

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29628
Docket No. MW-28763
93-3-89-3-151

The Third Division consisted of the regular members and in addition Referee Gilbert H. Vernon when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance
(of Way Employees
(
(The Kansas City Southern Railway
(Company (former Louisiana &
(Arkansas Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned KCS B&B Gangs 691 and 692 to work on L&A Bridges T-169.2, T-169.3 and T-169.4 on September 8, 9, 10 and 11, 1987 [Carrier's File 013.31-345(3) LAR].

(2) As a consequence of the aforesaid violation, L&A B&B Foremen H. Williams, H. H. Hoose; B&B Mechanics E. Jackson, Jr., C. D. Love, A. Woods, M. L. Kelly; B&B Helpers L. Willis and J. P. Goodman shall each be allowed pay for an equal proportionate share of the straight time and overtime hours expended by KCS B&B Gangs 691 and 692 working on L&A Bridges T-169.2, T-169.3 and T-169.4 from September 8 through 11, 1987."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

The initial claim asserted that two B&B crews (gangs 691 and 692) from the KCS seniority district were assigned to work on three bridges on the L&A seniority district and asked for compensation for two L&A district crews due to "future loss of work opportunity." The Carrier responded asserting that (1) there had been a derailment on September 5, 1987, (2) that only one gang (#692) performed work there beginning September 8, 1987, and (3) the assignment of the KCS crew was due to the emergency nature of the situation.

In its appeal to the next level, the Organization asserted that it had information that train traffic resumed over the bridges the morning of September 7, 1987. Therefore, its position was that the emergency ended with the restoration of traffic. The Organization did not refute the Carrier's claim that only one KCS crew had been used. In its response to the appeal, the Carrier did not deny that traffic was restored on September 7. Instead they repeated the bald assertion that the assignment of the KCS crew was justified on the basis of an emergency. They also denied there was a loss of work opportunity.

It is significant that the Carrier did not, until their submission to the Board, deny that train traffic was restored the morning of September 7. This, of course, comes too late. It is well established that such assertions to be considered must be made on the property. Under well established principles of the Board, the Organization's un rebutted assertion must stand as fact, particularly where the Carrier had advanced an affirmative defense to an otherwise clear violation of the Agreement.

This is not to say that an emergency due to a derailment ends in all circumstances the second a train moves over the track. This is not necessarily so. Traffic may move through the derailment site but at such a reduced speed that it cannot be said that reasonably normal operations had been restored. This decision, however, does stand for the proposition that if the Carrier seeks to justify crossing seniority district lines due to an emergency and that assertion is disputed, the Carrier must come forth with acceptable proof of the emergency on the property. Thus, given this lack of proof, we must accept that there was no emergency and reasonably normal operations were restored by the time the KCS crew was assigned.

The Board is also convinced that there was a loss of work opportunity for the L&A crews. The record reflects that one foreman and three crew members from the KCS work ten hours each on September 8, 9, 10 and 11. The Claimants are entitled to their proportionate share.

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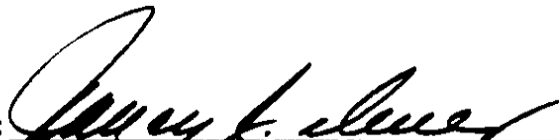
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A W A R D

Claim is sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 8th day of April 1993.