

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42480
Docket No. MW-42143
16-3-NRAB-00003-130027**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(BNSF Railway Company (former St. Louis
(San Francisco Railway 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 Claimants R. Harris, D. Edel and K. Russell for overtime service on the Thayer Subdivision between West Plains, Missouri and Jonesboro, Arkansas on January 28, 29, 30, 31 and February 1, 2009 and instead called junior employees D. Salzman, M. Jones, K. Gibson and J. Gibson (System File B-2655-7/12-09-0044 SLF).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Harris, D. Edel and K. Russell shall now each be paid for a total of forty-nine (49) hours at their respective overtime rates and for three (3) hours at their respective double time 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.

At the time of the incident giving rise to this claim, a severe ice storm had occurred in January 2009. That storm caused widespread power outages and considerable damage throughout Carrier's territory in Southern Missouri, Arkansas, and several Mid-Western states. In response to the outages, the Carrier installed portable generators at every signal system location to provide power to keep the signal system working. Not all of those signal systems were accessible by roads, so many were reachable safely only by rail, via a "hy-rail" vehicle. This dispute arose when Carrier used members of gang BBCX0113 – a gang with a hy-rail vehicle assigned to it – instead of gang BBCX0115 to refuel generators at the locations at issue.

On February 26, 2009, the Organization filed a claim on behalf of the above-referenced Claimants. In that claim it alleged that the Carrier had disregarded the Claimants' seniority status in assigning the junior employees on gang BBCX0113 to do the necessary refueling of the generators. The Carrier denied the claim on April 28, 2009. The Organization appealed the denial on May 4, 2009, and that appeal was denied by the Carrier on July 1, 2009. The matter was then progressed in accordance with the parties' agreement, after which it remained in dispute. Accordingly, it is properly before the Board for adjudication.

The Organization notes, at the outset, that there is no dispute that the Claimants are senior to the employees called to refuel the generators on the territory in question. It maintains that the Carrier's failure to call the Claimants was a violation of the Agreement and that the Carrier's defense was without merit. For example, it notes that Rule 57 provides that when overtime is needed, the Carrier will call, in seniority order, the number of employees necessary to perform the work at issue. It reiterates that the Claimants were all senior to the employees actually called. In support of its position, the Organization cites, among other awards, Third Division Award 19758. Moreover, the Organization disputes the Carrier's defense that an emergency situation existed and a hy-rail was needed to perform the refueling work. With respect to the first defense, the Organization maintains that once the generators were in place and power was restored, the "emergency situation" ceased to exist. With respect to the second defense, the Organization disputes the Carrier's assertion that certain of the generators could be reached only by a hy-rail. In support of the latter argument, the Organization cites a note from Claimant Harris in which he states that

the track at issue “runs along or very close to the highway and for the most part can be walked to from the roads.” Accordingly, the Organization asks that the claim be sustained in its entirety.

For its part, the Carrier notes that the generators in question were essential to keeping the Carrier’s signal system operational. It maintains that a significant number of the generators needed were inaccessible by roads, either because of their location or because the roads themselves were impassable due to fallen limbs and ice. The Carrier notes that Rule 57 provides that “when overtime service is required, the foreman of gangs . . . will call, in seniority order, the number of men in the gang necessary to perform the work for which called.” In this case, the Carrier insists, the gang that was “necessary to perform the work” was gang BBCX0113, because it had a hy-rail, which Claimants’ gang did not. In support of its position, the Carrier cites Third Division Award 25182 .

The Board has reviewed the record and the correspondence between the parties. Although the Organization has insisted that the Carrier’s characterization of the “emergency” nature of the situation at issue is exaggerated, we find no evidence to support that allegation. Moreover, the Organization has presented no information that would counter the Carrier’s argument that a hy-rail vehicle was not necessary for refueling the generators. Clearly the Carrier had an obligation to call employees for overtime in order of seniority, but the salient point here is that the gang “necessary to perform the work” at issue was gang BBCX0113, since they were the gang to which the hy-rail was assigned as standard equipment. Within that gang, the Carrier would have had a clear obligation to call in employees by seniority, but that is not the issue here.

We also note that both Third Division Award 19758 , cited by the Organization, and Third Division Award 25128 , cited by the Carrier, distinguish between the obligation to call employees for overtime by seniority, and the right to call the gang “necessary to perform the work” required, particularly during an emergency. In light of the foregoing we find no support for the Organization’s position and the instant claim is denied.

AWARD

Claim denied.

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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 28th day of November 2016.