

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: ( (Brotherhood of Maintenance of Way Employes  
(Missouri-Kansas-Texas Railroad Company

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

(1) The Agreement was violated when the Carrier assigned employes who did not hold seniority on Seniority District No. 4 to perform track repair work on Seniority District No. 4 between Mile Posts 660.7 and 663.4 beginning December 15, 1986 (System Files 300-385 and 300-390).

(2) As a consequence of the aforesaid violation, Seniority District No. 4 Machine Operators H. D. Curtis and C. R. Pennington and Seniority District No. 4 Laborer M. Holt shall each be compensated for all wage loss suffered beginning December 15, 1986 and continuing until the violation is corrected."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

On December 14, 1986, a derailment occurred on the Carrier's main track in Seniority District No. 4. Available employees were called in the emergency situation, including some from other than District No. 4. Thereafter, commencing December 15, 1986, employees from other than District No. 4 continued to work on the track, although train service had been restored.

The Claimants hold seniority in District No. 4 and were in furloughed status at the time. The Organization concedes the "emergency" situation on December 14 but argues that the Claimants should have been recalled commencing December 15 when, in the Organization's view, the emergency no longer continued, in preference to assigning work to employees whose seniority did not entitle them to perform it.

The Carrier argues, among other points, that the Claimants were not "available," since it would have been necessary for them to go through the recall procedure, including notice and physical examination. The Carrier concedes that no attempt was made to call the Claimants.

Seniority Rules clearly assign the work involved to Seniority District No. 4 employees. After the rerailling emergency on December 14, the Claimants held rights to the work involved. It would have obviously been unnecessary to delay the work, which concerned restoring the track following the derailment. Nevertheless, as the Organization argues, the Carrier is responsible for its failure to make any effort to recall those whose seniority entitled them to the work.


The Board notes that it may not have been practical to return the Claimants to active status on December 14, but there is no showing that such could not have been accomplished immediately thereafter. The Claim will be sustained commencing the following day (December 15), and the Claimants are entitled to pay to the extent that employees from other than District No. 4 continued to be engaged in the work.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 28th day of February 1990.

CARRIER MEMBERS' DISSENT  
TO  
AWARD 28270, DOCKET MW-28352  
(Referee Marx)

On December 14, 1986, Carrier experienced a single track main line derailment that caused some two (2) miles of track damage.

Beginning on December 15, 1986 and continuing for the next 11 days, Carrier used available employees, including other than Seniority District 4 employees, to effect necessary repairs.

In Second Division Award 7159 (Marx) it was noted:

"It has long been held by this Division that a main line derailment creates an emergency situation requiring immediate attention. Carrier has discretion in clearing the main line for operation. See Second Division Awards 6840 and 6841."

Claimants had been furloughed for some time and as the Carrier pointed out on the property:

"There was no time to call men that were in a furloughed status who had been off for over ninety (90) days as the requirements of recalling furloughed employees involves Certified Notification sent to said employees, proof of receipt and return-to-service physical scheduled. As past experience has shown this would have far surpassed the time involved herein as the track was repaired in eleven (11) days."

There was and is no dispute that the Claimants were not even reasonably available to perform service. The Organization does not dispute this but simply asserts that Claimants should have been given their return to work physicals at the time they were furloughed so that they would be immediately available when called. Such an argument finds no contractual support but more importantly, ignores the rational basis for requiring return to duty physicals - insuring an employee's present ability to perform work.

While the Majority does note that:

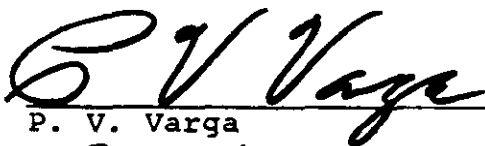
"It would have obviously been unnecessary to delay the work..." (Emphasis added)

and

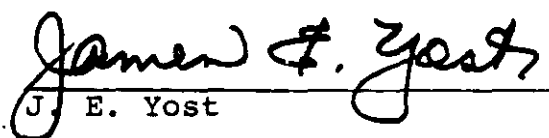
"...that it may not have been practical to return the Claimants to active status on December 14..." (Emphasis added)

the Majority nevertheless concludes that Claimants lost work and awards compensation as if Claimants were in fact able and available for work beginning on December 15, 1986. Whether the emergency continued after the evening of December 14th or not, or whether Claimants should have been queried whether they wanted to perform temporary service (for which there is NO contractual support in this record), simply ignores the very real fact that Claimants could not be recalled and be available to perform active service between December 15 and 26, 1986. They therefore had no "wage loss" and were not contractually entitled to be compensated as if they could have actually worked.

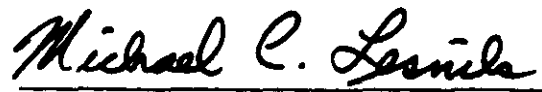
We Dissent.

  
P. V. Varga

  
R. L. Hicks

  
J. E. Yost

  
M. W. Fingerhut

  
M. C. Lesnik

LABOR MEMBER'S RESPONSE  
TO  
CARRIER MEMBERS' DISSENT  
TO  
AWARD NO. 28270 - DOCKET NO. 28352

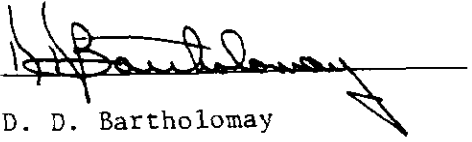
The Carrier Members' Dissent to Award 28270 is nothing more than an attempt to have the last word by having the same arguments presented to the Board reproduced as a dissent. However, the last word in this Award was clearly set forth by the Majority thusly:

"Seniority Rules clearly assign the work involved to Seniority District No. 4 employees."

Hence, any argument raised here by the Carrier concerning emergency conditions, Claimants' availability or necessity for a physical prior to returning to service is tautological.

At risk of adding a paper trail to a well-reasoned Award, comment concerning the Claimants' availability must be added. Carrier's arguments on the Claimants being furloughed, the necessity of being notified by mail for recall and the necessity of a physical before returning are specious. In reality, the Carrier is attempting to use a unilaterally instituted policy of requiring a return to work physical to circumvent the Agreement. Moreover, being furloughed in and of itself does not render an employee unavailable. In fact, with modern technology, "in line with the holding of the First Division in Award No. 4790, that where an employe has a telephone the rule should be and is that a sincere and honest attempt on the part of the Carrier to call through such modern and common method of communication," (Third Division Award 5029 dated September 15, 1950).

Therefore, I concur in this well reasoned Award.



D. D. Bartholomay