

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40999
Docket No. MW-41150
11-3-NRAB-00003-090424**

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference

PARTIES TO DISPUTE: (

(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to assign Mr. R. Mendoza to overtime duties on a work train working on the slide near Crescent Lake, Oregon and instead offered and assigned said work to junior employee W. Allen beginning on February 6, 2008 and continuing (Carrier's File 1502814).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant R. Mendoza shall now be compensated at his respective time and one-half rate for all overtime hours worked by junior employee W. Allen in the performance of the aforesaid work beginning on February 6, 2008 and continuing.”

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 facts indicate that on January 19, 2008, a huge mud, rock and snow slide occurred on Coyote Mountain, taking with it thousands of trees and two sections of the Cascade Subdivision near Frazier, Oregon. The event, was dubbed the "Frazier Slide" which spanned approximately 40 acres, and in some places buried what had been ground level under 200 feet of debris. It wiped out sections of the mainline (3,000 feet of track) in three different areas. Approximately 200 employees and contractors worked around the clock to remove debris and unsuitable material from the sites. The track was out of service for 105 days during which time the slide caused the rerouting of 15 daily trains. The track was returned to service in early May 2008.

It is the position of the Organization that the Carrier improperly used a junior employee to perform overtime service on a work train working on the slide near Crescent Lake, Oregon, in lieu of the Claimant. It argued that the Carrier ignored and disregarded the Claimant's accumulated seniority within his respective Class and Sub-department by calling, assigning and utilizing a junior employee to perform overtime duties on a work train, instead of calling the Claimant who was fully qualified and available, thereby causing him a loss of work opportunity and compensation. It concluded by requesting that the claim be sustained as presented.

It is the Carrier's position that the situation was a massive mudslide that was an extreme emergency and during such circumstances it is afforded wide flexibility in the filling of assignments. In its initial declination it stated that the Claimant lived in Duncan, Arizona, 1300 miles away from the slide location, whereas junior employee W. Allen lived 40 miles away. Accordingly, in this instance the Carrier utilized the most readily available and qualified employee for the emergency site area to assist in the work. It further argued that the junior employee who performed the work was regularly assigned to the work train and in accordance with Rule 26(h) had preference to any associated overtime. It closed by asking that the claim remain denied.

On appeal the Organization countered that it did not matter where the Claimant lived, because he was at the work site. Therefore, he was readily available for the necessary overtime worked by the junior employee.

In its rebuttal the Carrier asserted that a review of the Claimant's monthly time summary reveals that the Claimant was paid travel allowance to and from his home during the disputed time period. Therefore, it was obvious that he was not available for all overtime worked.

There is no dispute that the Carrier was faced with an emergency situation and during such circumstances it is afforded greater latitude in the filling of assignments. In response to the Organization's allegations the Carrier offered several reasons for the use of the junior employee, the first being that he was more readily available. That argument fails because the record substantiates that the Claimant was not 1300 miles away from the work site as stated in the initial declination, but instead was at the work site with the junior employee. In fact, both were assigned to Consolidated System Gang 9003. Therefore, he was available for any overtime service (absent any days he was paid travel allowance to and from his residence). However, that availability does not mean he had the first right for all overtime over junior employees. On the property the Carrier argued that the junior employee was regularly assigned to the work which, according to it, was not disputed by the Organization. It further asserted that the Claimant and the Organization never argued that the Claimant should have been assigned to the work train, but instead only requested the overtime hours worked on that position. That argument was only partially correct because the on-property record reveals that the Organization stated in its initial claim of April 2, and in its appeal letter of July 15, 2008, the following:

“At no time was Claimant Mendoza, asked or afforded the opportunity to work with the aforementioned work train. Nor was Claimant Mendoza's seniority considered when it came to assigning someone to the work train.” (Emphasis added)

The claim may have only requested overtime as a remedy, but it is clear from the record that the Organization contended that the Claimant should have been assigned the work train position because he had a superior Assistant Foreman seniority date of October 5, 1987, as opposed to the junior employee's Assistant Foreman seniority date of January 27, 2000. Rule 26(h) allows overtime to be first

offered to the employee who regularly works the position, but if a junior employee was improperly assigned a position over a senior employee, the Rule cannot subsequently be used as a shield to cover a violation of the Agreement. There has been no showing that if the Claimant had been assigned to the work train position rather than the junior employee during the emergency situation that the Carrier's operation would have been hindered. The Board concludes that the Agreement was violated.

With respect to the remedy, the Carrier argued that time records indicate that the Claimant periodically returned home during the timeframe of the claim. Thus, he was not available for all of the overtime service claimed, whereas the Organization argued that if the Carrier had offered him the overtime, he may not have gone home on occasion. The Board finds substance in the Carrier's argument. On the contrary, the Organization's argument is speculative as to what the Claimant's availability would have been if he had been assigned the work train position or been offered the overtime. Therefore, the Board finds and holds that the Claimant has demonstrated a lost work opportunity and is entitled to all overtime hours worked by the junior employee absent those days he was paid travel allowance to and from his residence. The parties are directed to meet and review the Carrier's records so as to determine the appropriate number of hours owed the Claimant in accordance with Part (2) of the claim.

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 20th day of July 2011.