned Seniority District B-4 Gangs 3470, 3471 and System Gang 4092 employees to perform such cleanup and bridge repair work on December 12, 13, and 14, 2005 (System File 2RM-9710T/1440547 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Short, S. Bishop, J. Sensenich, D. Murphy, S. Johnson, E. Lindloff, P. Asleson and D. Austin shall now “*** each be compensated for an appropriate share of 200 hours of straight time and forty (40) hours of overtime when the Carrier had a C&NW System B&B gang and district B-4 gangs perform Maintenance of Way work on district B-2, at the applicable 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 Claimants hold seniority in the Building and Bridge Department ("B&B") on Seniority District B-2. The record evidence establishes that a garbage truck struck the overhead bridge on the Firestone Industrial Track in Des Moines, Iowa, on December 12, 2005. The bridge was knocked to the ground and repaired by Carrier forces. The Firestone Industrial Bridge is on Seniority District B-2. The Claimants were not assigned the work.

The Organization claims that the failure to assign Seniority District B-2 B&B employees violated the Agreement. Specifically, the work is reserved to B&B employees and the assigned employees were from a Seniority District B-4 System Gang. The assignment of the B-4 employees was improper – B-2 employees were available to perform the work and were not called. Further, the assignment of System Gang employees was in error because the System Gang Agreement is for "programmed work" and the repair of the bridge was not "programmed work." Therefore, the System Gang was prohibited from performing the work "in lieu of regularly headquartered B&B forces."

The Organization further contends that the Carrier's defense of an "emergency" situation is invalid, because the Carrier did not treat the situation as an emergency. Rather, the Carrier waited until the day after the occurrence to begin work and then did not work around the clock. Moreover, this was on an industry track and not a mainline structure. Simply because a bridge was knocked down does not automatically create an emergency. Further, if it were an emergency, why were not all available forces, including the B-2 B&B employees, called out to perform the emergency work?

The Carrier counters that when a garbage truck knocks down a Carrier bridge, such constitutes an emergency. In an emergency, the Carrier has wide latitude to respond to the emergency and can deviate from certain Agreement provisions during the emergency period. The Carrier asserts that it produced an un rebutted statement from the local Manager which revealed that the Carrier was prohibited by the municipality from working

on the bridge around the clock. Moreover, System Gang employees are not prohibited from being utilized to respond to an emergency.

The Board carefully reviewed the record evidence. It establishes that the Firestone Industrial Track bridge is within the B-2 B&B Seniority District. However, that does not end the inquiry. The Carrier defends its deviation from the Agreement based on its assertion that an emergency existed. Because the assertion of an emergency is an affirmative defense, the burden is upon the Carrier to establish the existence of the emergency.

An emergency under the Agreement exists when “an unforeseen combination of circumstances which calls for immediate action develops.” Third Division Award 20527 (citing Third Division Award 10965).

The record establishes that the bridge over a local thoroughfare was knocked down by a garbage truck on December 12, 2005. An industry bridge over a local thoroughfare being knocked down by a garbage truck is “an unforeseen combination of circumstances.” The question then remains whether those unforeseen circumstances require immediate action. The Organization argues that a fallen bridge on an industrial lead track does not necessarily create an emergency. While true, it is not applicable in the instant matter.

The Carrier established that an emergency situation calling for immediate action existed. The unrefuted email statements from the local Manager establish that the municipality would not allow personnel to repair the structure on an around-the-clock basis. The City removed the debris and the Carrier forces had to reset the steel spans and restore service. The Carrier forces restored the industrial bridge and returned to their assignments when the service was restored.

Under a long line of applicable Awards, the Carrier had the discretion to assign Carrier forces to respond to the emergency. The decision to assign System Gang or B-4 Seniority District forces cannot be found to be arbitrary, capricious, or unreasonable. Based upon the above, the claim must be denied.

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 14th day of May 2010.