

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30674
Docket No. MW-28534
95-3-88-3-359

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. (former Chesapeake
(and Ohio Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when, without a letter of notice or discussion as required by the October 24, 1957 Letter of Agreement, it assigned outside contractors to perform trackmen's work (snow removal) at Peach Creek, West Virginia on April 5, 1987 [System File C-TC-3766/12-83(87-596)].
- (2) The Agreement was further violated when the Carrier assigned welders instead of trackmen to perform trackmen's work (snow removal and tree removal) at Peach Creek, West Virginia on April 5 and 6, 1987.
- (3) The Agreement was further violated when the Carrier assigned welders instead of trackmen to perform trackmen's work (track repair) at Holden, West Virginia on April 9 and 10, 1987.
- (4) As a consequence of the violations referred to in Parts (1), (2) and (3) above, furloughed Trackmen T.F. Rakes, T.A. Rakes and R.Rakes shall each be allowed forty-six (46) hours pay at the appropriate trackmen's rates."

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 employee 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.

The operative facts in this case are not in dispute. Claimants hold seniority as Trackmen, but were in furlough status at the time of the incidents at issue. There were three claims as a result of certain events which occurred in April 1987. The first claim contends that Carrier improperly contracted out to Fleming Construction Company the work of removing snow from the parking lot and between the tracks at Peach Creek, West Virginia, on April 5, 1987. The second claim contends that four Welders were called and used to perform work of Trackmen at Peach Creek on April 5 and 6, 1987, cleaning switches and removing a tree from the track. The third claim asserts that two Welders performed Trackmen's work at Holden, West Virginia, on April 9 and 10, 1987.

In support of its claim, the Organization asserts that the Claimants were denied work opportunities despite the fact they were ready, willing and available to perform the work in question. The Organization further argues that the character of the work involved is clearly encompassed in the Agreement, and particularly in Rule 66, which expressly states that track forces are to perform work in connection with the "maintenance" of track facilities. Moreover, the Organization maintains that no notice of intent to contract work was received in connection with the removal of snow by the Fleming Construction Company.

The Carrier took the position during the handling of this dispute on the property that a snowstorm on April 5 and a derailment at a nearby coal mine on April 9 created emergency conditions which necessitated the utilization of the manpower complained of here. Carrier contended that, in emergency situations, it has considerably more latitude in assigning its work force to keep its business running efficiently and safely.

The Organization denied that an "emergency" as that term is used by the parties existed in either case. It argued that the equipment was available at Peach Creek to remove the snow and clear the tracks, and that Claimants could have reached the site more quickly than the people who performed the work. With regard to the derailment, the Organization argues that the mine has a double track, and that one track remained open while the other was being repaired.

In its Submission before this Board, the Carrier advanced several new arguments. It asserted that Claimants had no contractual right to the work because exclusivity was not proven and because, historically, other employees, as well as outside contractors, have performed the disputed work. It also asserted that there was insufficient time for Carrier to call out furloughed employees. While those arguments would have been duly considered had they been raised on the property, it is quite well established that the Board cannot consider argument or evidence de novo. See, Third Division Awards 27614; 17231; 19722. Accordingly, we have confined our review of this case to the arguments and evidence presented during the handling of the matter on the property.

So stating, it is clear that this case turns on whether emergency conditions existed on the claim dates so as to warrant the use of Welders and outside manpower. Having asserted the affirmative defense of emergency, Carrier assumed the burden of establishing on the record that one did in fact exist. See Third Division Awards 20223, 18393, 18331. Insofar as the incidents of April 5 and 6 are concerned, this Board is satisfied that Carrier met its evidentiary burden. The Organization never refuted Carrier's claim that the snow storm of April 5, 1987 was a freak incident which created havoc on the property and which demanded prompt action to keep the railroad open. Instead, the Organization merely contended that Claimants and equipment "were available" to perform the work. However, Carrier is given wider latitude in getting necessary work performed under emergency circumstances, as the Carrier has argued. We are not in a position to say that Carrier's judgment or course of action was arbitrary, capricious or unreasonable under these facts as to the conditions which existed on April 5 and 6, 1987.

The assignment of Welders to the Holden derailment stands on a different footing however. In that instance, Carrier merely asserted on the property that the fact of the derailment itself constituted an emergency. No probative evidence was offered to counter the Organization's assertion that the mine continued to operate because only one of the double tracks had been closed as a result of the derailment. Consequently, we are unable to presume an emergency situation existed on the basis of the record as it stands, based on the proofs available to the Board. There is a violation here.

Accordingly, we find that Carrier did not violate the Agreement when, without notice, it assigned outside contractors to perform snow removal work, nor did it violate the Agreement by assigning Welders to perform snow and tree removal on April 5 and 6, 1987. Paragraphs one and two of the instant claim, therefore, are denied. The Agreement was indeed violated when Carrier assigned Welders instead of Trackmen to perform work in connection with a derailment at Holden, West Virginia on April 9 and 10, 1987. That portion of the claim -- paragraph 3 -- is sustained, and Claimants shall be paid the appropriate Trackmen's rates for the lost work opportunity on those dates.

AWARD

Claim sustained in accordance with the Findings.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimants(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties. ..

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 31st day of January 1995.