NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20827
THIRD DMSION Docket Number CL-20899

Louis Norris, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks. Freight Handlers. Express end Station Employes
(The Atchison, Topeka and Santa Fe Railway company - western Lines -

STATEMENTOFCLAIM: Claim of the System Committee of the Brotherhood (GL-7701) that:

(a) Carrier violated the rules of the current Clerks' Agreement at Wellington, Kansas, on June 27, 1971, when it refused to call Mr. H. W. Glaze to protect a short vacancy on Car Clerk Position No. 4005, Wellington, Kansas, in line with hi8 request under Rule 14-D-2 of the current Clerks' Agreement.

(b) Mr. H. W. Glaze shall now be compensated twelve (12) hours pay at the pro rata rate of Car Clerk Position No. 4005, Wellington, Kansas, this in addition to any other pay he may have received on above-mentioned date.

OPINION OF BOARD: In this dispute it is the claim of Petitioner that Carrier violated Rule 14-D-2 of the current Agreement (later corrected to 14-E-2 without objection), when it refused to call Claimant to protect a short vacancy on Car Clerk Position No. 4005, Wellington, Kansas, in line with his request under said Rule. Payment is demanded for 12 hours pay at the applicable pro rata rate in addition to any other Day Claimant may have been entitled to receive on said date.

It is conceded by Carrier: (1) that such vacancy existed on June 27, 1971; (2) that the sequence provided in Rule 14 had beta exhausted without providing an occupant for said Position; (3) that Claimant then became the senior employee with a written request on flle protecting the short vacancy in said Position; and (4) that Carrier was then obligated to cell Claimant to fill such vacancy on said date.

Also, there is no dispute as to the applicability of Rule 14 which, in effect, provides that Carrier shall fill such vacancies "by calling" the senior qualified employe available.

Carrier contend8 that it fulfilled its obligation under Rule 14 "to call" Claimant when it dialed his telephone number. In fact, this telephone number had been disconnected. However, Claimant 's residence address was on file with Carrier and was approximat·ly oat mile away from tht job site. In these circumstances, Petitioner argues, some further "reasonable effort" was required of Carrier to contact Claimant at the senior qualified employee available.

It is Carrier's contention that Claimant was no longer "available" once his phone was disconnected, that It was not required to make :n, Further attempt to communicate with him relative to filling the vacancy, and that it was then at liberty to call the next available qualified employee.

In support of its position Carrier urges initially that an "emergency situation" existed by virtue of the fact that there was only "one hour and ten minutes before Position 4005 was due to start". Petitioner contends, however, that such "emergency" issue was not raised on the property and accordingly cannot be considered by this Board de novo at part of the appellate process. This rule of proctdurt has been vigorously urged upon the Board, in prior disputes, by both Carrier and Organization. Absent unusual and compelling cicumstances, this principle merits consistent adherence and we therfort apply it to this dispute.

See Award Nos. 11178 (Ray), 11027 (Hall), 11432 (Rose), 14917 (Kabaker), 11617 (Coburn) and 13060 (Engelstein).

Additionally, there is no probative evidence in the record establishing that the period of one hour and ten minutes before the position was to start work constituted an emergency situation in end of itself. Nor do prior Awards cited by Carrier establish such concept, for these Awards relate to "bona fide" emergencies.

Thus, in Awards 5944 (Douglass) and 14838 (Zack), severe snowstorms had occurred and it was held that under such bona fide emergency conditions wider latitude should be afforded Carrier. Similarly, in 19140 (Franden) a derailment had occurred. (Also, in the latter case, Claimant had no phone and the Foreman did not know where he lived). Finally, in 10376 (McDermott) less than one half hour was available in which to fill the vacant position, and the claim was denied "in view of the time element".

Accordingly, based on the record and the applicable authorities cited above, Carrier's contention that an "emergency" existed is rejected.

We proceed, therefore, to Carrier's major contention that it fulfilled its obligations under the Agreement, and that it was required to do nothing else once it dialed Claimant's telephone and found it disconnected. Carrier seeks to bolster its position on this issue by citing the following prior Awards as precedent. Each of these cases, however, is distinguishable from the facts involved in the instant dispute.

In 13173 (Wolf) Carrier did not have Claimant's telephone number or his current address; It was therefore free to call the employee next in line. The same conclusion applies to 14739 (Dugan) where Claimant did not answer his telephone and Carrier had a right to assume that he was not at home. Similarly, in 16779 (Cartwright) Claimant's baby sitter answered the phone for he was not at home; therefore, not available. And in Award No. 16, Public Law Board 300, (Moore) " - - - claimant did not have on file with Carrier his address or telephone number where he could be called".

In each of these cases, therefore, Carrier was found without fault in calling the next available employee either because claimant was clearly "not at home" or because neither his current telephone number nor his current residence address was on file with Carrier. This is not the case here, for although Claimant's telephone had been disconnected, the fact is that his current residence address (one mile away) was on file with Carrier. He asserts that he was at home and therefore available.

Carrier further urges that there is no rule in the Agreement which requires it to "seek au employe out and find him", and that this Board has no power to rewrite the Agreement between the parties, citing Award Nos. 10994 (Hall), 8676 (Vokoun), and others. We do not disagree with these precedents, nor do we hold here that the Carrier is required "to seek an employe out and find him". Conversely, however, we are not authorized to rewrite the Agreement to say that availability in such situations hinges on a requirement that the employee must have a telephone. There is no provision to that effect in the current Agreement.

In the latter respect, therefore, the fact that Claimant's telephone was disconnected places him in no better or worse situation than if he had no telephone at all. In either case, Carrier would be faced with the realization that it was unable to "to call" him by phone. This brings us to the heart of this case. Claimant lived one mile away; he could be reached personally within a matter of ten or fifteen minutes. Was Carrier therefore required to make "further reasonable effort" to contact Claimant.

Petitioner urges the Board to rule in the affirmative on this issue and cites the following Awards as controlling:

In 15487 (Kabaker) claimant resided seven blocks from his job site, did not have a telephone, but was at home. Carrier contended he was not "reasonably available" since he had no phone. This Board held as follows:

> "The Board must conclude that the Claimant was reasonably available and was entitled to be given preference for the call for work.
>
> "This conclusion is supported by the facts that establish that: Claimant resided in close proximity to his work headquarters; Carrier made no effort to call or reach Claimant to advise him of work opportunity although Claimant wss at home and available for work on day in question; no contractual provision in Agreement requires Claimant to have a telephone; record contains no facts relieving Carrier of its obligation to call Claimant nor has justification been shown for its failure to do so; Carrier did not disprove Organization's assertion that practice exists whereby employes have been contacted personally in the past.
>
> "Numerous awards of this Board are supportive of the conclusions herein. See Awards 4200 (Carter). 6756 (Parker), 13974 (House), 14917 (Kabaker), 14464 (Kabaker)."

In 13974 (House) claimant had no phone but lived "reasonably close" to Carrier's headquarters. Carrier made no effort to call and took the position that claimant was "not available" because he had no phone. Carrier argued that a "heavy burden" would be placed on it if it had to call senior employes "other than by telephone". This Board held as follows:

> " - - - every contract obligation imposes some burden, but fear that it may become an unreasonable burden, does not permit disregarding of the obligation. The fact is that Carrier made no effort to call Claimant who had listed himself as available for the involved work and wbo lived reasonably close to the headquarters frw which he had to be called. We will sustain the Claim."

In 3292 (Simmons) Carrier admitted its obligation under the Agreement "to call" claimant, but maintained that the making of the call was impossible and excused because telephone communication service was unavailable. This Board did not agree and sustained the claim, holding that:

> "Under the rule the duty to make the call rests on the Carrier, the duty to respond rests on the employe. Carrier pleads an impossibility of making the call. Such a situation as existed does not fall in the category of an impossibility that excused performance. The making of the call was possible but not practical. It was not the duty of the employe to furnish a practical means to the Carrier. That duty rested on the Carrier. It having contracted to make the call, and not having done so, must respond in the payment which the rules require." (Emphasis supplied).

In 4200 (Carter) claimant did not have a telephone, but "was only three or four miles away from his home station, not an unreasonable distance under modern methods of transportation". We held in that case that Carrier's failure "to contact Claimant" ignored his seniority rights. Similarly, in 4841 (Carter) Carrier failed to call claimant although he Lived 3.64 miles from the job site. This claim was sustained on the basis of the reasoning in Award No. 4200, supra.

The controlling principles enunciated in the last quoted series of Awards bear directly and pointedly upon the instant dispute. The Agreement requires Carrier "to call" the senior qualified available employee, but does not specify how the call is. CO be made. Nor does the Agreement require that the employee must have a telephone to be "available". As for the distance factor, Claimant's residence of one mile from the job site is well within the 3.64 miles and three to four miles sustained in the Last quoted Awards. We conclude, therefore, that once Carrier called Claimant and found his telephone to have been disconnected, the duty remained "to call" Claimant by other practical means. "That duty rested on the Carrier". (See Award 3292, supra, among others. )

Accordingly, based on the record evidence and the pertinent authorities cited above, we sustain the claim.

We emphasize that the foregoing findings in this dispute are not intended as precedent requiring the Carrier "to seek an employe out and find him". Rather are we inclined to the conclusion that disputes such as these must be decided on their own special facts and circumstances, with particular emphasis on the pertinent rules of the Agreement and upon the specific "time" and "distance" factors prevailing in each case.

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 the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: G. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1975.