

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number **20083**
Docket Number **MW-19928**

Frederick R. **Blackwell**, Referee

(Brotherhood of Maintenance of Way **Employees**

PARTIES TO DISPUTE: (

(Burlington Northern Inc. (formerly Chicago, Burlington
& **Quincy Railroad** Company)

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

(1) The Carrier violated the Agreement when, on February 19, 24, 25, 26, March 1, 2, 3, 4, 8 and 24, 1971, it used a **B&B** foreman and two (2) **B&B** mechanics from the **Creston** Zone to perform **B&B** work on the St. Joseph Zone of the **Ottumwa** Division (System File **27-3/MW-84** (i), 7-7-71).

(2) Each **B&B employee*** holding seniority on the **St. Joseph** Zone of the **Ottumwa** Division and assigned to **B&B** Gangs 1, 2 or 5 on the claim dates be allowed pay at their respective straight time rates for an equal proportionate share of the total number of man hours expended by **Creston** Zone **B&B** forces in performing the work mentioned in Part (1) of this claim.

*Each claimant was identified by name in Attachment A to the letter of claim presentation and to the appeal letter.

OPINION OF BOARD: The Claimants hold seniority on the **St. Joseph** Zone Seniority District in Group 4 of the Maintenance of Way **B&B** Department. On the claim dates the Carrier used **B&B** employees from the **Creston** Seniority Zone to repair a bridge on the **St. Joseph** Zone. The Employees allege that such action by Carrier violated the agreement, because the **Creston** Zone employees hold no seniority on the **St. Joseph** Zone and because the Claimants were available to make the bridge repair. The Carrier's defense, inter alia, is that its use of the **Creston** Zone employees was warranted by an emergency involving rising water, ice breakage, and an accumulation of ice and drift which damaged the bridge to the extent that it had to be taken out of service. Carrier further asserts that the Claimants were engaged in other similar emergency work when the disputed work was performed.

In their **Ex Parte** Submission the Employees challenge the Carrier's contentions concerning the existence of an emergency and the non-availability of the Claimants; specifically, the Employees point out that no overtime was worked during the bridge repair, that rest days were observed, and that the repair was not made on consecutive work days. **However**, the Carrier states that no such challenge was made on the property and that, consequently, the Carrier's contentions must be accepted as fact by this Board. In support of this contention the Carrier calls attention to several Awards, including Award No. 15503 (House) wherein this Board stated:

"Carrier in its letter of March 10, 1965 denying the claim stated among other things that it had been the practice of many years that a portion of work of the kind involved had been contracted out. There is nothing **to** show that Brotherhood ever denied this on the property; Brotherhood denied it as a fact for the first time in its Ex Parte Submission, too late for the factual issue the denial creates to be resolved by evidence properly in this record; therefore, the assertion of Carrier in its letter of March 10, 1965 is adopted by us as the fact. And Brotherhood, we find, had had at least constructive knowledge of the fact."

See also Award Nos. 14385 and 16431.

Analysis of the whole record shows that, during the handling of the claim on the property, the Employees did not deny **or** challenge Carrier's contentions concerning an emergency and the Claimants non-availability. **Their** first challenge of these contentions appear in the Employees' Ex Parte Submission. In these circumstances we must accept the Carrier's contentions as fact which, in turn, means that the Carrier has established a valid defense to the claim. Award Nos. 15503, 14385, and 16431. We shall therefore deny the claim.

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 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 Agreement was not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:


Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1974.