

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43734
Docket No. MW-42801
19-3-NRAB-00003-140516**

The Third Division consisted of the regular members and in addition Referee Jeanne M. Vonhof when award was rendered.

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

PARTIES TO DISPUTE: (

**(Union Pacific Railroad Company (former Chicago
and North Western Transportation 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 Track Supervisor D. Schminkey to overtime service (track inspection work) between Mile Posts 19 and 20 on the Clinton Subdivision on August 11, 2013 and instead assigned Track Foreman J. Koeppen thereto (System File J-1331C-510/1591559 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant D. Schminkey shall now “*** be compensated for the hours of overtime that employee Koeppen worked performing track inspections on the Claimant’s territory, at the applicable overtime 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.

This is an overtime claim involving the Carrier's use of a Track Foreman to inspect track in territory where the Claimant, a Track Supervisor (or Track Inspector) was regularly assigned to perform the inspection work. On August 11, 2013 track inspection work was needed on the Clinton Subdivision in the vicinity of Dewitt, IA. after a collision between a train and an automobile, resulting in the halting of train traffic on one set of tracks. The Carrier assigned Track Foreman J. Koeppen to perform overtime work inspecting the track. The Organization argues that the Claimant should have been called and offered the opportunity to work the overtime before it was offered to a Track Foreman.

The Carrier argues that this was an emergency situation. According to the Carrier, the Claimant was called first for the overtime opportunity and when he did not answer, the Track Foreman was called.

The Organization argues that the Claimant was clearly entitled to the work, under the applicable Rules. In support of its position the Organization relies upon Rules 1, 2, 3, 4, 23, and 31.

Rules 3, 23 L and 31 state, in relevant part,

“RULE 3 – CLASSIFICATION OF WORK

- A. An employee below the rank of Assistance Roadmaster directing the work of Foreman and others as well as patrolling and inspecting track and roadway as well as work incidental thereto shall be classified as a Track Supervisor.

RULE 23 – WORK WEEK

- L. Work on unassigned days - Where work is required to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employee who shall otherwise not have 40 hours of work that week; in all other cases by the regular employee.**

RULE 31 – CALLS

- A. Employees called to perform work not continuous with regular work period shall be allowed a minimum of two hours and forty minutes at rate and one half, and if held on duty in excess of two hours and forty minutes shall be compensated on a minute basis for all time worked. When necessary to call employees under this rule, the senior available employees in the gang shall be called."**

The Claimant is a Track Supervisor, part of the class of employees whose regular duties under Rule 3 include patrolling and inspecting track and roadway, and performing work incidental to these duties. As the employee regularly assigned to perform the track inspection duties in this territory, the Claimant was the "regular employee" contemplated under Rule 23L who was entitled to the overtime track inspection work. There is no dispute that the Claimant was the senior employee under Rule 31. Under these rules the Claimant was entitled to the disputed overtime assignment ahead of junior employees and employees assigned within a different class.

The Carrier argues that an attempt was made to call the Claimant to offer him the work, and he did not answer. At that point, and given the emergency nature of the situation, the Carrier argues that it did not violate the Agreement when it called the Track Foreman to perform the work.

The Organization provided an email statement from the Claimant stating that he did not receive a call to perform this work. The Carrier provided a statement from Manager of Track Maintenance Jim Mart, who claims to have made the calls. He

stated that this was an emergency because traffic was stopped until the automobile was removed and the track inspected. He also stated that, "after calling with no answer to 2 other employees," he called "Jim," the Track Foreman who performed the work. Mart's statement does not identify by name the two employees he said that he called before he called the Track Foreman. The Carrier also provided the statement of another Manager of Track Maintenance Matt Moore who stated that Manager Mart called the Claimant first and when he did not reach the Claimant, called the next most senior (unnamed) employee with rights.

The Board concludes that this evidence is not sufficient to establish that the Carrier called the Claimant on the night in question to perform the overtime work. The Manager who made the calls has not stated that he called the Claimant that night; he stated only that he called "2 employees." The statement by a third party, another Manager, that the Claimant was called is not reliable because that Manager did not make the calls or explain how he knew that the Claimant had been called.

The Carrier argues that the conflicting statements of the Manager and the Claimant create at best an irreconcilable dispute which cannot be resolved by the Board. However, the Board concludes that because there is no statement in the record from the Manager who made the overtime calls that night that he in fact called the Claimant, the Carrier has not presented sufficient evidence even to give rise to an irreconcilable dispute in the facts. In a similar situation in Third Division Award 40891, (Referee Margo R. Newman) this Board ruled,

"Therefore, this case must be analyzed in the same manner as others where a prima facie case of a violation is presented by proving an Agreement preference to overtime and the Claimant's availability. See Third Division Award 40871.... This situation does not raise an irreconcilable dispute of fact, because we are unable to conclude that the Carrier sufficiently established its secondary affirmative defense that it met its obligation to offer the Claimant the overtime assignment and that the Claimant was unavailable. See Third Division Awards 36396 and 40406. Because there is insufficient direct evidence to overcome the Organization's prima facie case, the claim will be sustained. See Third Division Award 39670."

The Carrier argues that this was an emergency situation and that in emergency situations management has more latitude in assigning work. Third Division Award 20527 defined an emergency as "an unforeseen combination of circumstances which calls for immediate actions." The Organization argues that the Carrier has failed in its burden to establish that this was an emergency situation. The Organization provided a statement indicating that by the time Employee Koeppen arrived at the site, the automobile had been moved and he had to wait another 45 minutes to inspect the tracks until a replacement crew arrived to move the train which had collided with the automobile.

At the time that Management was making the telephone calls, there was an urgent need to inspect the tracks, after a collision, in order to reopen the track involved in the collision. However, the Carrier has not demonstrated why the emergency provided a reason not to call the Claimant for the overtime work. Awards of this Board have determined that even in emergency situations, the Carrier must make a reasonable effort to call and use employees in accordance with the rules of the Agreement. In Third Division Award 21222, this Board ruled,

"Even with the broad latitude permitted Carrier in an emergency situation, the application still persists to make a reasonable effort to call the employees provided by rule for the work, (See Awards 18425, 20109, 21090 and many others), prior to resorting to other expedients. Evidence of such effort is lacking in this dispute."

The Organization demonstrated that both the Claimant and the employee who performed the work lived about the same distance from Dewitt, about 80-90 miles, and it would take either one of them about an hour and a half to reach the accident site. Therefore, this was not a situation where calling the Track Foreman to perform the work ahead of the Claimant provided better staffing in an emergency situation. There was no benefit to calling the Track Foreman before the Track Inspector, even if there was an emergency situation. In addition, local Management recognized that it had the obligation to call the Claimant first.

The Organization has made out a prima facie case that the Claimant had a preference for the overtime assignment under the Rules of the Agreement, that he was available, and that the Carrier assigned the work to an employee of a different

class. The Carrier has not proven that it did call the Claimant first or that the urgent nature of the work provided a reasonable basis for not calling the Claimant. Therefore, the claim must be sustained.

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 18th day of June 2019.