

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37448
Docket No. MW-36095
05-3-00-3-275

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 Railroad Company (former Chicago,
(Milwaukee, St. Paul and Pacific Railroad Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier called and assigned junior employees J. Gallegos and J. Galvan to perform overtime service to operate a front end loader at Bensenville Yard on January 9 and 10, 1999, instead of calling and assigning senior employee N. Demonte (System File C-01-99-C060-01/8-00219-033 CMP).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant N. Demonte shall be compensated for thirty-two (32) hours as the applicable 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.

It is unrefuted in the record that junior employees who did not hold Machine Operator seniority were allowed to operate a front end loader to perform snow removal service on January 9 and 10, 1999. The Carrier maintained that the work was done pursuant to a snow emergency which allowed it to assign work without regard to seniority. It is undisputed that some 22 inches of snow fell one week earlier, on January 2, 1999, in the Bensenville Yard area.

According to the Claimant's handwritten statement in the record, he inquired about weekend overtime opportunities for the claim dates, but was told that he would not be needed. He operated the front end loader the previous weekend performing snow removal work.

The Organization also asserted that car movements and switching continued throughout the snowfall period such that there was no snow emergency. The Carrier did not effectively refute this in the record.

In disputes of this kind, the existence of an emergency situation is an affirmative defense for which the Carrier has the burden of proof. When the existence of the alleged emergency is challenged by the Organization, as it was on this record, the Carrier is called upon to produce probative evidence to support its claimed affirmative defense. Mere assertions do not satisfy this burden of proof requirement.

On this record, we must find that the Claimant was available to work the overtime in question, had expressed interest in performing available overtime, and had the requisite seniority as well as the necessary qualifications to perform the work. The Carrier has not sufficiently proven the existence of any emergency circumstances that would have allowed it to assign the disputed work to the junior employees. The claim, therefore, has merit.

According to the record, however, the Carrier disputed the number of hours worked by junior employee Galvan on January 9, 1999. It is not clear from the record whether he worked 16 hours or only 13. Therefore, the remedy is remanded to the parties to determine the correct number of hours worked by the junior employees and to compensate the Claimant accordingly for the lost overtime.

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 22nd day of March, 2005.