

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 44336
Docket No. 44288
17-3-NRAB-00003-170332
20-3-NRAB-00003-190625

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 Agreement was violated when the Carrier assigned junior employees from Gang 8494 to perform overtime work at Mile Post 370 near Cameron, California on October 16 through 22, 2015 instead of assigning senior employees P. Reyes, A. Partida and R. Ayala thereto (System File T-1505S-921/1644797 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.

P. Reyes, A. Partida and R. Ayala (Claimants) have established and maintain 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 the instant claim on behalf of the Claimant alleging the Carrier violated the Agreement when it assigned overtime work conducted between October 16 and 22, 2015 to employees who had less seniority than the Claimants. 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.

It is undisputed there was a mudslide at or near Mile Post 370 near Cameron, California which caused track damage and rail service interruptions. The disputed overtime work involved a rail repair and resurfacing project.

The Organization disputes the Carrier's claim that the work involved emergency circumstances. It contends the tracks being worked on remained in service and that the overtime work took place days after the mudslide occurred. Even if the incident was an emergency, the Organization argues the Claimants were entitled to the overtime work based on the benefit of their seniority. The Organization denies Track Supervisor Travieso's assertion that work Gangs 8494, 8170 and 9092 were working on a rotating basis. It also contends the gangs often began at the same time of day during the relevant time period. The Organization maintains the Carrier made no attempt to assign the overtime work to the Claimants and instead allowed the junior employees to remain on the job when the Claimants were sent home.

The Organization argues the Claimants are entitled to the requested remedy: thirteen and one-half hours at their overtime rate for each day of the relevant time period. It disputes the Carrier's argument that the Claimants are not entitled because they were working on the claimed dates. The Organization cites numerous awards that held 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 claimed overtime work was performed in conjunction with an emergency situation as contemplated by Rule 25 (b) of the Agreement. The Carrier cites multiple awards from the Third Division which have held the Carrier has greater latitude when assigning work during emergency situations. The Carrier submitted a Train Held Report for the relevant time period showing that forty (40) trains reported being held or delayed for a total of 578.1 hours in support of its assertions the work was performed under emergency circumstances.

There is no doubt seniority is one of the most important and valuable benefits earned by employees and one which must be respected by the employer. When an Organization can establish claimants have more seniority than the employees called to perform the claimed overtime work, the Claimant are entitled to the work unless the Agreement permits the Carrier to assign other employees. (See Third Division Awards 43531, 20527, 10965 and 29164) The Carrier has the burden to prove the work was performed on an emergency basis. If the Carrier successfully proves an emergency exists, the Board must agree it has greater latitude when assigning employees to overtime work.

In the instant claim the Carrier successfully established the work was performed on an emergency basis. There can be no dispute that a mudslide fits the established definition of an emergency, “an unforeseen combination of circumstances that calls for immediate action.” (Third Division Awards 20527 and 10965). In this claim, unlike another claim before this Division (3-190624, Docket 44287) concerning the same time period, the Carrier presented extensive records which showed considerable train delays and service interruptions. Having established the emergency conditions existed, the Board agrees the Carrier had greater latitude to assign employees to the work. According to Travieso the work was being performed on a rotating basis. The Organization disputes Travieso’s assertion but does not provide documentation to substantiate its allegations. As has been held by numerous boards, the Organization must present concrete verifiable proof for each element of its claim.

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For all these reasons, the Board finds the Organization failed to present sufficient evidence the Carrier violated the Agreement and must deny the claim in its entirety.

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 January 2021.