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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35763
Docket No. MW-33802
01-3-97-3-276**

The Third Division consisted of the regular members and in addition Referee Barry E. Simon 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 or otherwise permitted outside forces (Weirton Steel Company) to perform repair work at the Half Moon Loop and Anchor Hocking switch at Weirton, West Virginia on September 24, 25, 26, 27, 28 and 29, 1995 (System docket MW-4209).**
- (2) As a consequence of the violation referred to in Part (1) above, Messrs. J. M. Duck, R. Rogers, R. Burdette, K. D. Shivers, D. M. McGraw, C. Miller, M. Hamilton, J. Hamilton and M. R. Marchbank shall each be allowed eight (8) hours' pay at their respective time and one-half rates and eight (8) hours' pay at their respective double time rates for each day cited in Part (1) above, and they shall each receive credit for days and month for vacation and other benefits.”**

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.

On or about September 23, 1995, a derailment occurred on trackage owned by the Carrier, as well as trackage owned by Weirton Steel Company, while Weirton employees were moving cars onto its property. It is undisputed that repairs were performed by Weirton between September 24 and 29, 1995. These repairs, which included the repair of the Carrier's track and Weirton owned track, were performed, apparently, without the knowledge of the Carrier.

The Organization cites an identical situation involving these parties, resulting in Third Division Award 29509, wherein the Board, sustaining the claim, held:

"Claimants are seeking four days pay each, account employees of a mining concern making repairs on tracks servicing the mine, on October 22 and 27 and November 3 and 4, 1988. Carrier argues that it had no knowledge that employees of the mining company undertook the repairs and that it did not authorize the work. However, in an effort to settle the matter it paid each of the Claimants one day's pay, which it argues cannot be considered as an admission against interest in this matter.

This record leaves little doubt that the work completed by the employees of the mining company on the dates in the Claim was work which would normally have been performed by Claimants. Carrier is not privileged to have strangers to the Agreement, in this case non-employees, enter upon its tracks and perform required repairs and then seek to be excused from payment of resulting claims on the basis that the work was unauthorized and/or that it was unaware that it was being completed. Such conduct would erode a basic premise that such work is reserved to employees within the Craft and could effectively nullify Agreement viability. In situations where Carrier is desirous or having outsiders perform repairs on its tracks it must resort to the procedures agreed upon for contracting out such work. A failure to do so cannot be excused on the basis that it was unauthorized and unknown."

The Board finds Award 29509 to be applicable to the circumstances herein. Although the Carrier did not have knowledge of the work, nor did it authorize the work, it was certainly the beneficiary of the work. There is no doubt the work performed was necessary, and would have been performed by the Claimants had it not been performed by Weirton's employees. The fact that Weirton might have been financially responsible for the repairs does not change the fact that this work was exclusively that of the Claimants.

The Board does not find, however, that the Claimants are entitled to all of the relief claimed. First, we note that Claimant J. Hamilton was off sick on each of the dates of claim. As he would not have been available to perform the work in question, he is not entitled to any remedy. Second, Claimant C. Miller was on vacation for two of the six dates of claim. Accordingly, he would be entitled only to one-third the remedy granted. The Board does not find it significant, though, that September 24, 1995, was a Saturday, and would not have been a work day for the Claimants. What is significant is that six days of work was performed. Finally, we do not agree that the Claimants are entitled to payment at any rate other than straight time, in accordance with numerous decisions of the Board.

We also do not find that all six days were spent in connection with the repairs to the Carrier's track. It is evident the Organization has not distinguished between the time spent repairing the Carrier's trackage and Weirton's trackage. Neither has the Carrier offered any indication as to how much time was spent on the repair of its trackage. In the absence of any evidence to the contrary, the Board will simply assume that the time was divided equally between the two properties. Accordingly, we will award each Claimant 24 hours' pay at the straight time rate, except that Claimant C. Miller shall be awarded eight hours' pay at the straight time rate, and the claim on behalf of Claimant J. Hamilton is denied.

AWARD

Claim sustained in accordance with the Findings.

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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 24th day of October, 2001.

LABOR MEMBER'S CONCURRING AND DISSENTING OPINION
TO
AWARD 35763, DOCKET MW-33802
(Referee Simon)

The Board correctly found that the Agreement was violated when the Carrier failed to call the Claimants to perform the overtime work involved here. This finding was not difficult to make inasmuch as the Carrier freely admitted that no calls were made to the Claimants. Having determined that a violation of the Claimants' seniority rights occurred, the Board should have paid the claim at the overtime rate. The Board's finding that the Claimants were only entitled to receive pay at the straight time rate, instead of at the time and one-half rate, is not only an anomaly that diverges from the overwhelming arbitral precedent established on this issue in general and on this property in particular but was an argument never raised by the Carrier during the handling of this dispute on the property.

The purported reason for the Board's decision to diverge from the well-established precedent to pay overtime claims at the overtime rate was its assertion that "**** Finally, we do not agree that the Claimants are entitled to payment at any rate other than straight time, in accordance with numerous decisions of the Board." The problem with such reasoning is that the record in this instance was unchallenged regarding the Carrier's failure to call the Claimants, in accordance with their seniority, to perform overtime work at the derailment site. As the Board recognized in its opinion, "**** There is no doubt the work performed was necessary, and would have been performed by the Claimants had it not been performed by Weirton's employees. The fact that Weirton might have been financially responsible for the repairs does not change the fact that this work was exclusively that of the Claimants." Obviously, had the Claimants not enjoyed a contractual right by virtue of their seniority to have been called to perform the overtime work, i.e., in lieu of the Weirton employees, then the claim would have been denied. The very fact that the record contained an uncontested failure by the Carrier to call the Claimants to perform overtime service to which they were entitled by virtue of their seniority mandated a full sustaining award. Either the Claimants were entitled to be called to perform the overtime work and receive the appropriate overtime pay, or they were not. Since their seniority rights were clearly violated, a full sustaining award was mandated.

Inasmuch as the Carrier never raised the issue of whether the remedy should be paid at the straight time rate or the overtime rate during the handling of this dispute on the property, the Board erred by considering this new argument. Therefore, I dissent to that part of the award which sustains the overtime claim only at the straight time rate.


Roy C. Robinson
Labor Member