

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32419
Docket No. MW-32140
98-3-94-3-399**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Union Pacific Railroad Company (former Missouri
(Pacific Railroad)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Union Pacific Federation employes to perform work (renewed public and private road crossings) on Missouri Pacific property between Mile Posts 339 and 289 on the Old Omaha Division beginning March 16 through 31, 1993 (Carrier’s File 930487 MPR).**
- (2) The Agreement was violated when the Carrier assigned Kansas City Terminal Gang 4202 to perform work (renewed public and private road crossings) on Missouri Pacific property between Mile Posts 339 and 289 on the Old Omaha Division beginning March 11 through April 7, 1993 (Carrier’s File 930477).**
- (3) As a consequence of the violation referred to in Part (1) above, Trackmen M. T. White, R. L. Shorb, M. W. Wilburn and M. W. Schmidt shall each be allowed pay at the appropriate trackman’s rate for all time expended by the Union Pacific Federation employes in the performance of the work in question.**
- (4) As a consequence of the violation referred to in Part (2) above, Claimants T. D. Clark, M. F. Petesch, L. D. Johnson, J. A. Musgrove and L. L. Wiese shall each be allowed pay at their respective and appropriate rates for all time expended by the**

members of Kansas City Terminal Gang 4202 in the performance of the work in question.”

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 hold Agreement covered positions on the Old Omaha Division. On the dates set forth in the claim, the Carrier assigned employees from the Union Pacific Federation and the Kansas City Terminal who do not hold seniority on the Old Omaha Division to perform the work of renewing public and private road crossings at various locations on the Old Omaha Division. On the property, the Carrier defended the assignments on the basis of an existing emergency; the seniority rosters had been exhausted and vacancies were filled with furloughed employees; the work was not routine; the claim was not sufficiently specific; the employees assigned were “new hires”; and no remedy is appropriate because Claimants suffered no wage loss.

This dispute raises similar issues to those discussed in Third Division Award 32421. For the same reasons stated in that Award, a sustaining Award is required in this case.

First, this Board can only consider arguments raised on the property.

Second, the work described is covered by the scope of the Agreement.

Third, the claim is sufficiently precise to put the Carrier on notice of the specifics of the dispute and the relief sought.

Fourth, the employees used by the Carrier were used across seniority lines as against the authority cited in Third Division Award 32421.

Fifth, these employees were not "new hires", but were Carrier employees not holding seniority on the Old Omaha Division.

Sixth, the main thrust of the Carrier's position on the property was the claimed existence of an emergency. According to the Carrier, the work performed was part of a program:

"In regards to the question of this program being an emergency: it must be understood that this particular tie renewal program could be deemed nothing but an emergency. The reasoning behind this decision was that this particular work had to be completed ahead of the Marysville Subdivision work in order for traffic from the Marysville to be transferred onto the Falls City Subdivision. Included in this prioritization was the 1200 to 1400 ties per mile and wide gauge condition of the Falls City Subdivision. Repairing this track prepared the line for the heavy flow of 15 to 20 trains per day additional load it would receive from the Marysville.

Due to inclement weather in January and February it delayed the unloading of material on the Falls City until about two weeks before the Tie Gang started. Ballast trains continued to freeze up even after the Tie Gang got started."

The Carrier bears the burden to demonstrate the existence of an emergency so as to allow it to avoid the requirements of the Agreement concerning the use of employees. Third Division Award 32421, supra and Awards cited. The Carrier has not met its burden. An emergency is a an unforeseen combination of circumstances that calls for immediate action. The Carrier's stated reasons present more of a scheduling problem flowing from an existing track rehabilitation program rather than establishing the need for immediate action based upon circumstances beyond its control.

Seventh, for reasons stated in Third Division Award 32421, supra, Claimants shall be made whole for the lost work opportunities brought about by the Carrier's violation of the Agreement. The number of hours improperly worked on the dates

covered by the claim shall be apportioned to Claimants. Claimants shall be made whole at the appropriate Agreement rate (i.e., punitive or pro rata) commensurate with the resulting total number of hours demonstrated by their respective records for the time covered by the claim.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 21st day of January 1998.