

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 43535  
Docket No. MW-42975  
19-3-NRAB-00003-150164**

**The Third Division consisted of the regular members and in addition Referee Kathryn A. VanDagens when award was rendered.**

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

**PARTIES TO DISPUTE: (**

**(Union Pacific Railroad Company (former Missouri  
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 senior employees D. Lefholz and M. McAllister to perform overtime track repair work at Mile Post 220.9 on the River Subdivision on December 1 and 2, 2013 and instead assigned junior employees S. Sinclair and R. Marcum thereto (System File UP622BT13/1597064 MPR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants D. Lefholz and M. McAllister shall each be compensated for three (3) 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.**

**The Claimants have established and maintain seniority within the Carrier's Maintenance of Way Department. At 9:00 pm on December 1, 2013, a broken rail needed to be repaired at Milepost 220.9. Repairs were finished at 12:30 am on December 2, 2013. Employees S. Sinclair and R. Marcum were called in to put joint bars on a broken rail. There is no dispute that the Claimants are senior to Sinclair and Marcum. Manager Hendrix explained:**

**"First this was a service interruption [sic], train stoppage, track emergency....**

**This broken rail required the use of the Geismar Rail expander. This piece of equipment is assigned to welding truck 42811. This truck is assigned to welding gang 1951. Mr Sinclair...and Mr. Marcum...are both assigned to welding gang 1951. According to the agreement with the BMW we are to use qualified employees on all equipment while utilizing [sic] the equipment to make repairs.**

**Mr Sinclair...and Mr Marcum...are both qualified on the Geismar rail expander [sic], and assigned to gang 1951 along with this equipment. We used employees trained on the operation of the equipment needed for a safe repair [sic] at the time."**

**The Organization filed a claim on December 20, 2013, stating that the Claimants should have been called to work overtime on December 1 to December 2, 2013. The Carrier denied the claim on the basis that the Claimants were not qualified to perform the welding work that was necessary to repair the broken rail. Additionally, it was asserted that the broken rail created an emergency. The claim was further processed on property, but the parties were unable to reach resolution. It is now properly before this Board for final adjudication.**

**The Organization contends that the Claimants were entitled to the overtime assignment, but that the Carrier assigned junior employees to the track repair work. Instead, the Organization contends that the Carrier assigned a non-Agreement**

employee and a junior employee to perform after hours track repair. The Organization contends that the Claimants were entitled to the benefits of their seniority, one of the most important cornerstones of the collective bargaining agreement. The Organization contends that the Carrier failed to produce credible evidence that an emergency existed, so it has failed to prove its affirmative defense. The Organization further contends that the Carrier has failed to prove that the junior employees were the “regular employees” entitled to this overtime work.

The Carrier contends that the work in question was caused by the broken rail that created an emergency, and that it has greater latitude when faced with an emergency to assign overtime other than by seniority. The Carrier further contends that the junior employees perform this work during straight-time hours, so they were entitled to the overtime work. The Carrier contends that Sinclair and Marcum were the regularly assigned employees because they were assigned to and operated the Welding Truck that contained the necessary equipment to repair the broken rail.

“Rule 1(c) provides,

(c) Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad.”

Seniority is a valuable property earned by employees, which must be respected by the employer. Third Division Award 24480; First Division Award 15128. However, where the Carrier demonstrates that an emergency existed, it has greater latitude in calling employees for repair work. Third Division Award 20310. The Carrier bears the burden of proving that an emergency existed. This Board has defined an emergency as “an unforeseen combination of circumstances that calls for immediate action.” Third Division Award 20527; Third Division Award 10965. This Board has also suggested that an event which is neither sudden nor unforeseeable, such as a heavy snowstorm, is not an emergency that would permit bypassing senior employees. Third Division Award 29164. Similarly, this Board found that “a broken rail per se does not constitute an emergency.” Third Division Award 20310. Repairs that must be made with urgency do not constitute an emergency, as this Board has defined the term. The Carrier has not presented evidence to support its claim that this broken rail created an emergency.

The Carrier also asserts that Sinclair and Marcum, while junior, were the regular employees and entitled to the work pursuant to Rule 26(j) which provides,

**“WORK ON UNASSIGNED DAYS. Where work is required by the Carrier to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee.”**

The Carrier’s statement that Sinclair and Marcum were the regular employees assigned to do welding work and that welding work was needed to do the repair was not refuted by the Organization on this record. Based on the record before this Board, pursuant to Rule 26(j), the junior employees were the regular employees and were entitled to the overtime work, irrespective of the Claimants’ senior status.

**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 27th day of March 2019.**