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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 33911
Docket No. MW-32307
00-3-95-3-139**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Maintenance Foreman G. Iacona to perform overtime service (removing debris from the Fort Wayne Line) at Mile Post 17.5 on June 23, 1993, instead of assigning I&R Track Inspector J. Panseri to perform said work (System Docket MW-3178)**
- (2) As a consequence of the aforesaid violation, I&R Track Inspector J. Panseri shall be allowed four (4) hours' pay at his applicable time and one-half rate.”**

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.

At approximately 3:30 A.M. on June 23, 1993 the Carrier's Fort Wayne main line was taken out of service because of debris on the track. Carrier called Maintenance Foreman Iacona, who lived ten miles from the work site at mile post 17.5, rather than the Claimant who lived 60 miles from the site, despite the fact that the Claimant was more senior.

The parties do not disagree that Rule 17 requires that overtime work of the type customarily performed will be offered on a preferential basis to the most qualified, available and senior employee. They disagree however whether an emergency situation existed that excused the Carrier's failure to do so. The Organization contends that the Carrier failed to carry its burden of proof in this regard. Alternatively, it argues that assuming arguendo that an emergency existed, the Carrier violated the agreement nonetheless when it failed to make any effort to contact the Claimant.

We disagree on both counts. There is no dispute that the record contains dispatcher sheets that show that the track in question was placed out of service while the debris was removed and the Organization did not rebut the Carrier's assertion that the Fort Wayne Line was a ". . . critical link between the Philadelphia and Chicago terminals." For this reason the Awards cited by the Organization are distinguishable because in those instances the record was devoid of any probative evidence. Rather, the Organization argues that the Carrier cannot prove that there was an emergency absent evidence that trains were in fact delayed. Secondarily, it argues that as we face the new millennium distance is no basis for assigning overtime service to junior employees. Again, this Board disagrees. First, we do not think it would be prudent to require that before an emergency situation can be found actual delays to service are required. Second, although the Organization is correct that today one can arrive at distant locations faster than once imagined that does not, in and of itself, mean that time is not of the essence.

Therefore we find that an emergency existed such that the Carrier's assignment of the overtime work to a junior employee was proper. The remaining argument raised by the Organization is that the Carrier violated the Agreement by failing to make an effort to contact the Claimant. We, however, believe that our determination regarding the existence of the emergency disposes of this argument as well. Simply put, since an emergency existed that justified assigning the work to the junior employee, we see no value in holding that the Carrier was required nonetheless by failing to contact the Claimant.

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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 24th day of January, 2000.

LABOR MEMBER'S DISSENT
TO
AWARD 33911
DOCKET MW-32307
(Referee Perkovich)

The above-referenced award was based on unsupported assertions and therefore a dissent is required. This case involved the Carrier's decision to assign a junior employee to perform overtime work based on his proximity to the starting point and an alleged emergency. The Majority held that an emergency situation existed and the Carrier was free to assign the overtime to the junior employee without regarding the Claimant's superior seniority. The Carrier claimed that since there was debris on the Carrier's main line, such automatically created an emergency. During the handling of this dispute on the property, the Organization pointed out that although there may have been debris on the track, such in and of itself did not create an emergency situation. The Organization further challenged the Carrier's allegation of emergency by requesting that it produce evidence of trains being delayed. The Majority erred when it stated:

“*** First, we do not think it would be prudent to require that before an emergency situation be found actual delays to service are required. ***”

The afore-cited proclamation of the Majority flies in the face of the long-established definition of an emergency that has been universally accepted by the Board. This Board has consistently held that an emergency is defined as:

AWARD 24440:

“... the sudden, unforeseeable, and uncontrollable nature of the event that interrupts operations and brings them to an immediate halt. ***”

Clearly, in this case the mere existence of debris on the track was insufficient to prove an emergency. The Majority in this case should have followed the precedent already established on this subject and sustained the claim. Instead, it accepted the Carrier's unproven assertion of emergency, much to the detriment of the Claimants.

Under date of February 22, 2000, Referee Eischen rendered an award which was nearly identical to the facts in this docket, wherein the Board held:

AWARD 33937:

“The Organization made out a prima facie case that the Carrier violated the Claimants' Rule 17 overtime preference rights by mis-assignment across Rule 4 seniority district boundaries. See Awards 41 and 81 of Special Board of Adjustment

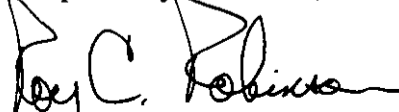
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"No. 1016 and Third Division Awards 24662, 29381 and 30181 involving these same parties. The Carrier's burden of persuasion on its affirmative defense of 'emergency conditions' is not met by mere assertion and the record facts do not support a conclusion that this was a true 'emergency.' See Third Division Awards 14321, 20223, 20310, 23853 and 29742. ***"

The Majority in this docket clearly missed the boat by accepting the Carrier's mere assertion of emergency as proof and compounded its error by denying this case. Since the Carrier failed to prove its affirmative defense, the Majority should have sustained the claim as presented.

This award is palpably erroneous and I therefore dissent.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Roy C. Robinson". The signature is stylized with a large, looped "R" and "C".

Roy C. Robinson
Labor Member