

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23401
Docket Number MW-23235

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company)

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

(1) The Carrier violated the Agreement when it failed to recall furloughed employee Thomas Coman to fill a vacancy as laborer on Extra Gang 5529 June 12, 1978 to July 25, 1978 (System File G#104/D-2244).

(2) As a consequence of the aforesaid violation, the claimant be allowed thirty (30) days pay (eight hours each day) at the applicable laborer's straight-time rate."

OPINION OF BOARD: Claimant, Thomas Coman, was furloughed prior to June 12, 1978. Claimant was reemployed on July 25, 1978. The Organization claims that Carrier violated the Agreement when it failed to recall Claimant to fill a vacancy on Extra Gang #5529 from June 12, 1978 through July 25, 1978. An employee junior to Claimant filled that vacancy. The Organization asked that Claimant be paid thirty (30) days, eight hours a day, at the applicable laborer's straight-time rate.

Carrier contends that it attempted to contact claimant to fill the vacancy on Extra Gang #5529. It asserts that Claimant was telephoned at his home on June 8 and June 9, 1978. Carrier contends that, in all, three calls were made to Claimant's residence on each of these days. Therefore, it maintains that Claimant was not available. Carrier also urges that It was informed by other employees that claimant had other employment.

Claimant, on the other hand, insists that neither he nor his wife ever received a call from Carrier. He asserts that he did not have another job but, instead, was at home available for work.

"Rule 11

Increase in Force

When forces are increased, except as provided in Rule 8 (c), the senior, available, laid off employees in the respective classifications will be notified and they will return to service within seven (7) days after being notified at their last known address, unless prevented from doing so by reason of sickness or other unavoidable cause. Failure to return to service in accordance with the provisions of this rule will cause forfeiture of seniority rights."

There is really no dispute but that Claimant **was** entitled to be called **for** the position. After all, he was a senior laid off employee in the **classification**. Thus, the only issue to be decided is whether Claimant was available for work.

This Board has repeatedly held that **Carrier** must make a **reasonable** effort to contact an employee **alla** inform him of available work. See Awards **18425, 20109, 21090 and 21222**. In a **series** of Awards we have held that a single call is insufficient. See Awards **16279** and **21222**. We have also held that more than two calls would likely be sufficient. See Award No. **22422**.

Here, Carrier asserted that six calls were made over the course of two days. Clearly, had Carrier established that such calls were placed we would conclude that a reasonable effort was **made**. **In** fact, we have previously concluded that if a conflict in direct evidence existed, a claim would normally fail because the Board has no basis for reconciling **such** conflicting statements. (See for example Award **#22403**)

Here, however, Carrier has failed to introduce any probative evidence that the calls were actually made. While it may be true that **Carrier**, attempting to fill a **Gang** has little reason not to seek out a **qualified employee**, the fact remains that Carrier must establish through reliable evidence that **Carrier made** a reasonable **effort to** contact the employee. Mere assertions will not suffice.

For **example**, Carrier presented no evidence on the property as to which **employee** actually **made** the calls. See Award No. **23235**. It failed to introduce a statement from many employees stating **that he** or she attempted to contact Claimant. Similarly, no **specific times were provided as to the time** of the alleged calls.

Given this absence of any concrete evidence, we must conclude that Carrier did not establish that it **made** a reasonable effort to contact Claimant. **As** such, we are constrained to conclude that Claimant was available within the meaning of Rule 11. Therefore, we **will** sustain 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**;

Award Number 23401
Docket Number MW-23235

Page 3

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

claims **sustained**.

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

ATTEST: *A. W. Paulsen*
Executive Secretary

Dated at Chicago, **Illinois**, this 6th day **of** October **1981**.

CARRIER ~~MEMBERS~~' DISSENT
TO
AWARD 23401, DOCKET MW-23235
(~~REFEREE~~ SCHEIDMAN)

Dissent to this **Award is** required because the Majority improperly held the Carrier to a higher degree of proof than was required of the petitioning employees.

In the initial denial of this claim, Carrier's Assistant Division Manager pointed out the following:

"Attempts to reach Mr. **Coman** were made repeatedly when hiring personnel back for Extra Gang **5529** early this summer.

"However, each time there was no answer at **his** home."

The Employees were also advised that:

"You were also advised that on June **8** and **9, 1978** three attempts were made on each of the dates in an effort to contact Mr. **Coman** with **regard** to the work in question. There was **no** answer received on any of these occasions."

Except to allege that Claimant received no phone calls, no evidence whatsoever was submitted that would rebut the Carrier's statement of fact.

It **is** not the Carrier that **must make** the claim for the **Employees;** that is their burden as the one asserting the claim. There was no evidence, other than allegations submitted in this case, that rebutted **the Carrier's** statements of fact. Yet, the **Majority** simply concludes at page 2 of the Award that such. **unrebutted** statements 'hll not suffice". Obviously, the Employees' unsubstantiated allegation, under this construction, cannot begin to **meet** its burden.

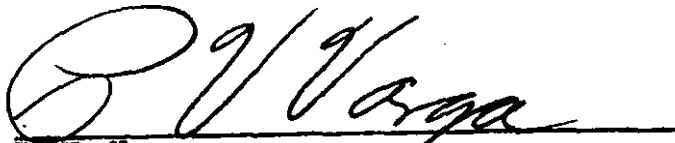
In Third Division Award 9266 (Hornbeck) it was pointed out:


"...the Claimant cannot succeed on the weakness of a **specific** defense of the Carrier. He must maintain his claim on the strength of his own proof." -(Emphasis added)

Third **Division** Awards 22760 (**Scheinman**), 22161 (Weiss), 22180 (**Norris**), 22292 (**Scearce**), 21677 (**Caples**), 21658 (Sickles), 21842 (**Mead**), 21894 (Roukia), are but some of the recent Awards that **properly** placed the burden of pnwf on the proper **party**.

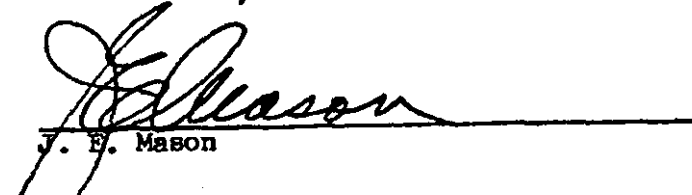
By ignoring the **Employees'** burden of proof in this case, the **Majority** has altered the existing practice concerning the application of **Rule 11** on **this** property to the detriment of all.


We dissent.


P. V. Varga


W. F. Euker


D. M. Lefkow


J. E. Mason


J. R. O'Connell

