

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 43770
Docket No. MW-42641
19-3-NRAB-00003-140325**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 assigned members of Interdivisional Gang 3742 to perform overtime track repair work on the Shoreline Subdivision on April 10, 2013 instead of regularly assigned Section Gang members R. Harrison, D. Braaten, D. De Witt, and S. Lehmann thereto (System File B-1331C-109/1585668 CNW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Harrison, D. Braaten, D. De Witt, and S. Lehmann shall “ *** each be compensated for an equal share of all hours of work, reportedly *forty (40) hours of overtime and forty (40) hours of double time*, as shown earlier in the claim, at the applicable rate of pay.’ (Emphasis in original.)”**

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 facts of the events that gave rise to this Claim are not in dispute. On April 9, 2013, Train LPA7909 derailed five cars at approximately Milepost 115.0 on the Shoreline Subdivision, near Cedarburg, Wisconsin. The impact of the derailment included over 650' of damaged track (rail, ties and ballast), a 36" steel culvert that had been smashed, and damage to the train cars. The line was out of service. In response, the Carrier marshaled its forces, including the Claimants, to restore service to the area as quickly as possible. A number of the Carrier's forces were assigned to work both overtime and double time on the project.

On May 14, 2013, the Organization filed this Claim, contending that on April 10, 2013, the Carrier failed to offer overtime work to the Claimants, who were regularly assigned to work in that area, and instead offered the overtime work to the employees of a seasonal Tie, Rail and Ballast gang, Interdivisional Gang 3742, which is not normally assigned to work in the area. According to the Organization, Claimants were sent home while five employees of the Gang continued to work, eight hours' overtime and eight hours' double time. As the regularly assigned employees performing work of the nature that was being performed, Claimants were entitled to be utilized before all other employees under Rule 23 and Rule 31.A and 31.B of the parties' Agreement. The Carrier has not established that an emergency warranting any exception to the requirements of the Agreement existed.

The Carrier argues that the Organization has failed to carry its burden of proof. First, there is no proof that Gang 3742 performed any work belonging to the Claimants, specifically any information regarding the location, work hours or description of the work performed by the Gang. Moreover, the work done to restore the Shoreline Subdivision to service following the derailment was not routine maintenance, but was undertaken in response to an emergency, where the Carrier has greater latitude to assign employees as needed. Payroll records establish that two of the Claimants worked their regular shifts plus eight hours of overtime while the other two worked their regular shifts plus a combined ten hours of overtime. Without the names of the Gang 3742

employees who worked when Claimants contend they were entitled to, it is impossible to determine their exact hours. However, a review of the Gang's payroll records establishes that no employee worked "eight hours overtime and eight hours double time." Finally, the relief sought is excessive: the Claimants all worked their regular shifts plus considerable overtime.

The Organization is correct that, in the ordinary course of events, the employees who are regularly assigned to work in an area are entitled under Rules 23 and 31 to be offered any overtime or double time work before it is offered to other employees:

"RULE 23 — WORK WEEK

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L. Work on unassigned days — Where work is required 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 shall otherwise not have 40 hours of work that week; in all other cases by the regular employees.

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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.

B. Double time compensation shall be allowed on an actual minute basis after sixteen (16) hours of work in any twenty-four (24) hour period, computed from the starting time of the employees' regular shift, or after sixteen (16) continuous hours of service."

But the critical qualifier here is "in the ordinary course of events." The April 9, 2013, derailment at Milepost 115.0 on the Shoreline Subdivision was hardly an ordinary event.

This Board has previously defined an emergency as "an unforeseen combination of circumstances which calls for immediate action." (Award 10965, cited in Third

Division Award No. 20527) The evidence in the record establishes that the April 9, 2013, derailment qualified as a genuine emergency. The record includes a statement from Chase Nichols, Director of Track Maintenance:

“This work was a derailment where the subdivision was OOS for 4 days due to this. During this time we can use employees how we need to restore service. Employees were set up in shifts and various employees received various amounts of OT during this time. In addition this work was not done on unassigned days which is what their claim is based on. The work was all done during the week. The only weekend OT was given to regular assigned employees to that territory.”

The record also includes a statement from James Nudera, Manager of Track Maintenance, which provides more insight into how employees were assigned:

“This was an emergency derailment on the mainline, and as far as I know everyone was asked to stay and work, and some persons refused. All the persons stated in this claim worked the derailment.”

As the Carrier stated in its August 15, 2013, denial of the Organization’s October 12, 2012, appeal, “... [T]his was a legitimate emergency derailment situation that knocked the subdivision out of service for four (4) days. The Carrier marshaled its forces and allocated them into shifts in order to work round the clock in order to remove the emergency in the shortest time possible. The Claimants worked their regular assigned shift and the overtime the [sic] followed, creating upwards of a sixteen (16) [hour] work day.” The Organization argues that the Carrier violated the Agreement when it did not offer Claimants the overtime that was offered to members of Gang 3742. The record includes a statement from the Claimants:

“As far as the derailment on the shoreline we were all working there. Managers then formed shifts and decided to use the interdivisional gang for the overnight work and sent them to rest and come in later. Paying them the extra money that we should have earned as the regular employees of the area. We lost a lot of money by them doing this to us. All of us that claimed this overtime did work our shift at the derailment site. It was just the wrong shift were [sic] we made less money than the interdivisional gang guys. None of us refused any work....”

The evidence in the record does not indicate who from Gang 3742 worked overtime or when they worked it, assuming they indeed worked overtime instead of straight time on the cleanup. From the statements in the record, it appears that Claimants were assigned the overtime immediately contiguous with their regularly assigned shifts and that they were disgruntled because they were not sent home and asked to return to work for an overnight shift that they believed would be more lucrative. First, there is no evidence in the record to demonstrate that the overnight shift would have been more lucrative. Second, Claimants each worked sixteen hours, and being assigned to the contiguous overtime shift is how they would have been assigned under ordinary circumstances. Finally, the Board has ruled in the past that:

“In this Division and in the other Divisions of the Board it is well established that the Carrier, in an emergency, has broader latitude in assigning work than under normal circumstances; in an emergency the Carrier may assign such employees as its judgment indicates are required and it is not compelled to follow normal Agreement procedures.” (Third Division Award No. 20527, Lieberman)

According to the Casualty Work Order for the derailment, the Carrier used three contractors and six train crews, in addition to Claimants and other employees regularly assigned to work in the area. The Carrier’s exercise of its discretion in how best to restore service as quickly as possible was reasonable, as was its decision regarding how to schedule its employees to work on the derailment. Employees were scheduled in shifts around the clock so that work on the cleanup could proceed continuously. The Claimants appear to believe that they are entitled to be offered any work around the clock until the emergency was over, but that would be patently unsafe. Claimants were assigned straight time and overtime during the week, and all weekend overtime.¹ The Carrier did not violate the Agreement.

AWARD

Claim denied.

¹ Payroll records indicate that Claimants Braaten and Ehrmann each worked 16 hours on April 10, while Claimants Harrison and DeWitt worked 13 hours each. All of the Claimants worked 18 hours on April 11, which means that they were paid for both overtime and double time on that date.

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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 16th day of July 2019.