

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 21012
Docket Number MW-20854

Dana E. Eischen, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
{ St. Louis-San Francisco Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when, on August 6, 1973, Track Laborer Donnie Jones (Section Gang 203) was called and used for overtime service from 1:15 a.m. to 7:30 a.m. instead of calling and using Track Laborer A. L. Pense who also is assigned to Section Gang 203 and who is senior to Track Laborer Donnie Jones (System File B-410/D-7591).

(2) As a consequence of the aforesaid violation, Track Laborer A. L. Pense now be allowed 6-1/4 hours of pay at his time and one-half rate.

OPINION OF BOARD: In this case there is no factual dispute. Claimant is a member of Section Gang 203 headquartered at Fort Smith, Arkansas, with a seniority date of July 9, 1937.

On the night of August 5-6, 1973 Train No. 730 derailed at the south end of the tunnel at Winslow, Arkansas, a location not within the territory of Gang 203. Carrier's Roadmaster called out employees to assist in rerailing the train and one called was Donnie Jones, a member of Gang 203 who has seniority from March 13, 1970. Mr. Jones resides some fifteen (15) miles from the derailment site and four (4) miles from the Frog Repairer whom he was called out to assist. Claimant A. L. Pense resides some forty-one (41) miles from the derailment site and was not called by Carrier to assist in the rerailing. Jones worked from 1:15 a.m. to 7:30 a.m. on August 6, 1973, a total of six and one-quarter hours. By letter dated August 28, 1973 the instant claim was filed by the Organization on behalf of A. L. Pense alleging violation of Article 2, Rules 2 and 8 of the controlling Agreement and seeking 6 1/4 hours of pay at the time and one-half rate. The claim was denied by Carrier on grounds that Claimant's seniority did not apply to non-Track Department work and because an emergency condition existed under which Carrier had broad latitude in making assignments. The dispute was not resolved on the property and comes to our Division for resolution.

It is clear from the record that Claimant does not have a claim to the work here involved per se because it was work outside his seniority sub-department and performed outside the territory of his assigned gang.

Rather, Claimant concedes that Carrier did not have to call a member of Gang 203 to do the work but, having done so, it was required by the Agreement to call Claimant who has more seniority than Jones. Carrier retorts that it called Jones solely because he was geographically closer to the derailment than was Claimant and thus more available to respond quickly to the emergency situation.

The Organization argued for the first time before our Board that the situation involving the derailment was not an emergency and that Carrier thereby was precluded from asserting emergency latitude in making assignments. At no time on the property was this point contested by the Organization and, indeed, correspondence in the record suggests the Organization acquiesced in calling the incident an emergency. It is too well established to require elaborate citation that matters raised de novo at the Board level come too late and cannot be considered. In these circumstances Carrier's characterization of an emergency situation stands effectively unrefuted. It is quite true that Carrier has the burden of proof on the issue of emergency and cannot meet same by a bare unsupported assertion. See Award 20223. But that earlier case involved a clear and unambiguous contractual reservation of the disputed work to the claimant therein as well as an absolute void of evidence substantiating Carrier's assertion of emergency. The instant case presents no clear-cut contract claim to the work and does contain unrefuted evidence that the derailment blocked a tunnel on the main line. Moreover, as noted supra the Organization adopted the characterization of "emergency" on the property and did not protest same until reaching the Board level. In all of the circumstances of this particular case we are persuaded that Carrier has shown that an emergency was involved herein. Further, in light of the emergency conditions prevailing we cannot conclude that Carrier abused the broad latitude it has in meeting such situation or violated the Agreement when it called the nearest available, albeit junior, member of Gang 203 rather than Claimant, the senior but distant member of that gang. Accordingly we shall deny the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employee involved in this dispute are respectively Carrier and Employee within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

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That the Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of March 1976.