

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42533
Docket No. MW-42217
17-3-NRAB-00003-130167**

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 Foreman P. Spisak to perform overtime service (remove tree from track) on March 5, 2010 and instead assigned junior Foreman D. Ambrose (Carrier’s File 8-00805 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Spisak shall now be compensated for six (6) hours at his respective 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.

On March 5, 2010, a tree fell onto the mainline track near ML 579 in the vicinity of Bainbridge, New York and required removal. This situation was reported to dispatch by the train stopped at ML 579. According to the Organization, tree removal “required the overtime services of” the Claimant, the senior qualified and available employee capable of performing this work. The Organization states “the Carrier failed to call the Claimant and offer him the overtime work opportunity and instead called and assigned junior employee D. Ambrose.” On March 27, 2010, the Organization filed a claim alleging a violation of Rule 11.8 - Preference for Overtime which states:

“Employees 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 the order of their seniority.”

On April 14, 2010, the Carrier denied the claim. “To allow safe passage for trains, the Carrier assigned employee Ambrose to clear the [tree] obstructing as he was on site and available.”

On September 7, 2010, the Organization filed an appeal. The tree posed a delay in train operations and inconvenience but “at no point” was the track structure in jeopardy. There is no support from the Carrier to find an emergency situation. Also, the Carrier called the Claimant during his off-duty hours at his residence to inquire where the chainsaw was located; it was in Binghamton or 32 miles from Bainbridge. Employee Ambrose could not perform any work until the chainsaw arrived. Instead of offering the work to the Claimant, the Carrier assigned it to the junior employee. The Claimant regularly performs this work as his inspection vehicle carries the chainsaw.

On June 30, 2011, the Carrier denied the appeal reiterating arguments in its claim denial. The Carrier notes that Employee Ambrose was on duty during this time frame (winter hours) and on straight time. Thus, there was no overtime involved with this assignment. “The Carrier would agree if there were no Foremen on duty and overtime required, then the Claimant would have been called out, as per Rule 11.8, this is simply not the case.”

Having reviewed the record, the Board finds that the dispatcher received information from the train stopped at ML 579 that a tree was downed on the mainline track. Third Division Award 24440 defines emergency as a sudden, unforeseeable and uncontrollable event that interrupts operations and brings them to an immediate halt. Applying Award 24440, the Board finds that a tree on the mainline that stopped a train is an emergency as there is an interruption in operations. In an emergency, the Carrier is afforded flexibility in its response.

The record shows that the Claimant and Employee Ambrose were not on the same work schedule when this emergency arose. The Claimant was off duty; Ambrose was on duty. Ambrose, the on duty foreman, was assigned the task of removing the tree from the track to restore train movement. No overtime hours were incurred as Ambrose was on straight time (winter hours). In this situation, Rule 11.8 does not come into play as there was no work performed on overtime.

Given these findings, 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 6th day of March 2017.