

Award No. 10513
Docket No. MW-9716

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION
(Supplemental)

David Dolnick, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
THE DELAWARE AND HUDSON RAILROAD CORPORATION

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

1. The Carrier violated the Agreement when it called and used the Foreman and two trackmen assigned to Section L-5 to perform overtime service on Section L-1 on December 20, 1955 instead of calling and using employees regularly assigned to Section L-1.

2. Foreman Simeon LaBombard and Trackmen Fred Blair and Arnold K. Wells each be allowed eight hours' pay at their respective overtime rates because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: As is generally customary on most railroads, this Carrier's property is divided into sections which are numbered. The section crews, consisting of a Foreman, occasionally an Assistant Foreman, and a varying number of Trackmen, are assigned to and responsible for the general maintenance of their individual sections.

Section Foremen's positions on each of such sections are obtained by making application for and being awarded individual positions as such which have been bulletined in accordance with Rule 27. After an employe has been awarded and assigned to a position as Section Foreman on a particular section, such Foreman cannot transfer to another Foreman's position, save and except when he has been displaced from the section to which assigned by bulletin, by a senior Section Foreman or unless and until he makes application for and is awarded a Section Foreman's position at some other section location which has been advertised by bulletin.

The seniority rights of Trackmen are restricted and confined to the individual gang on which employed in accordance with Rule 3(b).

Claimant Section Foreman and each of the claimant Trackmen were assigned to the section territory identified as Section L-1.

Foreman A. Buckland resides between Peru and Valcour, which is 4 miles from his headquarters at South Junction. Trackmen L. Shelters and A. Badger reside at Cadyville, which is 15 miles from their headquarters at South Junction.

The derailment in question occurred approximately 6 miles from Port Kent and 2½ miles from South Junction.

Attached, marked Exhibit "A", is photostatic copy of statement of Track Supervisor John F. Ryan concerning his efforts to call claimants.

POSITION OF CARRIER: It is the carrier's position that this derailment constituted an emergency which required prompt attention.

Every reasonable effort was made to call the Foreman and trackmen from Section L-1 and failing to contact them, the carrier was perfectly justified in calling and using the men most readily available to take care of the emergency.

Awards of the Third Division give support to the carrier's contention that it was justified in using these Section L-5 men after every reasonable effort to reach the men from Section L-1 had failed. Award 4200, Referee Carter, has been used as a controlling award on this issue in other cases before the Third Division and the following is quoted therefrom:

"Of course, if claimant could not be found after a reasonable attempt to contact him had been made, the Carrier would be justified in calling someone else."

Award 5887, Referee Yeager, stated in Opinion of Board, as follows:

"On the facts as disclosed and within the meaning of awards of this Division this was an emergency. The employes, or a sufficient number of them to perform the work, in the emergency were entitled to be called if by a reasonable effort to contact them they could be reached. If they could not be reached by a reasonable effort, then the Carrier was justified in calling and using others."

Carrier respectfully requests that claim be denied.

Management affirmatively states that all matters referred to in the foregoing have been discussed with the committee and made part of the particular question in dispute.

(Exhibits not reproduced.)

OPINION OF BOARD: A derailment occurred on Section L-1 at approximately 9:55 P. M. on Tuesday, December 20, 1955. Under the terms of the Agreement, the Carrier was obligated to call the Foreman and the gang employed on Section L-1 to perform the necessary emergency work occasioned by the derailment. The Claimants were the Foreman and Trackmen on Section L-1 who were eligible for such emergency work.

An affidavit, by Track Supervisor, John L. Ryan says that after he was notified of the derailment by the Dispatcher, he tried for 30 minutes "to get hold of Foreman S. LaBombard at his boarding place in Champlain, New York," but "could not get call through." The affidavit also says that the oper-

ator advised him that no one answered the call. He also "tried to locate Arnold Wells, but could not get any answer from his place." He then "asked the Dispatcher to call A. Buckland to get his men out to report at the wreck." Carrier's Ex Parte Submission says that Mr. Ryan also attempted to contact Trackman Fred Blair, but Mr. Ryan's affidavit does not state that fact.

LaBombard, Wells and Blair were all Section L-1 employees who were entitled to the work. A. Buckland was the Foreman and L. Shelters and A. Badger were Trackmen of Section L-5 who reported and performed the emergency work.

Each of the Claimants deny that they received a call to report; each has stated that they were at home available for such work. The record contains the following written statements:

1. S. LaBombard stated that he was at home the evening of December 20, 1955 and received no call from anyone to report for work. He went to bed at 11:00 P. M.

2. Johnny M. Lefebvre, the son of the householder with whom LaBombard roomed, stated that he was at home the evening of December 20, 1955, doing his school work until 11:45 P. M. when he went to bed. There was no phone call received for Mr. LaBombard. The telephone "was in good working condition."

3. Marius Lefebvre, the householder with whom LaBombard boarded, stated he was at home on December 20, 1955, "sitting near the telephone from 9:00 o'clock to about 11:00 P. M. and no call came through." There was "no telephone call for Simeon LaBombard from Track Supervisor Jack Ryan." His "phone was in working order."

4. Mrs. Marius Lefebvre, the wife of Marius Lefebvre, also stated that on December 20, 1955, "there was no telephone call that came from Jack Ryan, Track Supervisor, for Simeon LaBombard, as I had not gone to bed yet at 11:30 P. M. so no call came and our phone was o.k."

5. Fred A. Blair, Mrs. Fred Blair, Geraldine Blair and Shirley Blair, in a joint statement said: "On the evening of December the 20th, I was home with my family and received no phone call about the wreck. So I was not called to go to work."

6. Trackman Arnold K. Wells stated that he was at home all evening. He received no call "to report for railroad duty. His "telephone wasn't out of order either." He also said he had witnesses to prove that he was home.

7. Elbridge Thomas and Mrs. Elbridge Thomas said:

"My husband and I were down to Arnold Wells' the night of Dec. 20th from early evening until after twelve watching TV and there were no calls for him to report for work."

The Carrier has cited Awards 4200 (Carter), 5887 (Yeager), 8016 (Cluster) and others to justify its position that the Carrier made "every reasonable effort to call the Foreman and Trackmen from Section L-1." We do not believe that the Carrier made such a "reasonable effort." The preponderance of the evidence in the record is that the Claimants were at home

on the evening in question, and that they received no calls from Mr. Ryan, from the Dispatcher or from anyone. It is inconceivable that none of the three households had been reached; each of the Claimants then living in different villages. It is significant that Mr. Ryan's affidavit does not say that he or anyone else called Trackman Blair.

While the burden of proof is upon the Claimants, they have shown by a preponderance of evidence that they were available for the emergency derailment work on December 20, 1955. In Award 9689 (Elkouri), cited by the Carrier, this Board held that "the Record herein is in serious conflict as to whether Conductor Bell was available, and this Board has no means of resolving such conflicts in the Record." There is no such serious conflict in this Record. Disinterested persons as well as members of the Claimants' families have corroborated the statements of the Claimants that they were available. Again, we point to the Record that there is no convincing proof that Claimant Blair was called at any time by anyone.

Claimants seek to recover eight hours' pay at their respective overtime rates. This Board has ruled in a long line of Awards that where the Claimants have performed no work they may recover only straight time pay. See Awards 10190 (Daly), 10125 (Carey), 9764 (Fleming), 9748 (McMahon), 9681 (Elkouri), 9489 (Rose), 9393 (Hornbeck) and others. Irrespective of the logic and reason for this position, we are constrained to comment because of the trend and weight of authority on this subject.

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 Employees involved in this dispute are respectively Carrier and Employees 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 Carrier violated the Agreement.

AWARD

Claim is sustained at the straight time rate.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 11th day of April 1962.

CARRIER MEMBERS' DISSENT TO AWARD 10513, DOCKET MW-9716

The majority accepted the unsworn statements of so-called "disinterested persons" as well as members of the Claimants' families to prove the Claimants were available for emergency service on the date in question, in preference to the sworn statement of the Track Supervisor who had attempted to contact

the Claimants through a telephone operator without success. The "disinterested persons" were the landlord of one of the Claimants and the landlord's family, and friends of another of the Claimants who were allegedly visiting him on the evening in question. To classify these people as "disinterested persons" and to hold that the submission of unsworn statements by them must be given more weight than a sworn statement by Track Supervisors is "to strain at the gnat and swallow the camel". We certainly can not countenance treating a sworn statement so lightly. Perjury is a violation of the state criminal code and must be proven beyond a reasonable doubt. It certainly cannot be inferred on the strength of self-serving declarations. To hold, as the majority has done here by inference, that the affiant has perjured himself, on the strength of unsworn statements is, to our knowledge, without precedent and in utter disregard of all legal precepts.

It is one thing to say that an affidavit is too general or does not go to the issue involved, **Award 8193** (Wolff); or that an affidavit is not specific although this would not impugn its accuracy, **Award 8831** (Daugherty); it is quite another to imply the affidavit is not credible because there are several unsworn statements in conflict with it. In **Award 7004**, Referee Wyckoff, we said:

"The Organization contends that the charge was not proved beyond a reasonable doubt because 'one man said that four men were gambling and four men said they were not gambling.'

"Numerical superiority of witnesses certainly raises a doubt, but not necessarily a reasonable doubt. Corroborating circumstantial evidence or proof of faulty perception, bias or interest often resolves a conflict in favor of one man's testimony as against an array of witnesses."

The majority was made aware that we are not in a position to resolve disputed issues of fact, nevertheless they proceeded to do so on the premise that "there is no such serious conflict in this Record". A mere recitation of the facts involved herein repudiates this assertion. It would indeed be difficult to find a more classic example of a serious conflict of evidence. However, it is not essential for a dismissal or denial award that the conflict be serious, as is apparently implied by the majority. In **Award 9682**, Referee Elkouri, (who also assisted in the rendition of **Award 9689**, cited in the present award), we said:

"There is conflict in the Record relative to the work in dispute which allegedly was performed by the Agent on certain specified holidays. This Board has no method by which it can resolve conflicts in evidence.

"In view of the above considerations the Claim must be denied."

See also **Awards 6091** (Whiting), **8313**, **7720** (Cluster) and **9390**, **9947** (Rose).

The majority made much of the fact that Trackman Blair's name was not included in Supervisor Ryan's affidavit. They say this fact is significant. That well may be, but if it is deemed significant, it could only be so, if it was concluded that as to Trackman Blair, Supervisor Ryan could not swear that a bona fide attempt was made to contact him. It would necessarily follow from this "significant" fact that you must conclude he did attempt to contact the

other Claimants. Treated otherwise, the absence of his name from the affidavit has no significance.

While the majority has paid lip-service to the burden of proof principle, they have demonstrated by their findings in this case that this assertion is made without conviction.

For the reasons set forth hereinabove, we dissent.

/s/ W. F. Euker

/s/ R. E. Black

/s/ R. A. DeRossett

/s/ G. L. Naylor

/s/ O. B. Sayers