

Award No. 5425

Docket No. MW-5364

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

J. Glenn Donaldson, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

THE DELAWARE AND HUDSON RAILROAD CORPORATION

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood, that:

(1) The Carrier violated the agreement on May 16th and 19th, 1948, when it assigned employes holding seniority on Section H-10, to perform overtime service on Section H-11, and failed to call an available employe holding seniority on Section H-11;

(2) Trackman Frank Ruby, Section H-11, be allowed pay at the time and one-half rate for a period of two (2) hours and forty (40) minutes on each of the dates referred to in part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On Sunday, May 16, 1948, two (2) trackmen from Section H-10 were called to clear cattle from the track on Section H-11.

On Wednesday night, May 19, 1948, one Assistant Foreman and one Trackman from Section H-10, were called to clear cattle from the track on Section H-11.

The Assistant Foreman and three trackmen referred to above, hold no seniority on Section H-11.

Trackman Frank Ruby who is employed, and holds seniority as a Trackman on Section H-11 was available and willing to perform the above referred to work on May 16 and 19, 1948, had he been called.

The Carrier made no effort to call Trackman Frank Ruby to perform the work referred to above.

Claim was filed with the Carrier on behalf of Trackman Frank Ruby and claim was declined.

The agreement in effect between the two parties to this dispute, dated November 15, 1943, and subsequent amendments and interpretations are by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES: Rule 2 of the effective agreement reads as follows:

On May 19th an Assistant Foreman and trackman were called; both being qualified motor car operators and one having a key to toolhouse in which small motor car was located.

The employees called were paid two (2) hours and forty (40) minutes under Call Rule.

POSITION OF CARRIER: It is the Carrier's position that the presence of cattle on the track constituted an emergency which required immediate attention. When the Section Foreman was not available and none of the men in his gang, including claimant, were qualified motor car operators, it was necessary to use the men most readily available to take care of the situation. On both dates the employees called used the Track Supervisor's personal motor car to go to the location where the cattle were on the track.

Under the circumstances as they existed in this case, the Carrier contends claim should be denied. It is the Carrier's position that when the Section Foreman of Section H-11 could not be reached, the Track Supervisor protected the situation in a proper manner.

OPINION OF BOARD: Claim of Trackman Ruby, assigned to Section H-11, for call at rate of time and one-half for period of two hours and forty minutes on each of two days, Sunday and week night, when others were used to chase cattle from tracks on his section.

Failing to reach Foreman of Section H-11, who was the only employee on that section qualified to operate a track motor car, Carrier summoned two men from adjacent section, H-10, on each of the occasions stated. Both men called were qualified motor car operators, claimant was not. The Organization does not file claim because of the use of one such employee, it being recognized that one car operator was needed. However, the second employee was to be used only to assist in chasing the cattle once the trouble spot was reached and claimant was shown to have been available and capable of performing the task. The use of one other than claimant or some other trackman from Section H-11 was justified by Carrier upon the grounds that the second employee called had a key to the toolhouse in which the motor car used was stored. The claim is based upon the alleged violation of the Seniority Rules, Rules 2(a) and 3(b) and revised Rule 19, the Call Rule.

Being an emergency, Carrier could have relied with immunity upon men other than Maintenance of Way employees to correct the condition present on the dates in question. Electing, however, to use Maintenance of Way employees, Carrier was obligated to respect the seniority within the ranks of such Organization, (Awards 4841, 2341), at least to the extent permitted by the emergency. It is shown by the record that the eligible employee was available and could have been reached readily by telephone for work on his own section, hence no delay in correcting the dangerous condition would have ensued by his use.

Failure to use a trackman from the section involved in the emergency cannot be excused by Carrier's failure to distribute and have available keys to the toolhouse in which the motor car was located. We have previously held that a party's negligence or lack of foresight cannot excuse its violation of the rules (Award 4158).

That there were other trackmen on Section H-11 senior to claimant does not bar this claim. We have often ruled under like circumstances that the claim asserted and processed is valid and that Carrier will be protected from plural claims.

Revised Rule 19, dealing with calls as applied to the facts of this case, supports the time and one-half rate claimed.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employe involved in this dispute are respectively Carrier and Employe within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 8th day of August, 1951.