

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40995
Docket No. MW-40852
11-3-NRAB-00003-090152**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division –
(IBT Rail Conference
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign Messrs. A. Castillo, G. Perez and K. Ring for overtime derailment repair work near Mile Post 50.50 on the Oakland Subdivision on September 9, 2007 and instead called and assigned junior employees J. Rains, J. Palima and B. Lyons (Carrier’s File 1487552 SPW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimants A. Castillo, G. Perez and K. Ring shall now each be compensated for ten and one-half (10.5) 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.

Claimants A. Castillo, G. Perez and K. Ring hold seniority in various classifications in the Track Sub-department. They are headquartered in Newark, California. On September 9, 2007, subsequent to a train derailment at Mile Post 50.50 on the Oakland Subdivision between the Altamont and Livermore stations, the Carrier called out Track Inspector Campos. The Carrier then called out three employees (Rains, Palima and Lyons) who are junior to the Claimants, to perform the necessary repair work that resulted from the derailment. The derailment site lies within the Claimants' territory for seniority purposes.

The Organization argues it met its burden of proof. The Claimants are senior to the employees called. The Carrier asserts the derailment constitutes an "emergency." The contention that a derailment is an emergency is an affirmative defense that the Carrier must establish through probative evidence. The Organization maintains the Carrier failed to establish this affirmative defense.

Although the Carrier defends on other bases, such as, the employees assigned were the "regular employees," the evidence to support this assertion was not presented in the processing of this claim on the property. Accordingly, the Board has not considered the Claimants' and the assigned employees' time cards or the undated statement of Director Allen concerning the work assignments in question. When the parties conferred regarding this matter in July 2008, the Carrier's stated defense was the existence of an emergency. As a result, it has greater latitude to make assignments. It assigned available forces.

The Organization argues that the mere assertion that an emergency exists does not make it so. The Rule at issue here is Rule 25 (b). In pertinent part, it reads, as follows:

"Rule 25 Work Limits

(b) Preference of Overtime

. . . Overtime in connection with emergencies will be handled by most readily available forces, with preference to the employees of designated territory when time permits.”

In Third Division Award 35007, involving the parties to this dispute, , the Organization argued that the Carrier had not declared an emergency and the defense was not raised on the property. Referee Scheinman stated on behalf of the Board that, “There having been a derailment, it was apparent that an emergency existed, whether or not one was actually declared.”

The Board concludes that the derailment that occurred on September 9 created an emergency situation on both September 9 and 10, 2007. The Organization notes that the Carrier made no effort to contact the Claimants who were senior to the employees assigned. It cites Third Division Award 20310 in support of its position that the Carrier should have made an attempt to contact the senior employees who lived closer to the overtime assignment. The Board found in Award 20310 lack of evidence of an emergency. It involved the repair of a broken rail. The Carrier called out a Welder to make the repair. As an afterthought, the Carrier asserted an emergency existed. In sustaining the claim, the Board determined that the Carrier was required, but failed to establish the existence of an emergency. Here, the record evidence establishes that the derailment constituted an emergency. Under Rule 25 (b) the Carrier may and did use available forces.

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 20th day of July 2011.