

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40933
Docket No. MW-41117
11-3-NRAB-00003-090487**

The Third Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

**(Brotherhood of Maintenance of Way Employees 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 Agreement was violated when the Carrier called and assigned CNW Seniority District B-4 employees D. Broich and J. Fagan to perform overtime service on UP Eastern District territory at a bridge at Mile Post 24.25 on Nebraska Division on June 7 and 8 2008 instead of Eastern District Bridge and Building employees M. Coan and M. Hoppes (System File D-0835U-203/1506385).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants M. Coan and M. Hoppes shall now each be compensated for a total of twenty-four (24) 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.

It is the position of the Organization that on June 7 and 8, 2008, the Carrier improperly assigned overtime associated with emergency bridge repair work that occurred at Mile Post 24.25. It asserted that the Carrier failed to call the Claimants who were available for the work and instead assigned two Bridge and Building Carpenters from the old C&NW Seniority District B-4 headquartered at Boone, Iowa, to oversee delivery of rip rap for a total of 24 hours. It argued that the Claimants were denied work and compensation to which they were entitled by virtue of their seniority on the Nebraska Division and Eastern District in violation of multiple Rules of the Agreement.

The Carrier denied the claim on the basis an emergency occurred at the aforementioned bridge with train movement stopped and, in such circumstances, it had the right to assign work to available forces. It argued that both Rules 5 and 24 of the Agreement specifically mention flooding as an "emergency" condition. It further asserted that the Claimants were fully employed and working on other projects and, therefore, were not available because they were working on a bridge strengthening project on the Sharon Springs Subdivision hundreds of miles away from the emergency work.

On appeal, the Organization argued that Rule 5 is only applied to contracting forces and Rule 24 addresses transfers of employees and is not applicable in the instant dispute. The Organization attached a statement from Claimant M. Hoppes who indicated that his Gang No. 4908 was working east of Fairbury, Nebraska, and had relocated to Council Bluff, Iowa, just prior to the flooding. Within that statement Hoppes stated that both he and M. Coan were available for the overtime, and if it was the Carrier's contention that Broich and Fagan were utilized because they were closer and could respond sooner, that was in error because the two employees used were headquartered at Boone, Iowa, 176 miles from the bridge work site or about three hours away, whereas the Claimants were working at a site 15 minutes away. They were not working at Sharon Springs Subdivision hundreds of miles away.

In rebuttal, the Carrier argued that the work was not scope-covered and could have been performed by managers. Secondly, it was not disputed that an emergency existed and the track on the bridge was compromised due to the flooding conditions from the scour to the bridge support piers. It also argued that because the two employees that were utilized were under the C&NW Agreement, it was tantamount to performing service under a service contract as an outside contractor; thus no violation of the Agreement occurred.

The Organization rebutted the aforementioned argument again stating that the Carrier's interpretation of Rules 5 and 24(c) is strained at best because neither gave the Carrier the latitude to employ members of one Agreement to violate the seniority boundaries of another.

The record evidence reveals that emergency flooding conditions had caused damage to the bridge located at Mile Post 24.25 and on the aforementioned dates the Carrier used two B&B employees regularly assigned under the C&NW Agreement to perform work normally done by the Claimants and employees under the UP Agreement. The Carrier's reasons for using the employees was twofold. First, it argued that the situation was urgent and it had no choice but to utilize the most readily available Bridge and Building employees to oversee the contractors to expedite the return of Carrier service to the affected bridge on the Omaha Subdivision and, secondly, the Claimants were fully employed and unavailable to perform the emergency work because they were working hundreds of miles away from the flooding emergency.

The issue is straight forward and is not dependent upon whether the work was scope protected or not. The Carrier chose to use covered employees of its own workforce to oversee the outside contractors, i.e., employees who it believed were most readily available. The evidence substantiates and was not refuted that the Carrier erred because the employees it utilized were approximately 176 miles from the repair site whereas the Claimants were 15 minutes away and could have responded much quicker. Therefore, the Board finds and holds that the Agreement was violated. Because the Claimants were denied a loss of work opportunity the claim is sustained as presented.

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 24th day of March 2011.