

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35379  
Docket No. MW-34128  
01-3-97-3-673**

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

**PARTIES TO DISPUTE:** (Brotherhood of Maintenance of Way Employees  
(Soo Line Railway Company)

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned a junior employe to perform overtime service monitoring the water level and inspecting the bridge near Valley City, North Dakota on April 19, 20 and 21, 1996 instead of assigning B&B Assistant Foreman Dennis E. Luebke (System file R1.081/8-00219-007).
- (2) As a consequence of the afore-stated violation, B&B Assistant Foreman Dennis E. Luebke shall now be allowed thirty-three and one-half (33½) hours of pay at the assistant foreman’s 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.

It is undisputed that the Carrier used a junior employee to monitor Spring runoff water levels around a bridge near Valley City, North Dakota. After calling another employee who lived some 200 miles away from Valley City and finding that he was unavailable, the Carrier called the junior employee without attempting to contact the Claimant. The Claimant lived approximately 320 miles away from Valley

City. The Carrier contends an emergency situation existed that allowed it to deviate from strict seniority order in assigning the work.

The core issue in this dispute is whether emergency circumstances existed as the Carrier contends.

On this record, a contention of an emergency is an affirmative defense for which the Carrier must shoulder the burden of proof. After careful review of the record developed by the parties on the property, we find the Carrier has not satisfied that burden. The record contains nothing more than assertions unsupported by any affirmative evidence. Moreover, by first calling someone who lived 200 miles away, it is clear that immediate availability was not necessary. It is also undisputed that the monitoring work was not required around the clock over the three-day claim period.

Because the Carrier failed to prove the existence of a genuine emergency, the claim must be sustained for at least 31½ hours at the overtime rate sought. The claim is remanded to the parties to inspect payroll records or other appropriate records to determine if the proper number of hours is as great as 33½. If so, the claim is sustained at the higher number of hours not to exceed 33½ hours.

#### 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 20th day of March, 2001.