

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40919
Docket No. MW-40847
11-3-NRAB-00003-090112**

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

**(Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Union Pacific Railroad Company (former Missouri
(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 Western District and Central Division seniority employees to perform track repair work between Mile Posts 429 and 443 on Western District and Central Division seniority territory on September 5, 6, 7, 8 and 9, 2007 and instead called and assigned employees of the Southern and Eastern District Gangs 1333, 1387, 1356 and 2185 (System File T07-28/1489246 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants P. Matney, M. Winfrey, T. Morrow, R. Wright, S. Riley, J. Sager, J. Botts, J. Mankin, Jr., D. Kendrick, P. Lane, D. Shue, J. Clevenger, W. Carter, L. Webber, M. Gage, J. Coates, C. Drake, J. Sager, J. Jackson, A. Box, T. Williams, L. Foster and T. McClain shall now each be compensated for twenty-four (24) hours at their respective straight time rates of pay and for twenty-two (22) 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.

A little after midnight on September 4, 2007, a car on a train derailed. It was dragged 15 miles along the Carrier's main line impacting track and ripping out signals. The damaged track was located between Mile Post 429 and Mile Post 443 on the Van Buren Subdivision of the Wichita Service Unit on the Central Division Western Seniority Territory. Instead of using the 23 Claimants from the Western District and Central Division Seniority territory who were working in support of large System Tie Gangs in and around Muskogee, Oklahoma, approximately 140 miles from the site of the derailment, the Carrier assigned Gangs 1333, 1387, 1356 and 2185 from the Southern and Eastern Districts to repair the track. The employees of these four gangs began the repair work at 7:00 A.M. on the morning of September 5, well over 24 hours after the derailment. They worked on September 5, 6 and 7 at straight time and an average of one hour of overtime over these three weekdays. They worked and were paid overtime on Saturday, September 8 and Sunday, September 9. The employees of the four gangs worked 24 hours at straight time and a total of 22 hours of overtime at time and one-half rates.

The Organization established that the assignment of Carrier forces across seniority districts violates Rules 1, 2, 11 and 12. It notes that 16 Arbitrators in 24 Awards issued over 47 years have found that assignments across seniority districts violate the Agreement. See Third Division Awards 39797 and 40917. The Carrier asserts that the derailment created an emergency. Where an emergency exists, the Carrier enjoys greater latitude on how it deploys its forces. It is well established that if an emergency existed during the period of September 4-9, the Carrier's action would not violate the parties' Agreement.

The claim that an emergency existed is an affirmative defense to the Organization's claim. But for the existence of an emergency, the assignment of employees across seniority districts violates the Agreement. See Third Division Award 36982. The Carrier bears the burden of proof to establish the existence of an emergency, when the employees assigned began to repair the damaged track on September 5, 2007. See Third Division Award 32419.

The Board defined an emergency in Third Division Award 24440, as follows:

“...emergency is the sudden, unforeseeable and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt.”

The Carrier assertion of the existence of an emergency rests on the statement of its Director of Track Maintenance (DTM) that was provided during the on-property processing of this claim, as follows:

“With regard to the use of Southern and Eastern District employees to respond to a derailment on or about September 5, 2007, these employees were used to respond because they were closer to the derailment site than the Claimants. The Claimants were working in and around Muskogee, OK area. The Southern and Eastern District employees were working near the Little Rock area and therefore closer to the Van Buren Subdivision, the location of the derailment.

Further, the Claimants were supporting system tie gangs during this period of time. System tie gangs are large gangs consisting of 100 or more employees. Without the support of the Western District and Central Division Claimants these gangs would not have been able to perform their duties thereby severely limiting their ability to work.

I used the Southern and Eastern District Gangs to respond to this emergency because they were significantly closer and could respond to [the] emergency more quickly.

Finally, I want to emphasize that this was a derailment and a true emergency situation. A railway car was dragged over fifteen miles of track and caused significant damage to the Carrier's track

structure. For the Organization to state that this was not an emergency simply because the repair work did not begin the instant the derailment occurred is a misrepresentation of the facts. The fact is, it takes time to move equipment and manpower and in this case the work repair a mere several hours after the actual incident.”

The Organization claims there was no emergency based on two facts present in this case. First, the work did not begin until well over 24 hours after the derailment. Second, the Carrier never completely shut down train traffic on this main line.

The DTM’s statement addresses the first reason for the Organization’s argument that an emergency did not exist. The Board accepts the Carrier’s explanation that it would take some time to assess the extent of the damage done over a site that extends over 15 miles of track and marshal the resources necessary to address the damage done.

The Organization notes that the Carrier did not halt all traffic on the main line, citing Third Division Award 20892. However, the reduction of speed on the main line from 60 to 10 mph greatly impacts the traffic capacity on its main line. The reduction in capacity represents an emergency that the Carrier must address.

The Carrier’s second defense rests on an assertion that the Claimants were unavailable. The Carrier relies on Third Division Award 37770 wherein the claimants who were 70 and 120 miles from the site of an emergency were found to be unavailable. Here, the Claimants were in Muskogee, Oklahoma, 140 miles from the derailment site. Even though work to repair the track did not begin for more than 24 hours, the distance justifies the Carrier’s use of forces immediately available.

The record evidence reflects that the forces used worked on average one hour of overtime on each day during the period of September 5–7. The Organization argues that in an emergency, crews continue to work until the repairs are made and service is fully restored on the Carrier’s main line. This argument challenges the length of time the emergency lasted.

Approximately 19 of the overtime hours worked occurred on Saturday and Sunday. There is no evidence to suggest that the emergency continued into the

weekend, September 8 and 9. Furthermore, there is nothing in the record to suggest that the tie gangs the Claimants supported worked on September 8 and 9. By then, the Carrier could have assigned forces from the appropriate seniority district, the Claimants, to work the overtime. The Board finds that so long as the emergency was in effect, the Carrier's assignment of forces across seniority districts conforms to the greater latitude accorded a Carrier to address the emergency. Once the emergency ended, its assignment of forces had to conform to the Rule. See Third Division Award 38349. In the absence of evidence that the emergency continued into September 8 and 9, the Board concludes that the emergency did not continue. The Carrier was then obligated to assign employees from the appropriate seniority district on which the derailment occurred.

The Carrier shall pay each of the Claimants 19 hours at their overtime, time and one-half rate, for the work opportunity missed, when it did not assign the overtime of September 8 and 9 to the Claimants, employees with established seniority on the seniority district of the site of the derailment.

AWARD

Claim sustained in accordance with the Findings.

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 24th day of March 2011.