Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37205
Docket No. MW-36487
04-3-00-3-760

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Union Pacific Railroad Company (former Southern
(Pacific Transportation Company [Western Lines])

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to call and assign Water Service Mechanic G. A. Sampson for overtime service (water car work) at a tunnel fire in the vicinity of Oakridge, Oregon on September 12, 13, 14, 15, 16, 17 and 18, 1999 and instead assigned junior employe W. A. Deatherage (Carrier's File 1214695 SPW).

(2) As a consequence of the violation referred to in Part (1) above, Claimant G. A. Sampson shall now be compensated for fifty-two (52) hours' pay at his respective time and one-half rate of pay."

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.

This dispute arises from a tunnel fire that occurred on the Carrier's main line on Saturday, September 11, 1999, and the Carrier's assignment of a junior employee to perform water car work in conjunction with the fire on both straight time and overtime from Sunday, September 12, 1999 continuously during its seven day duration. The Claimant was on vacation during the week prior to September 12 and reported back to work on September 13, 1999. The Claimant lived 130 miles from the site of the fire, while the junior employee assigned lived 40 miles from the site. The Carrier assigned the junior employee to the Sunday overtime work and told him to report back for the duration of the job. His time record reveals that he worked between 12 and 18 hours per day from September 12 through September 18, 1999 on this job. There is no dispute that the Carrier did not attempt to call the Claimant to perform the overtime work on Sunday, September 12, or thereafter, and defended its assignment on the basis of the emergency nature of the work, the proximity of the junior employee to the site, and the Claimant's unavailability on September 12, 1999. In its Submission to the Board, the Carrier raises the argument that the Claimant expressed no interest in being assigned to the tunnel fire when he returned to work on September 13, 1999, waited until the job was completed, and then sought unjust enrichment by filing a claim for only the overtime hours worked by the junior employee.

The Organization contends that the Claimant was entitled to preference for the overtime work based upon his greater seniority under Rules 2, 3, 5, 6, 25, 26 and 28, and that the Carrier has an affirmative obligation to make a reasonable effort to call senior available employees before assigning junior ones, citing Third Division Awards 29855, 24918, and 24240 and Special Board of Adjustment No. 280, Awards 12, 75 and 110. The Organization posits that the Carrier merely asserted the existence of an emergency, without submitting any proof, thereby failing to sustain its burden of proving its affirmative defense. Third Division Awards 27783 and 18393. The Organization argues that, if an emergency existed, it was only for the first day and did not last for seven days, arguing that even in the face of such emergency, the Carrier was obliged to honor the Claimant's seniority right to scheduled overtime, relying on Third Division Awards 21222 and 20109 as well as Public Law Board No. 4768, Award 5. It notes that straight time was not sought by

the claim because the Claimant had worked his regular shift during the claim period, and only his seniority right to the overtime is involved.

The Carrier argues that the Claimant was unavailable for any assignment on September 12, 1999 because he was on vacation, citing Second Division Award 7900 as well as Third Division Awards 29092 and 23198. It notes that it was not required by Agreement, especially during the pendency of an emergency when it had other things on its mind, to substitute a senior employee after he returns from vacation when a junior employee has already been assigned full time to the emergency work, thereby entitling him to the overtime as a continuation of his regular assignment. The Carrier contends that the tunnel fire was clearly an emergency, which lasted until the fire was out and the main line reopened, and that under Rule 13 it has great latitude in assigning work in such emergency situations and can use the most readily available employee as it did in this case considering factors including how far an employee lives from the work site. See Third Division Awards 31825, 28119, 27700, and 20527. The Carrier argues that to grant the Claimant a monetary remedy, even if a technical violation is found by the Board, would be to unjustly enrich him for doing nothing to get the job, waiting for it to be completed, and then claiming entitlement to the excessive amount of overtime required to deal with the emergency situation. It urges the Board to adopt a "rule of reason" in interpreting the Agreement.

A careful review of the record convinces the Board that the Carrier has sufficiently shown that the tunnel fire on the main line constituted an emergency requiring immediate response on September 12, 1999. The Organization did not dispute that this portion of the main line was shut down as a result. There is no doubt that the Carrier is given great latitude in assigning work and overtime in response to an emergency situation, as noted in Rules 13 and 25(b) which permit the Carrier to use the most readily available forces to handle overtime in emergencies, and Third Division Awards 31825 and 20527. It has also been established that, under prior Board precedent, the Claimant was not available for the overtime assignment on September 12, 1999, still being considered to be on vacation at the time, and that the Carrier's failure to offer him that assignment was not a violation of the Agreement. See Second Division Award 7900 as well as Third Division Awards 29092 and 23198.

What is more problematic is the Carrier's contention that the emergency situation preventing it from complying with the seniority provisions of the

Agreement with respect to preference for overtime continued throughout the next six days. While dealing with the fire was certainly a main priority, there is no direct evidence in the record that establishes how long this section of the main line was shut down. What is clear is that the Carrier chose to utilize the junior employee it originally assigned on September 12, 1999 to continue with this project until its completion. There is no contention that special skills were involved or that the assignment to the water car work could not have been rotated or offered in compliance with the preference for overtime provisions once the Carrier had a chance to plan how to schedule this aspect of the work. The efforts to deal with the fire were apparently not scheduled on a 24/7 basis, because the junior employee could only work a maximum number of hours each day. The Carrier had the ability to rotate crews or employees in order to deal with the situation, as it has done in other continuing emergency situations, to get the matter dealt with as quickly as possible.

In this case it chose to give the assignment to one individual, who was junior to the Claimant, throughout the seven day period, even though it had the opportunity and time to utilize the contractual seniority procedures in calling out employees for scheduled overtime. The Agreement does not require the Claimant to affirmatively seek out all such overtime opportunities. Nor could he be expected to know where such opportunities existed on an ongoing basis. Rather, it is the Carrier that is obligated, when time and the exigencies of the situation permit, to make reasonable efforts to call senior available employees for overtime work. See Third Division Awards 27783 and 21222 as well as Public Law Board No. 4768, Award 5. It admittedly did not call the Claimant at any time during the six day period from September 13 - 18, 1999 to offer him the overtime opportunity it knew existed with respect to the tunnel fire water car work. Absent any argument by the Carrier that the specific amount of compensation sought by the Organization is excessive, we find that the Claimant is entitled to be compensated for his lost overtime work opportunity on September 13 - 18, 1999, but not on September 12, 1999 when he was unavailable.

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 28th day of September 2004.