

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42531
Docket No. MW-41753
17-3-NRAB-00003-110380**

The Third Division consisted of the regular members and in addition Referee Patrick Halter when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(
(CP Rail System (former Delaware and Hudson
(Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood:

- (1) The Agreement was violated when the Carrier failed to assign Taylor Welding Crew (Pennsylvania Subdivision-Seniority Territory #1) employees R. Heuer and J. Kordish to perform repair work at approximately Mile Post 619 on the switch frog at Powers Road on April 29, 30 and May 5, 2009 and instead assigned Binghamton Welding Crew (Susquehanna Subdivision-Seniority Territory #2) employees B. Cooper and R. Foote (Carrier’s File 8-00710 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Heuer and J. Kordish shall now each be compensated for a total of ten and one-half (10.5) hours at their respective straight 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.

On June 22, 2009, the Organization filed a claim for time worked by the Binghamton Welding Crew (Seniority Territory No. 2) at or near Mile Post 619 on the switch frog at Powers Road on April 29, 30 and May 5, 2009. The Patrol Foreman (Track Inspector) identified the frog's deteriorating condition whereupon the Track Maintenance Supervisor (TMS) placed it on the schedule for replacement. Instead of assigning the Claimants to replace the frog, they were scheduled to work at other locations and the TMS assigned the Binghamton Welding Crew to replace the frog switch at Powers Road.

Powers Road is south of Terrace Drive, which is the boundary between the Susquehanna Seniority District No. 2 and the Pennsylvania Seniority District No. 1. Work south of Terrace Drive is reserved for Pennsylvania Seniority District No. 1, however, the TMS assigned welders from the Susquehanna Seniority District No. 2, in violation of Rules 1, 4, 28, 44, 57 and Appendix J.

On July 30, 2009, the Carrier denied the claim stating the Taylor Welding Crew (Claimants) were handling emergency repairs on other frogs and the switch frog at Powers Road required urgent repairs which could not be delayed until the date scheduled for replacing it. The Carrier states "the hours worked by the Binghamton Welding Crew while performing the emergency repairs on the dates presented in the claim . . . does not exceed 3.5 hours per shift." Thus, there was no violation of Rule 17.2 ("simple tasks may be assigned to any employee represented by the BMWED capable of performing them for a maximum of four hours per shift").

On September 28, 2009, the Organization filed an appeal noting that the TMS was aware of the deteriorating frog switch as early as January 2009 and scheduled it for replacement without urgency. Work performed by the Taylor Welding Crew (Claimants) on April 29 was not an emergency as the defective frog at Mile Post 748 had been reported the week prior. On April 30, the Claimants performed thermite welding at Mile Post 671.6 towards the end of their work day and handled a repair at Mile Post 742.4 after duty hours. On May 5, the Claimants installed a frog at Mile Post 691.95 as well as performed thermite welding at the location. The Claimants were not informed that any work they performed on the claim dates constituted an emergency situation. In this claim, there was no emergency because the track remained in service at all times. There is no wording in Rule 17 that authorizes the Carrier to make

temporary assignments that cross division lines and adjacent subdivisions as a means to “assist” employees on the subdivision where the assignment was made.

On August 21, 2010, the Carrier denied the appeal. The TMS discovered the switch at Powers Road required immediate repairs. The Claimants were not available on April 29 as they were at Mile Post 748 (130 miles from Powers Road) performing repairs on the mainline interchange tracks to the North Shore Railway. The Claimants were unavailable on April 30 as they were at Mile Post 671.6 (60 miles from Powers Road) and another 70 miles distant at Mile Post 742 handling emergency repairs. The Carrier asserts it had no choice but to use Binghamton Welding Crew. On May 5, the Claimants installed the mainline switch at Mile Post 691 (replacing frog switch) or 72 miles distant from Powers Road. The Binghamton Welding Crew was less than 30 minutes from Mile Post 691 and available. The Carrier acknowledged the deteriorating frog switch at Powers Road and scheduled it for replacement but the Claimants were not available and “time was of the essence to ensure safe passage of trains.” The Carrier operates 15 to 16 trains over the mainline switch at Powers Road and inspected it numerous times; the Carrier could not wait for the Claimants. Had the TMS waited for the Claimants, he would have to place a slow order on trains at Powers Road.

Following telephone conference on September 20 and 27, 2010, this matter remains deadlocked and is now before the Board for a final decision.

Having reviewed the record, the Board finds that the Carrier’s assertion of an “emergency” is an affirmative defense which the Carrier failed to prove. The switch frog at Powers Road was scheduled for replacement; the Carrier was informed of its deteriorating condition as early as January 2009 and continuing inspecting it on numerous occasions thereafter. It was placed on the schedule for replacement. Although the Carrier asserts time was of the essence, its actions in scheduling the claimed work does not reflect an emergent response. The affirmative defense is not established. The switch replacement at Mile Post 619 did not present an emergency situation.

As for whether the Carrier used Rule 17 as a means to “assist” the Claimants, the Board will follow Third Division Award 39730 which involves the parties to this dispute and addressed seniority territory assignments.

“The record reveals that the Claimants’ seniority was confined to Seniority Territory No. 3 and they were entitled to the work opportunities that took place within those territorial limits. On the date in question, the Carrier had Seniority Territory No. 2 employees perform work on Seniority Territory No. 3. It is true the Rules allow

the Carrier to move employees across seniority territories to ‘assist’ other employees of that particular territory. The problem with the Carrier’s case here is that it appears that there was no ‘assistance’ being provided. As has been found in several other cases, the Carrier basically ‘replaced’ Seniority Territory No. 3 employees with Seniority Territory No. 2 employees The employees who were brought in from Seniority Territory No. 2 to work on Seniority Territory No. 3 were not assisting under the interpreted meaning of the word and, therefore, the claim must be sustained.”

Applying Third Division Award 39730 to the findings in this claim, the Board concludes that the Carrier replaced Seniority Territory No. 1 employees (Claimants) with Seniority Territory No. 2 employees who “were not assisting under the interpreted meaning of the word and, therefore, the claim must be sustained.”

The Carrier’s assertion that Claimants were unavailable as they were occupied performing work at other locations and, thus, fully employed, has been addressed in Third Division Awards 30181, 31828, 32421, 3240, 32699, 32993 and 35082, to name a few, and not credited. There are no circumstances in this claim that warrant deviating from this arbitral precedent. Thus, the requested remedy in Part 2 of the claim is granted.

AWARD

Claim sustained.

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 6th day of March 2017.