

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40940
Docket No. MW-41036
11-3-NRAB-00003-090389**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman 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 assigned Utah Seniority Division Gang 6076 to perform switch cleaning duties at and between Mile Posts 110.0 and 116.9 on the Idaho Division on February 5, 6, 7, 8, 11, 12, 13, 14 and 15, 2008 (System File C-0816U-152/1500999).**
- (2) As a consequence of the violation referred to in Part (1) above, Idaho Seniority Division employees T. Lloyd, R. Wallentine, M. Eastvold, P. Day, K. Wuthrich, R. Holm and M. Jacobs shall now be compensated as follows: ‘Claimants Eastvold, Day and Wuthrich are each entitled to sixty (60) hours of compensation at their straight time rate of \$19.64 per hour which is \$1,178.40 and thirty-six (36) hours of compensation at their overtime rate of \$29.46 per hour which is \$1,060.56. Claimants Holm and Jacobs are each entitled to sixty (60) hours of compensation at their straight time rate of \$20.90 per hour which is \$1,254.00 and thirty-six (36) hours of compensation at their overtime rate of \$31.35 per hour which is \$1,128.60. This equates to \$2,554.78 in wages for Claimant Lloyd, \$2,554.78 in wages for Claimant Wallentine, \$2,238.96 in wages for Claimant Eastvold, \$2,238.96 in wages for Claimant Day, \$2,238.96 in wages for Claimant Wuthrich, \$2,382.60 in wages for Claimant Holm and \$2,382.60 in wages for Claimant Jacobs. ***”**

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.

This is a seniority district dispute involving the work of cleaning snow from switches on the Idaho Division during a 10-day period in February 2008. It is one of a number of claims filed by the Organization protesting the manner in which the Carrier assigned work during this period - across seniority districts, to junior employees, and to contractors - and raises the issue of whether the snow storm occurring in Idaho in late January to mid-February constituted an emergency situation justifying such assignments. These claims rely on one or all of Rules 1, 5, 13, 14, 15, 16, 26, and 35 as controlling. The Carrier relies on the following part of Rule 5, Classification of Work:

“This Agreement will not apply to forces temporarily employed for emergency work incidental to wrecks, washouts, landslides, fire, and similar disasters where the Carrier’s operation is interrupted in whole or in part.”

There is no dispute that there was significant snow fall and blowing snow on the Idaho Division causing switches to malfunction during relevant times within the claim period, or that the Claimants were assigned to tasks related to clearing the snow and switches, and were working overtime. The record includes a statement from the Manager of Track Maintenance calling the situation an emergency, indicating that due to the volume of snow local forces could not keep up, the Claimants worked lots of overtime and were paid for not working due to hours worked, and that no work was taken away from the Claimants by this assignment to help keep switches open for local and mainline trains. The Carrier also submitted a Train Delay Report purportedly showing that 155 trains were delayed for a total of 1,739.3 hours and a statement from

the Director of Track Maintenance indicating that this was an emergency and that train crews were getting stranded because of blowing snow.

The claim and appeals assert that this was not an emergency situation because the Utah Gang did not work during its rest days, some of the Claimants were allowed to take personal days or vacation, and the Idaho Division employees were sent to other locations prior to the Utah Gang coming to work on their district. The Organization presented a statement from the Local Chairman saying that there was no emergency and trains were moving, part of Idaho Extra Gang No. 6586 (three employees not the Claimants herein) were cleaning switches on February 4 and 5 and were moved to different locations in Idaho prior to the Utah Gang showing up late on February 5 after driving 12 hours. Included in the Carrier's Submission are FEMA National Situation Reports from February 5 & 9, 2008, confirming that a State of Emergency was declared in Idaho due to significant snowfall. These documents were apparently not exchanged on the property and are objected to by the Organization as new evidence.

The Organization argues that there is no dispute that the Claimants were the proper employees to perform work on the Idaho District, and that the Utah Gang had no seniority in the district where the disputed work was performed, giving the Claimants an Agreement preference to this work. It asserts that the Carrier did not establish its affirmative defense of an emergency in this case. The Organization relies upon the following facts in support of this contention: (1) snow in Idaho in the winter time does not establish an emergency (2) Utah Division employees were permitted to observe their rest days during the alleged emergency (3) the self-serving statements of the Managers are conclusionary and not proof of an emergency (4) the Train Delay Report really shows only eight delays attributed to the weather, three of which occurred on a non-claim date (February 9) when Utah Gang employees were observing their rest days and (5) some of the Claimants were permitted to take vacation and observe personal leave time during the alleged emergency. The Organization relies upon the following precedent in arguing that the situation in Idaho did not meet the definition of an emergency, and the Carrier violated the Claimants' seniority rights by bringing in non-district employees to perform their work: Third Division Awards 2040, 2460, 10965, 16454, 24440, 30797, 32414, 32419 and 35733. Finally it maintains that the fully employed defense proffered by the Carrier is invalid, citing Third Division Awards 30076, 30408 and 35732.

The Carrier contends that there was an enormous amount of snowfall, all available employees were working to keep ahead of the snow accumulation to no avail,

and other forces were brought in to assist local district employees, all facts not disputed by the Organization. It asserts that the situation meets the definition of emergency found in Third Division Award 20527 and Rule 5, which permits the Carrier broad discretion and latitude in assigning work, pointing to the Managers' statements and Train Delay Reports. The Carrier submits that it is not precluded from using employees to manage ongoing snowfall and its aftermath when necessary, even if not on rest days. The Carrier also argues that there was no loss of work opportunity for the Claimants because they were also performing snow-related functions to keep railroad operations going, and working much overtime in doing so, concluding that the remedy request is excessive and not supported. It also notes that two of the named the Claimants were improper due to their assignments and seniority at the time.

A careful review of the record convinces the Board that the Carrier met its burden of proving its affirmative defense of an emergency even without considering the FEMA reports. The Organization did not refute the fact that there was a large amount of snowfall during the claim period, blowing snow, or that the Claimants as well as other employees were assigned to clean switches to keep the local and mainline tracks open. Neither did they dispute the statement that the Claimants worked overtime in doing so, or that they could not keep up with this task without help. As noted by the Manager of Track Maintenance, the Utah Gang called to help during this time period was helping local forces, and was not used to replace them. None of these assertions were refuted by the Local Chairman's statement that employees Owen, Brown and Purkey of Idaho Extra Gang No. 6586 (none of whom are the Claimants) were moved to different locations after cleaning switches on February 4 and 5 when the Utah Gang arrived to do that work. His statement acknowledges that they did other functions within the Idaho district necessary to keep the tracks and roadways open during the snow storm.

We concur with the Carrier that this is not a situation where it could have waited to schedule the necessary switch cleaning when the Claimants were available to work additional hours at a later date. These were admittedly functions directly caused by the constant build up of snow on the switches, which created both proven service delays and potential safety issues. The fact that the Utah Gang was permitted to enjoy its rests days during this period, while still working overtime, as did the Claimants, does not negate the fact that those forces were used for emergency work resulting from the snow storm, which interrupted the Carrier's operation, in part, under Rule 5. The emergency created by the unusually severe snow storm was that the switches on the Carrier's main and local lines had to be kept clean on an ongoing basis to allow

continued operations. The fact that the Carrier was able to move trains, as asserted by the Local Chairman, does not negate the fact that it experienced delays and crews being stranded which adversely impacted its operation and that the assignment of extra gangs to help local district employees had its intended effect. Neither does the fact that this emergency lasted over a period of time change the result. Having found that the Carrier met its burden of establishing an emergency in this case, Board precedent makes clear that it is granted wide latitude in making work assignments to deal with the emergency. See Third Division Awards 2275, 3167, 20527 and 31231. Under the specific circumstances of this case, we are unable to conclude that the Organization met its burden of proving a violation of the Agreement.

AWARD

Claim denied.

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 24th day of March 2011.