Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39530
Docket No. MW-38011
09-3-NRAB-00003-030446
(03-3-446)

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Delaware and Hudson Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned Supervisor C. Loughan to perform Maintenance of Way Department track work at Rouses Point on February 27, 28, March 1 and 2, 2002, instead of assigning Mr. D. M. Jordan (Carrier's File 8-00263 DHR)

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. M. Jordan shall now be compensated for eight (8) hours' pay at the trackman's straight time rate of pay for each of the aforesaid dates and compensated for all additional hours on each date that Supervisor C. Loughan expended in the performance of the aforesaid work at the trackman's 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.

The incident precipitating this dispute was a derailment on or about February 27, 2002, that blocked the Carrier's main line at Rouses Point, New York. It is undisputed on this record that during the clean-up of the derailment, the Carrier used an ARSA (American Railway Supervisors Association [TCIU]) Engineering Supervisor to assist in the repair of the track. On April 23, 2002 the Organization filed a claim alleging that the Carrier violated the Agreement by assigning an ARSA employee to perform what was clearly Trackman's work on the dates of February 27 and 28, and March 1 and 2, 2002. The record indicates that Third Party Notice was given to ARSA, and it declined to file a Submission on this matter.

The Carrier denied the claim on June 20, 2002. In that denial, the Carrier contended that "In the instant emergent conditions, additional personnel from outside the BMWE are employed and in all instances were required [for] restoration of train movements." The Organization appealed that denial by letter dated August 16, 2002. In that appeal, the Organization disputed the Carrier's contention that the "emergent" conditions lasted four days and "required" the use of non BMWE-represented employees. It argued that rail service had been restored before the end of the four days and there was, therefore, no need to use any outside forces to perform what was clearly BMWE scope-covered work. The Carrier denied that appeal on September 30, 2002. Its denial included the argument that the Claimant was fully employed on the days at issue, and held no seniority on the subdivision in question, but rather on a subdivision two subdivisions away from the derailment. The claim was then progressed including conference on the property, after which it remained in dispute, and is properly before the Board for resolution.

At the heart of this issue is the clear language of Rule 11.8. It provides that:

> "Employes will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them during the course of their work week or day in order of their seniority."

The Carrier's defense for not adhering to this Rule is that there were "emergent" conditions that required it to assign other than BMWE-represented employees to the restoration of rail service following the derailment. Yet there remains unresolved on this record the question of whether the Organization's contention that

service had been restored prior to March 2, 2002, was factual and that there was, therefore, no longer an emergency. The Carrier's assertion is in the nature of an affirmative defense, for which it bears the burden of proof.

In this case, neither party has shown when rail service was restored, thus arguably ending the alleged emergent condition. The Board is confronted with dueling accusations/defenses, with no evidentiary support provided on the record by either party to support its position. Both parties cited cases in support of their positions, but these cannot be viewed as other than argument absent documentary evidence concerning the violation claimed. The Carrier asserted without opposition that the Claimant was "fully employed" during the period in question. However, that does not address the matter of whether, if there was overtime work available, the Claimant might have been ready and able to perform such work under the provisions of Rule 11.8. The Board, therefore, directs the parties to make a joint search of the employee records and if, in fact, there was overtime work performed by the Supervisor during the period in question for which the Claimant would have been the senior employee qualified and available, he shall receive payment for only those hours at the penalty rate of time and one-half.

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 2nd day of February 2009.