Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13508
Docket No. 13349
00-2-98-2-35

The Second Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

(Brotherhood Railway Carmen Division
(Transportation Communications International Union
PARTIES TO DISPUTE: (
(Grand Trunk Western Railroad Incorporated

STATEMENT OF CLAIM:

"Claim of the Committee of the Union that:

1. That the Grand Trunk Western Railroad Company/CN violated the terms and conditions of the current Agreement on November 29, 1996 when Carman LeRoy Sexton was not properly compensated for the Holiday, the Friday after Thanksgiving. Carman Sexton's position was canceled for the holiday, then his position was filled by another employe who worked the complete shift. Carman Sexton was not given the opportunity to work his regular assignment.

2. That accordingly, the Grand Trunk Western Railroad Company/CN now be ordered to provide the following relief: That Carman LeRoy Sexton be compensated for an additional eight (8) hours pay at the rate of time and one half due to the fact that his assignment worked eight (8) hours on the holiday and he was [not] called for same."

FINDINGS:

The Second 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.

Claimant, a Freight Car Repairer/Freight Car Inspector assigned to the Car Department at Flint, Michigan, worked a regular position from 4:00 P.M. to Midnight, Monday through Friday on the Flint Repair Track at the time this dispute arose. On November 25, 1996, the District Mechanical Supervisor issued a bulletin advising Carmen personnel at that location that all repair work and certain Train Yard positions in the department would be suspended for Thanksgiving Day and the following Friday, November 29, both holidays. Five Carmen were scheduled to work their normal assignments on Thanksgiving, and four were designated to work the next day. The Claimant was not assigned to work either day. His normal assignment on Friday would have been as a Freight Car Inspector in the Train Yard.

At approximately 1:30 P.M. on November 29, 1996, District Mechanical Supervisor R. F. Miller called Carman R. J. Suchy from the Overtime Board to fill the Claimant's position on the second shift as a Yard Inspector as a result of a derailment at the location.

This claim, submitted on January 27, 1997 by the Organization on the Claimant's behalf, contends that the Carrier's failure to utilize the Claimant at holiday premium rates in lieu of Carman Suchy violated Rules 3 and 5 of the Agreement.

According to the Organization, the Parties' longstanding practice has been that whenever work develops on a position that has been annulled because of low holiday volume, and a need thereafter arises for manpower, the employee who normally works the position on which the work is required is called for the assignment.

The Carrier does not dispute the Claimant's general right to work his own position on the holiday. Indeed, it asserts that its action in assigning the five employees on Thanksgiving and the four on the following Friday to work their regular positions was entirely consistent with that policy. However, on this occasion when the derailment occurred the scenario changed. In this instance, Suchy was called on short notice in the face of an emergency resulting from a main line derailment. In such emergency situations, its practice has been to go to the incumbent if there are three or more hours

of advance notice, but if fewer, it calls the next senior available man because the positions are all fungible. Calling in seniority order, it maintains, is the safest way of avoiding quarrels and complaints.

Our starting point is the Organization's argument on an important operative fact: whether a true emergency was presented on November 29, 1996. The Organization argues that there is no evidence to support the Carrier's claim. There is some merit in the contention. The sole documentation of emergent conditions in this record appears to be the Carrier's early and persistent reliance on a "mainline derailment" necessitating additional manpower. On the other hand, the Organization made no showing either that such an incident did not occur, or if it did, that it did not constitute an emergency. As the moving party, it is the Organization's burden to produce persuasive proof on the point, and in its absence, the Carrier's representations on this fact issue must be credited.

That determination puts us squarely at the basic question of what the Rules dictate concerning who gets called on this property when an unexpected need arises for additional Carmen on a holiday after positions have been blanked. The Organization yokes its argument to Rule 3 and Rule 5 - Completion of Shifts. That reliance appears to the Board unavailing, as the sections of Rule 3 (a) cited merely establish the rate of pay for holiday work; (b) Section 1 of the August 19, 1960 National Agreement appearing in that Rule, while referencing "regularly assigned employees" is similarly a provision addressing rates of pay; and Rule 5, while referring to "employees assigned to work on holidays," is a rest provision and does not answer the question of who should be assigned to holiday work.

The Carrier's central argument is that the National Agreement itself makes no express provision for the circumstances presented here. Instead, the National Holiday Pay Agreement deals with the question of who stands for holiday work, leaving the issue to each individual property:

> "(d) Except as provided in this Section 5, existing rules and practices thereunder governing whether an employee works on a holiday and the payment for work performed on a holiday are not changed hereby."

The Carrier further contends that in the absence of an explicit Rule, its past practice of assigning such work to the senior regular employee, i. e., employees on the

Overtime Board in seniority order, governs. The Organization denies the existence of any such practice and points to the Carrier's "Rules Governing the Overtime Boards" as proof of a contrary controlling practice.

Based upon our reading of the Overtime Board guidelines, it is clear that they are silent on holiday work and shed no light on the historic practice of assigning it. Accordingly, we are unable to agree that they provide any basis for concluding anything in either direction on this key element of the claim.

On balance, the Board appears to be faced with an unresolved conflict of fact on a crucial aspect of the dispute. Because we cannot with any certainty determine what existing practices the parties have established for dealing with short notice holiday call-outs, we are unable to make a judgment as to whether the Agreement was violated and, by the rules of the Board, must dismiss the claim.

AWARD

Claim dismissed.

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 Second Division

Dated at Chicago, Illinois, this 17th day of April, 2000.

Labor Member's Dissent to
Award No. 13508
Docket No. 13349
(Referee J. Conway)

The above cited award contains a statement and position by the neutral that cannot go undisputed.

The claim involved the right of an employee to work the holiday if the position worked was assigned to the employee. The Carrier, in its denial of the claim, cited an emergency existed and therefore it called out from the overtime board. The neutral, in regards to the question of an emergency, makes the following statement:

> "Our starting point is the Organization's argument on an important operative fact: whether a true emergency was presented on November 29, 1996. The Organization argues that there is no evidence to support the Carrier's claim. There is some merit in the contention. The sole documentation of emergent conditions in this record appears to be the Carrier's early and persistent reliance on a "mainline derailment" necessitating additional manpower. On the other hand, the Organization made no showing either that such an incident did not occur, or if it did, that it did not constitute an emergency. As the moving party, it is the Organization's burden to produce persuasive proof on the point, and in its absence, the Carrier's representations on this fact issue must be credited."

We must adamantly and vehemently disagree with the position of the neutral. The definition of an emergency has been defined on numerous occasions and falls under the "affirmative defense" doctrine.

I quote from Second Division Award 5484:

> "Carrier's defense to this claim is that an "Emergency" existed which permitted Carrier to use Electrician Shannon rather than Claimant for the repair work on said trailers.
>
> In asserting that an "Emergency" existed, Carrier thus is raising an affirmative defense, and the burden is upon Carrier to prove such defense by competent evidence. No factual evidence was adduced by Carrier to support this allegation of an "Emergency". Mere assertions cannot be accepted as proof. Therefore, we must reject said contention of Carrier that an "Emergency" did exist in this instance."

Second Division Award 11086 reads as follows:

"In asserting that an emergency existed, the Carrier is thereby raising an affirmative defense and bears the burden of proving, by competent evidence, that the work was an emergency nature. (See Second Division Awards 5484 and 6252.) An examination of the record fails to show that the Carrier has fulfilled its obligation in that regard. The rerailing of five cars after eighteen hours was hardly the type of situation that constitutes an emergency. Moreover, the Carrier suspended operations at the derailment site on March 14 and waited until the first shift on March 15 to begin the operation again. That action on the part of the Carrier made it clear that the work involved did not require the immediate relief that an emergency situation demands. In the cases cited by the Carrier, most notably Second Division Awards 7246 and 6510, the Carriers provided extensive proof that emergencies existed so that any delay in performing the repairs would have had a significant, detrimental impact on the Carrier's operations. No such evidence was presented here in that regard. Therefore, the Claim must be sustained."

The Organization also refers to Labor Members Dissent to Award 33911 Docket 32307, Third Division which deals with a similar occurrence regarding an emergency condition.

The Organization can not stand idly by while a long established doctrine is wrongfully interpreted and we would hold that such doctrine cannot be overturned by one misguided interpretation.

Therefore, the statement in Award 13508 has no merit or standing as regards to the interpretation of an affirmative defense when an emergency argument is raised by a Carrier.

Alexander M. Novakovic
Labor Member