

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40781
Docket No. MW-40409
10-3-NRAB-00003-080209**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign Welder D. Zlomke and Grinder D. McKeon to perform Welding Sub-department overtime service (welding repairs on a frog) at Mile Post 112.6 on the Hastings Subdivision on July 2, 2006 and instead called and assigned Track Sub-department Foreman M. Perez and Truck Driver T. Behrens [System File C-06-J010-56/10-06-0301(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants D. Zlomke and D. McKeon shall now each be paid for six (6) hours 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.

This intra-craft dispute arose when the Carrier assigned employees from the Track Sub-department instead of employees from the Welding Sub-department to repair a broken frog. According to the original claim:

“Rules 1, 2, 5, 29, and 55 . . . were violated on July 2, 2006 when the Carrier assigned a foreman and Truck Driver to perform the work of a Welder and a Grinder. . . . [T]he Carrier assigned Foreman [name omitted] to perform the work of a Welder. . . . [T]he Carrier assigned Truck Driver [name omitted] to perform the work of a Grinder. The work performed was to make welding repairs on a frog. Equipment used to make this repair included the welding truck assigned to Seward, Nebraska.

This work took place at the East Siding Switch Fairmont, at Mile Post 112.6 on the Hastings Sub-Division, Line Segment 0002, and the Foreman and Truck Driver each worked (6) hours overtime on Sunday July 2, 2006 performing this work at the exclusion of the Claimants.”

The Claimants are members of mobile track gangs and were off duty when the broken frog was discovered. According to the Organization, the Carrier should have called the Claimants to come in and assigned the welding work to them as rest day overtime, instead of assigning it to employees from the Track Sub-department who were already on site.

A frog is a switch component used at the intersection of two rails to provide support for wheels and passageways for their flanges; this permits wheels on either rail to cross to the other. A broken frog can cause a train to derail, so repairs need to be made immediately. In this dispute, the frog at issue, near Fairmont, Nebraska, was discovered to be broken on Sunday morning, July 2, 2006. It appears that the rail line

was shut down until the frog could be repaired. The Roadmaster for the Hastings Sub-division called his off-duty Welders to perform the repair but got no response. He contacted the Roadmaster for the neighboring Ravenna Sub-division for assistance, which is when the Track Sub-department employees were assigned to perform the repairs. They were the first qualified Welders on the emergency call list. The truck that is assigned to Gang TRWX0661 was parked at Seward, Nebraska, and was used to make the repairs. The Roadmaster submitted a statement regarding the incident:

“Upon discovery of the frog needing repair at MP 112.6 on the Hastings sub calls were placed to welders Konen at Hastings and Paz at McCook with no response. A subsequent call (10:30) was made to the adjacent Roadmaster on the Ravenna Sub and that was when the Mtce [sic] Gang Foreman and Truck Driver were dispatched to make the repairs. They used TRWX0661’s truck 17615 that was parked at Seward. These repairs were made on Hastings Sub where TRWX17498 (Hastings NE) and TRWX17494 (McCook NE) work.

Mr. Zlomke works on TRWX1065 (Grand Island) and McKoen works on TRWX0661 (Seward). Each of these crews are mobile but normally report to the listed locations. This failure was on the Hastings Sub and was deemed urgent enough to dispatch the closest qualified person to make the repairs and Mr. Perez is qualified and was on duty as the foreman on the Relief maintenance gang.”

The Organization contends that the Carrier violated the Claimants’ seniority rights when it failed to assign the work to them. Rule 1.B of the Agreement establishes separate and distinct Sub-departments within the Maintenance of Way and Structures Department, including the Track Sub-department and the Welding Sub-department. Rule 2.A provides that employees are entitled to consideration for positions in accordance with their relative length of service with the Company. Rule 2.B provides that employees’ seniority rights are confined to the Sub-department in which they are employed. Rule 5 establishes separate seniority rosters for each Sub-department. Rule 55 sets forth the various classifications within the Maintenance of Way and Structures Department. There is no question here that Welding Sub-department forces were entitled to be assigned to perform the frog repair, instead of Track Sub-department forces. The Carrier’s defenses are invalid. The work here was not

“incidental” to anything; it was a welding repair to a frog. The Carrier’s “emergency” defense was not raised at the first level and there is no evidence to support it. Nothing in the Roadmaster’s statement supports the “emergency” defense. Moreover, the Claimants were assigned to Mobile Track Gangs and, as such, were entitled to perform work of their Sub-department anywhere on that consolidated Seniority District. Both Claimants were working on the Ravenna Sub-division, the same sub-division to which the Track Sub-department employees that performed the Welding Sub-department work were assigned. In fact, the Track Sub-department employees used the truck assigned to the same mobile gang that one of the Claimants was assigned to, TRWX0661, to accomplish the work. No attempt to contact either of the Claimants was made, although both were available and would have performed the work if called. The Carrier’s defenses are without merit and the Claimants are entitled to the requested remedy.

According to the Carrier, the Organization is required in cases of intra-craft disputes to establish exclusivity throughout the entire system, and it has not met its burden in that regard. Moreover, this was an emergency, permitting broader latitude in assigning employees. The broken frog here constituted an emergency, because it brought traffic on the single main line to a standstill. Prior Third Division Awards have held that carriers have broader latitude in assigning employees than in a normal situation, and is entitled in an emergency to call out the employees who can most quickly respond to an emergency and correct the problem with a minimum of delay. Additionally, the Agreement does not reserve this work to the Claimants. Rules 1, 2 and 55 are general in nature; absent express contract language, reservation of work can only be proved by past performance. The Organization failed to provide such evidence in this case. Finally, Rule 78 contemplated situations in which members of one craft might occasionally perform other duties. In this case, the Carrier did not violate the Agreement when, faced with an emergency, it used its emergency call lists to find personnel qualified to make the appropriate repairs. The claim should be denied.

The Organization stresses that “it is important to recognize the importance of job classifications and the reservation of work inherent in seniority, assignment, and classification,” and the Board agrees with that proposition. Moreover, the Carrier does not dispute that, in the ordinary course of things, the work that was done on the frog is Welding Sub-department work that would ordinarily have been assigned to

Welding Sub-department employees. According to the Carrier, however, the discovery of this broken frog presented an emergency, and the Carrier has leeway to handle emergencies somewhat differently than the “ordinary course of things.”

But what constitutes an emergency? The Organization put forth a definition from Third Division Award 24440: “a sudden, unforeseeable and uncontrollable . . . event that interrupts operations and brings them to an immediate halt.” That definition is too narrow. The reality is, some emergencies are large and some are small; some take days to correct, while others can be corrected in a few hours. One particular problem with the definition suggested is that it limits emergencies to situations where there has already been a halt in operations. That eliminates an entire category of lesser emergencies, such as the fact pattern in this case presents: the discovery of a relatively small problem that has the potential to seriously disrupt operations (as in a derailment) but that can, with immediate action, be corrected in order to avoid the larger emergency. Upon discovery of the broken frog, it appears that the line was shut down until it could be repaired. The Roadmaster’s e-mail referenced the seriousness of the situation from management’s perspective: “The failure . . . was deemed urgent enough to dispatch the closest qualified person to make the repairs. . . .” Considering the potential for serious damage to operations if the frog were not repaired quickly, the Board finds that the situation constituted an emergency. The broken frog may not have been an emergency along the lines of a derailment or spill of toxic materials, but immediate prophylactic action was necessary to avoid a larger emergency.

In an emergency, strict adherence to the protocols of seniority may not be possible. In this case, the record indicates that the Roadmaster on duty followed protocol by calling the Welders who were headquartered on the Hastings Sub-division, but was unable to reach them. When they did not respond, he sought assistance from the Roadmaster on the neighboring Ravenna Sub-division, and they went down the emergency call list until they found two individuals who were already on duty and who were qualified Welders, and assigned them the job.

The Organization contends that the Claimants should have been called out. An examination of the record establishes that the Carrier’s organization of its workforce is why they were not called out - but that there is little, if anything, that can be done about it, and the Carrier did not violate the Agreement in its assignment. The

problem is simply inherent in the organizational structure. The broken frog was located on the Hastings Sub-division. The Mobile Track Gangs assigned to work there are TRWX17498 and TRWX17494. The Claimants work for two different Mobile Track Gangs: TRWX1065, assigned to Grand Island, and TRWX0661, assigned to Seward, Nebraska. (Seward is where the TRWX0661 gang's truck was parked for the weekend.) Because their Mobile Track Gangs work anywhere throughout the entire District 400 Territory, which covers several states, the Claimants could have been anywhere on the District. Exactly how the Organization would have the Carrier perform the call-out in an emergency situation like this one is not clear. The Claimants are from different Mobile Track Gangs and might not both have been called out. The fact that they are qualified Welders and the work involved was Welding Sub-department work is not enough. The Carrier has to have an orderly process for calling out employees in an emergency that does not impede its ability to respond quickly to a crisis. In this case, the Roadmaster tried calling the Welders headquartered on the Hastings Sub-division. When they did not respond, he went to an emergency call procedure rather than calling all Welders assigned to all Mobile Track Gangs on the Sub-division. Even had he done that, the Claimants might not have been called, because their track gangs were based elsewhere. Taking all facts into consideration, the Board concludes that the Carrier did not violate the Agreement when, after attempting to reach employees in the Welding Sub-department within the Sub-division, it assigned the work to the closest qualified Welders that it could find, who happened to be on duty already. The claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of December 2010.