

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 29859
Docket No. MW-30052
93-3-91-3-464

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

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

- (1) The Agreement was violated when the Carrier assigned Concrete Tie Gang Foreman L. E. Wynn, instead of Timbering and Surfacing Gang Assistant Foreman D. E. Wilhoit, to perform overtime service with the tamper operator on June 7 and 8, 1990 [System File 1(29)(90)/12(90-753) LNR].
- (2) The Agreement was violated when the Carrier assigned junior employe Mr. P. D. Price, instead of Ballast Plow Operator S. A. Cooper, to operate a ballast regulator between Corbin and Sinks, Kentucky on June 7 and 8, 1990.
- (3) As a consequence of the violation referred to in Part (1) above, Claimant D. E. Wilhoit shall be paid five (5) hours at his assistant foreman's time and one-half rate and four (4) hours at his double time rate for time worked by Mr. Wynn on June 7, 1990, and Claimant Wilhoit shall be paid at his double time rate eight (8) hours and paid the difference between double time and straight time for eight (8) hours at the assistant foreman's rate on June 8, 1990.
- (4) As a consequence of the violation referred to in Part (2) above, Claimant S. A. Cooper shall be paid five (5) hours at his machine operator's time and one-half rate and four (4) hours at his double time rate for time worked by Mr.

Price on June 7, 1990, and Claimant Cooper shall be paid at his double time rate for eight (8) hours and paid the difference between double time and straight time for eight (8) hours at the machine operator's rate on June 8, 1990."

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.

D. Cheek, D. Wilhoit, D. Neuspickel, S. Cooper and P. Price constitute the Tie and Surfacing Gang headquartered at Livingston, Kentucky. Respectively, the individuals are Foreman, Assistant Foreman, Tamper Operator, Ballast Plow Operator and Track Repairman. The gang works Monday through Friday with rest days Saturday and Sunday.

On Thursday, June 7, 1990, at approximately 6:30 P.M., a derailment occurred which caused "extensive" track damage. Foreman L. Wynn, Gang 5C85, was on duty and reported to the derailment site. Tamper Operator Neuspickel, who was also on duty, worked a tamper with Foreman Wynn at the site in an effort to repair the damage. At the same time, and in connection with the derailment, Track Repairman Price helped Foreman Cheek move a ballast regulator from Corbin, Kentucky to Sinks, Kentucky.

On June 20, 1990, the Organization filed the present claim on behalf of Foreman Wilhoit and Ballast Plow Operator Cooper. The Organization maintained that, "On June 7, 1990, the Claimants were released from duty after they had completed their tour of duty at eight hours at their respective straight time rates and three hours at their time and one-half rates. Foreman Wynn was used by the Carrier to resume Claimant Wilhoit's assignment for a period of nine additional hours. Had Claimant Wilhoit been allowed to continue his assignment on June 7, he would have worked an additional five hours at his time and one-half rate, and four hours

at his double time rate." The Organization further maintained that Claimant Cooper was also "not allowed to complete his tour of duty. Had Claimant Cooper been allowed to complete his tour of duty, he would have worked an additional five hours at the time and one-half rate, and four hours at his double time rate of pay."

Carrier denied the claim stating that: "An emergency existed on the property precipitated by a derailment which occurred on June 7, 1990. Wynn, Neuspickel and Price were on duty at the time, and readily available to meet the critical service demands. Claimants Wilhoit and Cooper were not on duty, having completed their respective tours earlier in the day."

The Organization never rebutted the Carrier's emergency defense in handling on the property. An unrefuted material fact must be taken as true. See Special Board of Adjustment No. 540, Award 660. Carrier was faced with a derailment emergency which necessitated immediate action. It was no violation of the Agreement to use employees who were already on the scene, rather than wait for Claimants to arrive at home and call them back out again. Therefore, this claim is denied. See Public Law Board No. 76, Award 24, as well as Third Division Awards 20527 and 21012.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Catherine Loughrin
Catherine Loughrin Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.