

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39306
Docket No. MW-37884
08-3-NRAB-00003-030278
(03-3-278)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it assigned Three Rivers East Seniority District employees P. Burns, R. Brumley, F. Hone, T. Van Sickle, T. Koon and A. Colecchi to perform track repair work at Blacks Run Yard on the Three Rivers West Seniority District on January 22, 2002 instead of Three Rivers West Seniority District employees B. Donnelly, J. Bradley, E. Velez, E. Larson, J. Trisch and R. Nestler [Carrier's File 12(02-0352) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, Claimants B. Donnelly, J. Bradley, E. Velez, E. Larson, J. Trisch and R. Nestler shall now each be compensated for eight (8) hours' pay at their respective straight time rates of pay and for four (4) hours' pay at their respective time and one-half rates 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.

Claimants B. J. Donnelly, J. L. Bradley, E. R. Velez, E. J. Larson, J. M. Trisch and R. Nestler established and hold seniority in the Track Department on the Three Rivers West Seniority District of the Baltimore Service Lane. At the time that this dispute arose, four of the six Claimants, i.e., Donnelly, Bradley, Larson, and Trisch, were furloughed and awaiting recall.

On January 22, 2002, the Carrier assigned six employees from the Three Rivers East Seniority District to perform track repair work at Blacks Run Yard, located within Three Rivers West Seniority District territory. The Three Rivers East Seniority District employees expended eight straight time and four overtime hours on the claim date.

According to the Organization, the Claimants were fully qualified and willing to perform the work on January 22, 2002, but were not given that opportunity by the Carrier, in violation of Rules 1, 3, 4, and 17 of the parties' 1999 Agreement. The Carrier asserts that the assignments did not violate the Agreement because this was an emergency situation in which the Carrier had broad flexibility in utilizing its entire work force, and because none of the Claimants were available to perform the work.

An "emergency" is generally defined as an unforeseen combination of circumstances that calls for immediate action. Third Division Award 29164. The Board has long recognized the principle that a Carrier in an emergency has broader authority in assigning employees than under normal circumstances. See, e.g. Third Division Awards 32143 (heavy snows) 21477 (damage due to tornado) and Awards cited therein. If challenged by the Organization, the Carrier has the burden of proving its affirmative defense of emergency. That burden is not met by merely reaffirming that there was an emergency. See Third Division Awards 33937, 35590.

When challenged, the Carrier offered no evidence of the asserted “emergency situation” other than the Chief Regional Engineer’s statement that “employees from [sic] crossed seniority districts to work on a derailment.” In contrast to Third Division Award 21477, on which the Carrier relies, there is no information about the nature of the derailment, the extent of damage caused, nor its impact on the Carrier’s operations. It is impossible from this record to determine that the circumstances necessitated such “immediate action” that the situation was in fact an emergency that permitted the Carrier to disregard the seniority provisions of the Agreement. Thus, the Board finds that the Carrier violated the Agreement by assigning employees outside the Three Rivers West Seniority District to perform the disputed work.

The Carrier asserts that the claims of Claimants Velez and Nestler must be denied because they were unavailable for the disputed work, inasmuch as they were on duty and under pay on a SPG gang off of the Baltimore Service Lane at the time. The Board previously rejected this argument in on-property Awards 29353 and 25964. Because the Carrier failed to demonstrate that there was an emergency situation for which they were unavailable to respond, Claimants and Velez and Nestler are entitled to the remedy requested (eight hours’ pay at their respective straight time rates and four hours’ pay at time and one-half).

The four remaining Claimants were on furlough and had not received their first quarter safety certification. The Organization asserts that the Carrier’s “unorganized practices” have resulted in some employees being recalled to service despite their lack of safety certification, but this assertion falls far short of establishing that the Claimants on furlough were available for service here. The fact remains that the four furloughed Claimants were not qualified to respond to a call for service on the claim date. Therefore, Claimants Bradley, Donnelly, Larson, and Trisch are not entitled to any remedy.

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

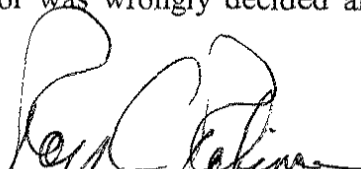
Dated at Chicago, Illinois, this 29th day of September 2008.

LABOR MEMBER'S CONCURRENCE AND DISSENT
TO
Award 39306, Docket MW-37884
Referee Kohn

Although the Majority sustained this claim in part, it erred in its findings insofar as the furloughed Claimants were concerned. Hence, a Concurrence and a Dissent is in order. This case involved the Carrier's decision to call employees from the Three Rivers East Seniority District to perform work on the Three Rivers West Seniority District. As usual, the Carrier alleged that an emergency condition existed which absolved it from calling and assigning the proper employees. Of course, the Organization challenged the Carrier to prove its affirmative defense. As can be seen, that affirmative defense was shown to be defective as the case was sustained in part. The problem with this Award is the Majority's determination that:

"The four remaining Claimants were on furlough and had not received their first quarter safety certification. The Organization asserts that the Carrier's 'unorganized practices' have resulted in some employees being recalled to service despite their lack of safety certification, but this assertion falls far short of establishing that the Claimants on furlough were available for service here. The fact remains that the four furloughed Claimants were not qualified to respond to a call for service on the claim date. Therefore, Claimants Bradley, Donnelly, Larson, and Trisch are not entitled to any remedy."

Apparently, the Majority believes that the Carrier's self-imposed limitation, i.e., "safety certification" supercedes the collective bargaining agreement. One could only imagine what kind of harmful effects could be wrought on the Agreement with this kind of reasoning. Rule 4 - Seniority is clear and unambiguous and, apparently the Majority recognized this when it sustained pay for two (2) of the Claimants. However, for the Majority to buy into the Carrier's contrived and strained reasons to deny four (4) of the Claimants in this case the monetary relief they were entitled to was clearly unjust. If the Board were to embrace this action in future cases, such would only erode the seniority provisions of the Agreement. The Majority's decision to deny the four (4) furloughed Claimants the monetary relief prayed for was wrongly decided and shall provide no precedential standing in future cases.



Roy C. Robinson
Labor Member