

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23032
Docket Number MW-22952

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: { **Brotherhood of Maintenance of Way Employees**
{ **The Denver and Rio Grande Western Railroad Company**

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

(1) The Carrier violated the Agreement when **it assigned** Section Laborers, Raymond Guccione and K. D. **Armenta**, from the Salide Section to perform track work on the Malta Section instead of Malta Section **Laborers**, J. J. **Salazar** and E. A. **Giron**, from 9:00 A.M. to 2:00 P.M. on October 16, 1977. (System File D-43-77/MW-10-78)

(2) Section Laborers J. J. **Salazar** and E. A. **Giron** each be allowed pay at their respective overtime rates **for an equal** proportionate share of the total number of man hours worked by the Section Laborers from the Salide Section, referred to above."

OPINION OF BOARD: Claimants were section *laborers assigned* to carrier's Malta Section. On Sunday, **October 16, 1977**, a car **derailed** at Mile Post 271, which **was** within the **assigned** Malta Section. Carrier called the section foreman from the **Salida Section** to **rerail** the car. He, in turn, **called** two laborers *from* the **Salida Section** to complete the *work*. Claimants allege that they were available for work on the day **in question**, that the work to be done was in the Malta Section, and that they had the right to do it. They filed the claim **requesting five (5) hours** at the punitive rate. Carrier denied the **claim** and **it has** been forwarded to this board for resolution.

The organization alleges that carrier violated the controlling agreement by not calling claimants to do work on their section. It cites Rule 15 (j) as its basis *for* this claim. That rule **reads in** pertinent part as follows:

• **"Work on Unassigned Days.** **Where** work **is** required by the company to be performed on a day which is not a part of any assignment it may be performed by an available extra or unassigned employee who will otherwise not **have** forty **(40)** hours of work that week; **in** all **other cases** by the regular **employee.**"

The organization argues that this rule leaves no latitude for carrier in this case. if no extra men were available, claimants, as regular employees, had a right to be called to do the emergency **work** on their section.

Carrier **claims** the foreman who was **called** did **not** have claimants' phone numbers. He therefore called two men from his own section, Selide. Carrier also **claims** that the required **work was** emergency work and, as such, carrier was not obligated to call **claimants**. **In** accordance with Rule 4, Classification Rule, **employees** from seniority groups, other than regular employees, can be used in emergency **situations**. The **derailment** on October 16, 1977 was an emergency. Thus, carrier was not required to call **claimants**.

A review of the record of this case and of the many **awards** cited on this point persuades this board that carrier did, **In** fact, violate the agreement when it failed to **call** claimants for the over-time work **in** the Malta Section on October 16, 1977. There is no question that Rule 15 (j), the rule that is operative **In** this case, requires that claimants, as regular employees should have been called, given the facts presented **here**.

As to the carrier's statement that the foreman did not have claimants' **telephone** numbers **and was** therefore unable to call them, this board **Is** not impressed with this argument. First, the record of this case is not clear as to whether claimants' **home** numbers were available to the **Salida** Section foreman. What **is** clear, however, is that he made no attempt to try and contact them. Carrier **has** a greeter **obligation** in such cases. It cannot **merely** say, "The phone numbers are not available; therefore, the men need not **be** called for the work." This **board**, and **particularly** this division, has consistently held that **carriers** must make a reasonable effort to call men to work, even **In** emergency situations, **before** the men can be bypassed. No showing **is** evident in the record before us that any effort **wee** made **by carrier to** contact claimants.

Carrier also argued that given the fact that an **emergency** existed, it had the **right** to call those who could be reached **moat** easily. While **this** issue need not be discussed here, the board does think that It should **be** noted that when **carrier raises a** defense of emergency, It is incumbent **on carrier** to **prove** that an emergency exists. A mere assertion **in the** record **is** not sufficient to result in such **en** action. **There is** no such showing **in** the record of this **case**; it **contains** only assertions, there **are** no facts to support it.

Carrier submitted e recent Third **Division** decision (Award **No. 22948 - Scheinman**) for **consideration** in this matter. A careful review of that award reveals it is totally out of phase with the facts of this **case**. In that award, a legitimate emergency existed. The section foreman had no way of knowing **that** claimant should **have** been called or how to get in touch with him. In considering the instant case before the board, it must be concluded that no emergency existed and **that** the foreman made no attempt to contact claimants. **There** is, however, e legitimate question in the record as to the **availability** of **claimants'** phone **numbers**. The two are **quite different cases** and Award **22948** cannot be considered on point here.

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 Employer involved **in** this **dispute** are respectively Carrier and **Employees** within the **meaning of** the **Railway** Labor Act, es approved June 21, **1934**;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD **ADJUSTMENT** BOARD
By Order of **Third** Division

ATTEST:


Executive Secretary

Dated at Chicago, **Illinois**, this 28th day of October 1980.