

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 44334
Docket No. 44286
17-3-NRAB-00003-170330
20-3-NRAB-00003-190623

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

**(BROTHERHOOD OF MAINTENANCE OF WAY
(EMPLOYES DIVISION – IBT RAIL CONFERENCE**
PARTIES TO DISPUTE: (
(UNION PACIFIC RAILROAD COMPANY (former
Southern Pacific Western Lines)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when the Carrier assigned junior employees from System Gang 9092 to perform overtime work (track surfacing and lining) at Mile Post 535 in the Colton Yard at Bloomington, California on October 26, 2015 instead of assigning senior employees P. Reyes, A. Partida and R. Ayala thereto (System File T-1505S-920/1644796 SPW).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants P. Reyes, A. Partida and R. Ayala shall now each ‘... be compensated thirteen and one half (13.5) overtime hours worked by junior system gang employees on the dates described above because of the Agreement violations cited herein. ***”**

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, P. Reyes, A. Partida and R. Ayala have established seniority in the Carrier's Track Sub-department and were regularly assigned to their respective positions during the time relevant to this dispute. On December 8, 2015 the Organization filed this claim on their behalf alleging the Carrier used employees with less seniority than the Claimants to perform overtime track surfacing and lining work in connection with a derailment that occurred near Mile Post 535 in the Colton Yard at Bloomington, California. The Organization claims the junior employees were each compensated for thirteen and one-half hours of overtime pay. The parties were unable to resolve the matter after processing it in the normal and customary manner on property. This dispute is now properly before this Board for final adjudication.

The Organization argues the Claimants were entitled to the overtime work based on the benefits of their seniority and that the Carrier made no attempt to assign them. Instead the Carrier used employees with less seniority. Based on considerable arbitral precedence, the Organization maintains the Carrier has an obligation to at least make a reasonable attempt to contact employees according to seniority order and that it failed to do so in this situation.

The Organization claims the overtime work was completed approximately thirteen hours after the derailment. The Organization also contends the derailment occurred in the Colton Yard, which has over 100 tracks that could have been used to avoid delays. The Organization points out the one train that was delayed for 4.1 hours, could have used two other tracks to depart Colton yard. For all these reasons, the Organization argues the Carrier failed to prove its assertion the overtime work was in conjunction with an emergency situation.

Finally, the Organization contends the Claimants are entitled to the requested remedy. The Organization denies the Carrier's assertion the Claimants should be denied the remedy because they were working on the claim date. It cites numerous awards which have held that a) full employment is an insufficient defense to a

compensatory remedy and b) the Organization is free to name any claimant it chooses in an alleged Agreement violation.

The Carrier argues the Organization failed to meet its burden to prove each element of its claim. For instance, the Organization did not identify the junior employee(s) who performed the work or the number of hours they worked. The Carrier maintains the derailment occurred during normal business hours which caused a temporary closure on a main line and a delay in service of four hours. This was an emergency situation as contemplated by Rule 25 (b) of the Agreement. The Carrier argues several Third Division Boards have held the Carrier has greater latitude in the assignment of work in emergency situations.

There is no doubt seniority is one of the most important and valuable benefits earned by employees and one that must be respected by the employer. As held in Third Division Award 43531 (which cites Third Division Award 20527, 10965 and 29164), when the Organization proves claimants were more senior to the employees who were called to perform the claimed overtime work they are entitled to the work unless the Agreement permits the Carrier to assign other employees. The Carrier bears the burden of proving the derailment presented an emergency situation. If the Carrier successfully proves an emergency exists, it has greater latitude in calling employees for the repair work.

It is also well established that derailments by their very nature constitute an emergency, which has been defined by numerous Boards as “an unforeseen combination of circumstances that calls for immediate action.” (Third Division Awards 20527 and 10965) The Board has reviewed the record in its entirety, including all on-property correspondence, and finds the Carrier never refutes the Organization’s assertion the overtime repair work took place approximately thirteen hours after the derailment. The Carrier has therefore, failed to establish the overtime work was a circumstance that required immediate action. As such, the Board finds that the Carrier violated the Agreement when it failed to make any attempt to contact the Claimants to perform the overtime work at issue in this claim.

The Board is then left with the question of remedy. The Organization asks that the Claimants each receive thirteen and one-half hours at their over-time rate. The

Carrier argues the Claimants are not entitled to the requested remedy for a number of reasons. They were fully employed in their regular assignments and there is undisputed evidence that Partida and Reyes worked five hours of overtime and Ayala worked six hours of overtime on October 26, 2015. The Organization failed to identify the junior employees assigned to perform the work. Nor has the Organization provided any evidence of the number of hours worked. For these reasons, the Board does not award additional overtime payments.

AWARD

Claim sustained in accordance with the Findings.

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 January 2021.