

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc.
(Formerly The Chesapeake and Ohio Railway Company)

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

(1) The Agreement was violated when the Carrier assigned Assistant Roadmaster Lovell, Blacksmith Welder T. Downs and Welder Helper E. T. Wright instead of Trackman T. W. West, Sr. to clean snow from switches on January 26 and 27, 1987 [System File C-TC-3657/12-66(87-340)].

(2) As a consequence of the aforesaid violation, furloughed Trackman T. W. West, Sr. shall be allowed eight (8) hours of pay at the trackman's straight time rate, eight (8) hours of pay at the trackman's time and one-half rate and eight (8) hours of pay at the trackman's double time rate for a total of twenty-four (24) hours of pay at the rates he would have received if he had been assigned to perform the work in question."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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.

A Third Party notice was issued to the International Brotherhood of Boilermakers and Blacksmiths on October 6, 1988 and they filed a response on November 1, 1988.

On January 26 and 27, 1987, there was a heavy snowfall in the Newport News, Virginia area. Several switches froze and it was necessary to thaw the switches and remove accumulated snow and ice to keep the trains in operation. In order to keep the trains running, an Assistant Roadmaster and a Blacksmith Welder and his helper went out on the tracks to clear the snow from the

switches. The Claimant is a trackman on furloughed status at the time of the incident. The claim essentially contends that the work in question belongs to employees in the Maintenance of Way and Structures Department and that the Carrier was obligated to recall the Claimant.

During the handling of this dispute on the property, the sole defense raised by the Carrier was as follows:

"... this action was taken based on an emergency situation where it was necessary to keep trains moving and prompt action was required. Whenever possible, Mr. Lovell attempted to locate track forces but was unable to do so, therefore, took the necessary action to keep the railroad open."

In subsequent correspondence, Carrier presented a statement from the Assistant Roadmaster, which stated that during the 24-hour period in question, he assisted in cleaning snow and ice removal for approximately four hours. The remainder of the time, he maintained, was spent performing supervisory duties. Carrier presented no evidence as to the number of hours spent by the Blacksmith Welder and helper removing accumulated snow and ice from the switches in the area.

In its Submission before this Board, Carrier raised several new arguments. It asserted that the work in question has historically been performed by employees other than trackmen and that the Organization failed to prove that it had exclusive jurisdiction over the work either as a matter of contract or historical practice. Unfortunately for the Carrier, we are precluded from considering those arguments. This Board may entertain only the evidence and contentions of the parties that have been presented during the handling of the claim on the property. The newly raised arguments of the Carrier must, therefore, be deemed waived.

Accordingly, the crux of the case is whether the circumstances present at the time justified using the Assistant Roadmaster and employees outside this bargaining unit. Having asserted the affirmative defense of emergency, the Carrier assumes the burden of establishing on the record that one did in fact exist. See, Third Division Awards 18331; 18393; 20223; and 20310. An examination of the record of the handling on the property reveals little in the way of probative evidence to support Carrier's contention that there was an emergency involved herein. The Board notes that any snowfall in Virginia is probably unusual. There was a heavy snowfall and switches were frozen, which also would certainly be unusual. That much is clear from the record. However, an emergency is generally defined as an unforeseen combination of circumstances that calls for immediate action. There is nothing in the record which suggests that the weather conditions were on this occasion sudden or so unforeseeable as to constitute an emergency which would obviate the need to honor Claimant's seniority rights. Instead, there was record evidence that snow was predicted in advance, and the fact that the fall of snow was heavier than expected was the only element of surprise. Absent the requisite proof of suddenness or real unforeseeability, we are compelled to sustain the claim.

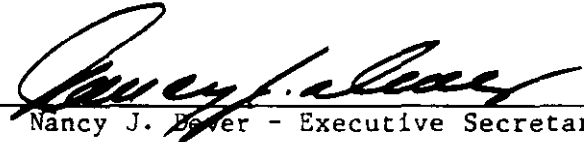
As to the remedy, the Carrier on the property at least implicitly disputed the number of hours claimed when it submitted Assistant Roadmaster Lovell's statement that he performed the snow removal work for a total of four hours during the 24-hour period in question. However, we have no evidence as to the number of hours worked by employees Downs and Wright, Carrier having failed to refute that portion of the claim. Absent further proof that the hours claimed were excessive, we cannot agree with Carrier's contention that the claim constitutes an unreasonable or improper penalty. The claim must be sustained in its entirety.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Bever - Executive Secretary

Dated at Chicago, Illinois, this 3rd day of April 1992.