Award Number 17760
Docket Number MW-18345

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Charles W. Ellis, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when it called and used B&B employe J. W. Burke instead of Burro Crane Operator W. M. Robinson to operate Burro Crane No. 2700 on May 5, 1968. (System File E-357-2).

(2) Burro Crane Operator W. M. Robinson be allowed nine and one-half (9 1/2) hours of pay at his time and one-half rate because of the aforesaid violation.

EMPLOYES' STATEMENT OF FACTS: The claimant established and holds seniority as a crane operator in Rank 3 of the Track Subdepartment. He was regularly assigned to the position of operator of Burro Crane No. 2700 by Bulletin No. 1110-A. His work week extended from Monday through Friday (Saturdays and Sundays were rest days). For identification purposes, his position was designated as Gang No. 29. During the work week which ended on May 3, 1968, the claimant operated this crane in the vicinity of M.P. C-147 and he was to resume operating the crane at that same location on Monday morning, May 6, 1968.

On Sunday, May 5, 1968, a derailment occurred at Mile C-147, causing certain track damage. The Carrier's Division Engineer determined that the utilization of a crane would expedite the repair work at the drailment and he decided to use the aforementioned Burro Crane No. 2700. Instead of calling and using the claimant to move the crane to the derailment site and to operate it thereat, the Carrier called and used a Bridge and Building Subdepartment crane operator, who does not hold any seniority within the Track Subdepartment, to perform the work. The B&B crane operator consumed nine and one-half (9 1/2) hours in the performance of the work.

The claimant, who had expressed a desire to be considered for calls by registering his telephone number with the proper Carrier officers in accordance with the provisions of Rule 30(b), was available, willing and indisputably qualified to operate the crane but the Carrier did not make any attempt to call him and give him the opportunity to do so.

Claim was timely and properly presented and handled by the Employes at all stages of appeal up to and including the Carrier's highest appellate officer.

tion that in view of the emergency conditions existing at the time that there was no basis for the claim, and it was, therefore, declined. Correspondence exchanged in connection with the claim is shown by Carrier's Exhibits "AA" through "II".

There is on file with the Third Division a copy of the current working rules agreement, and, by reference, it is made a part of this submission.

(Exhibits Not Reproduced)

OPINION OF BOARD: On Sunday May 5, 1968, a derailment occurred on Carrier's track. It was determined that Burro Crane No. 2700 was needed to clear the track. Claimant, who is the regular operator of Burro Crane No. 2700 lives 150 miles from the site of the derailment. For this reason employe J. W. Burke, who lives 20 miles from the site of the derailment was called to operate the Burro Crane. There is no dispute that the situation constituted an emergency.

Organization bases it's claim upon Rule 30 (b) and (g) which read:

"Rule 30(b) Employes, who desire to be considered for calls under Rule 31, will provide the means by which they may be contacted by telephone, or otherwise, and will register their telephone number with their foremen or immediate supervisory officer. Of those so registered, calls will be made in seniority order as the need arises.

"A reasonable effort must be made to contact the senior employe so registered, before proceeding to the next employe on the register. Except for section men living within hailing distance of either their foreman's living quarters or their tool house or headquarters station, and for men living in camp cars when they are present at the camp cars, an employe not registered as above shall not have any claim on account of not being worked on calls."

* * * * *

"Rule 30(g) Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

It is undisputed that the Claimant notified the Carrier of his desire to be called for overtime work by registering his telephone number with the proper Carrier officers as required under the above rule. The Rules provide no exception to the quoted provision in case of an emergency but Carrier cites a line of cases which generally hold that Carrier has wide latitude in dealing with emergencies and thus is relieved of any obligation to call or pay Claimant in this case. Award 17524 (Rohman), Award 15846 (Engelstein), Award 9394 (Hornbeck), Award 13316 (Hamilton), Award 13856 (Mesigh), Award 15597 (Ives), Award 14372 (Zumas), Award 16754 (Zack), and others.

We hesitate to hold contrary to the decisions of such a substantial list of cases but we are not convinced that the logic of those cases fits the situation as it actually exists.

The underlying logic of those cases is that an emergency is an unexpected and unforeseeable act of nature which Carrier had no control over and thus Carrier should not be made to suffer any extra expense because of it. This logic seems to ignore the fact that in the present free enterprise system

it is the Carrier that is expected to bear the risk of loss just as it is expected to reap the benefits of profit.

We can no more require the employe to share the burden of loss with the Carrier, in the absence of a contractual provision, than we can require the Carrier to share the profits with the employes, in the absence of contractual provisions.

The agreement makes no exception to the rule in case of emergency so Claimant was entitled to the benefit of the bargain. He can no more be expected to forego that benefit than could a independent Burro Crane operator be expected to forego his contract fee or a shipper be expected to forego his right to prompt delivery, in the absence of contractual provisions.

This is not to say that the Carrier did not make the right managerial decision in calling an employee other than the Claimant, this is merely to say that Claimant's right to overtime, if he is not called, must be treated as an extra expense pertaining to the emergency just as any other extra expense which the Carrier is put to in cases of emergencies. The Carrier relief from his extra expense is at the bargaining table and not before this Board.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

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

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 9th day of March 1970.

CARRIER MEMBERS' DISSENT TO AWARD 17760, DOCKET MW-18345

(Referee Ellis)

The conclusions of the Referee in Award 17760 are foreign to logic, not supported by the record, the rules of the applicable agreement or precedent awards interpreting the very rules involved in the dispute.

The dispute as handled on the property and as submitted to this Board was that, notwithstanding an emergency situation existed, the Claimant, who lived approximately 150 miles from the site of the derailment, should have been called and used to operate the crane to assist in clearing the main line.

It is the function of this Board to decide disputes in the light of the facts, the rules involved, and the evidence properly submitted by the parties. It is not the function of any referee to inject into a dispute any pet theory that he may have concerning economics. The Claimant herein was not available by reason of the distance from his residence to the site of the derailment. As stated in Award 13562 (Hutchins), "The employes cannot enforce a contract they could not have performed." See also Awards 13821 (Engelstein), 13934 (Dorsey), among others.

The Referee admits that a long line of awards of the Division, some of which he has cited, and involve the same parties, are to the effect that a Carrier may take any action deemed necessary to cope with an emergency. (Awards 15846-Engelstein, 15597-Ives, 14372-Zumas, 16754-Zack, 12537-Yagoda, involving the same parties; Awards 15998-Heskett, 13906-O'Gallagher, 12519, 12520-West, involving the same Carrier and another Organization; and Awards 9394-Hornbeck, 13085-Ables, 13316-Hamilton, 13856-Mesigh, and 17524-Rohman, among many others, involving other parties.)

The case law of the Division was expressed by Referee Coburn in Award 12240 as:

> "Where, as here, the Board is confronted with a long line of precedents which first postulate and then maintain a consistent interpretation of contract language we should refrain from disturbing what ought to be a settled matter."

and in Award 11788 (Dorsey):

> "We have no hesitation or compunctions in reversing prior Awards when we are convinced they are palpably wrong. But, we cannot and do not lightly regard precedent Awards; for, if we did so, it would not engender the prompt and orderly settlement of disputes on the property within the contemplation of Section 2 (4) and (5) of The Railway Labor Act, herein called the Act. The possibility that if the issue was before us in a case of first impression, we might have decided it differently, is not enough to justify reversal of precedent Awards. Only if in law and in fact a prior Award finds no support should we reverse it. Certainly, where a provision of an Agreement permits more than one interpretation, we must presume that the Division, in its deliberations, considered all of them before making its selective determination. We should not at a later date, with a different referee participating, substitute our judgment for that in a precedent Award unless we are unequivocally convinced and can find that the prior judgment is without support. To apply any other test would be to foster uncertainty in the Employe-Carrier relationships in derogation of the objectives of the Act."

In Award 10911 (Boyd) we held:

> "When the Division has previously considered and disposed of a dispute involving the same parties, the same rule and similar facts presenting the same issue as is now before the Division the prior decisions should control. Any other standard would lead to chaos." to chaos."

See also Awards 12669 (Ives), 12645 (McGovern), 13101 (Hall), 15545 (Dorsey), among others.

With the many awards by experienced and capable referees adhering to the principle that under emergency situations, the Carrier may assign such employes as good judgment dictates, we are confident that the erroneous dicta in Award 17760 will not be followed in the future, but as the Award is palpably erroneous and may possibly tend to generate more disputes on matters that are well settled, we must register our most vigorous dissent thereto.

/s/ P. C. CARTER
P. C. Carter

/s/ G. C. WHITE
G. C. White

/s/ R. E. BLACK
R. E. Black

/s/ W. B. JONES
W. B. Jones

/s/ G. L. NAYLOR
G. L. Naylor

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