NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 21224
THIRD DIVISION Docket Number EM-21193

Irwin M. Lieberman, Referee

PAKCIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Port Terminal Railroad Association

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

(1) The Carrier violated the Agreement when it used outside forces to perform track work between Fennel1 Street and Broadway Street on January 15, 1974 instead of calling and using its available off-duty Track Department employes (System File MW-74-10).

(2) Track Foreman F. Ross and Trackmen R. Hill, J. Carter, J. L. Hickman, W. Eason, J. Ellison, J. Adome, J. Peres, K. Thomas, G. Mejia and M. Perez each be allowed nine (9) hours and forty-five (45) minutes of pay at their respective time and one-half rates because of the violation referred to in Part (1) hereof.

OPINION OF BOARD: On January 15, 1974, a derailment occurred at about 6:00 P.M. blocking Carrier's main line. Carrier attempted to contact its Maintenance of Way Forces to assist in the clearing of the tracks but asserts that by 8:00 P.M. it had only successfully secured 20 men (3 foremen, 1 machine operator and 16 laborers),. Shortly after 8:00 P.M. Carrier secured the services of an outside contractor who sent ten men and a foreman arriving at the scene of the wreck at 9:45 P.M. and working until 7:30 A.M. Claim was instituted in behalf of eleven Track Department employes who said they did not receive a call to report for the work in question.

Carrier's defense is based on the fact of an emergency which justified the use of outside forces when its own employes were not readily available. Further Carrier asserts that a reasonable effort was wade to call all its track employes but to no avail. It is pointed out that the use of outside forces was an expensive alternative and not desirable for Carrier.

Petitioner argues that it presented evidence, in the form of sworn affidavits, that ten out of the eleven Claimants herein were home and available for work from 6:00 P.M. on January 15th until the next morning, and that Carrier presented no evidence that they were called. Based on the handling on the property and the lack of any substantiation by the Carrier that the Claimants had been called, Petitioner asserts that the Claim must be sustained.

The case turns on the question of whether Carrier's own forces were not readily available, thus justifying the use of outside employes during the emergency situation. While it is true that Carrier has considerable latitude in assigning forces during an emergency it still has responsibility to use

reasonable diligence in an effort to secure its own employes prior to using non-agreement forces. The Organization has presented uncontroverted evidence that ten Claimants were available from 6:00 P.M. on and were not called. Carrier, on the other hand, has only presented (on the property) unsupported general statements that they had tried to contact all maintenance of way employes. There is no direct evidence concerning calls to any of the Claimants herein. In Award 20109, involving the same parties we held, in sustaining a Claim:

> "On the facts before us we are not convinced that the requisite reasonable effort was wade by Carrier to contact Claimant before calling and using another employe in his position."

Similarly, in this dispute we have no evidence whatever that an effort was made to call Claimants; we merely find a general third party statement that all maintenance-of-way, employes were called. Even with the time pressures of an emergency and the latitude accorded to Carrier it must present some specific evidence to support its use of outside forces; it must show that it wade an attempt to call its own employes. This it has failed to do in this dispute: it has not met its burden of proof. The Claim will be sustained with respect to the tan employes who presented evidence of their availability.

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 to the extent indicated above.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 31st day of August 1976.