Award No. 13738
Docket No. MW-14107

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

John H. Dorsey, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

LOUISVILLE AND NASHVILLE RAILROAD COMPANY

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

(1) The Carrier violated the Agreement when, instead of calling and using Track Laborers Louis Murry, Albert James and A. L. Hartley for overtime service on May 11, 1962, it called and used two (2) extra gang laborers and a track supervisor for said overtime service.

(2) Messrs. Louis Murry, Albert James and A. L. Hartley each be allowed five and one-half (5½) hours' pay at their time and one-half rate because of the violation referred to in Part (1) of this claim.

EMPLOYES' STATEMENT OF FACTS: On May 11, 1962, Claimants Louis Murry, Albert James and A. L. Hartley were regularly assigned as track laborers with the section crew headquartered at Biloxi, Mississippi.

At about 6:00 P. M. on said date, the engine of a local freight train derailed while performing switching work on a siding located within the U. S. Government enclosure at the Keesler Air Force Base, Biloxi, Mississippi. The derailed engine did **not** obstruct the main line.

The Carrier called and used two extra gang laborers, who not only were junior to the claimant, but who held no seniority rights on this section, and a track supervisor to assist the regular section foreman of the Biloxi section crew rerail the subject engine. They worked from 6:00 P. M. to 11:30 P. M. performing said work.

Despite the fact that the claimants had complied with the provisions of Rule 30 by making known to their foreman their respective telephone numbers **or other means** whereby they could be reached for overtime service, the Carrier failed to call them in compliance with its commitments to do so, **as** set forth in Rule 30.

scene of the accident. There is nothing unique or novel in such handling and this Division has already established the principle that in emergency situations, such as existed here, the claimant cannot be considered as being available. For instance, in handing down its decision in Award No. 5944, this Division said:

> "We conclude that this claimant was not available. An emergency situation existed, and it was necessary for the carrier to get men to work as quickly as possible. The claimant lived some distance from the job, and had no telephone. In order for him to have been called, it would have required a great deal of time and thereby would have caused considerable delay in meeting the emergency."

In handling this dispute on the property, employes contend that Hartley could have reached the derailment within a period of 20 minutes, and that it would have required 35 to 40 minutes for James to have arrived. This is only conjecture on the part of employes. When the foreman and the others began clearing the main line, they did not know how much time would be involved, but they did know that they could not stand around waiting for two men to be located on a Friday evening after they had completed their work for the week, and then drive several miles to the point of derailment. An emergency existed, and they did the only thing they could have done — correct the condition as quickly as possible.

For the reasons outlined above, carrier feels the claim is without merit and respectfully requests that it be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: At about 6:00 P. M., May 11, 1962, the engine of a local freight train derailed during switching operations. Petitioner says that the derailment was on a siding at Keesler Air Force Base, Biloxi, Mississippi; Carrier says the derailment blocked the main line, but failed to adduce evidence as to the location. From the bare assertion that the main line was blocked, Carrier argued that the derailment created an emergency situation which permitted it to take the action which Petitioner alleges violated the Agreement.

The actions taken by Carrier and the manner in which and by whom the work involved was accomplished is set forth in the Carrier's Submission as follows:

> "The section foreman, who had completed his tour of duty, was immediately contacted and notified of the derailment and obstruction to the main line. In addition to the section foreman assigned to the territory, there are also three laborers [the Claimants herein], Messrs. Louis Murry, a resident of Biloxi; A. L. Hartley, a resident of Gulfport; and Albert James, a resident of Bay St. Louis, Mississippi.
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> An effort was made to contact Louis Murry by telephone, but he could not be reached. On account of the existing emergency, time did not permit an effort on carrier's part to try to contact Hartley at Gulfport, 13 miles south of Biloxi, or James at Bay St. Louis, about 30 miles to the south.
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> The section foreman, when contacted, immediately proceeded to the scene of the derailment, **where he solicited the help of the track**

supervisor and two extra gang laborers. With the help of these men, the main track was again placed in operation with the least possible delay." (Emphasis and words in brackets ours.)

While Carrier contends that its conclusionary statement that the derailment created an "emergency" relieved it from compliance with Rule 30(b) of the Agreement, it does not dispute that absent an emergency Claimants should have been called if they had fulfilled the conditions prescribed in the Rule. The Rule reads:

"RULE 30.

(b) Employes who desire to be considered for calls under Rule 31 will provide the means by which they may be contacted by telephone, or otherwise, and will register their telephone number with their foreman or immediate supervisory officer. Of those so registered, calls will be made in seniority order as the need arises.

A reasonable effort must be made to contact the senior employe so registered before proceeding to the next employe on the register. Except for section men living within hailing distance of either their foreman's living quarters or their tool house or headquarters station, and for men living in camp cars when they are present at the camp cars, an employe not registered as above shall not have any claim on account of not being worked on calls."

As to Claimants Hartley and James, Carrier does not deny that they had satisfied the qualifications of Rule 30(b). It admits it failed to call them. Its defense is their residences were too far removed from the derailment to make them available to satisfy the exigent "emergency."

As to Claimant Murry Carrier says it placed a call to a telephone number at which he said he could be contacted — a child answered the telephone and said Murry was unknown.

The record supports the finding that Claimant Murry had supplied Carrier with the telephone numbers of two neighbors at which he could be contacted. This we hold qualified him for call under Rule 30(b). The statements by Carrier that a call was made to Claimant Murry are garbled and hearsay. We can attach to them no probative value. Therefore, we find that Claimant Murry was not called.

Having found that each of the Claimants qualified for call under Rule 30(b) and were not called, we face the issues: (1) did the derailment create an emergency; and (2) if an emergency be found was Carrier relieved from compliance with Rule 30(b).

The record as made on the property contains no factual evidence to support Carrier's statement that there was an emergency. Whether or not there was an emergency is a conclusion which this Board can find only from facts of record of probative value. Lacking the facts, we must find that Carrier's defense of "emergency" fails for lack of proof.

The defenses of Carrier being unsupported by facts of record or without merit in law, we find Carrier violated the Agreement as alleged in the Claim.

Had Claimants been called and performed the work involved, as was their contractual entitlement, they would have been paid, by operation of the terms of the Agreement, time and one-half for the hours worked. In like circumstances this Board has awarded damages at the pro rata rate in some instances, and the overtime rate in others. The cases in which the pro rata rate was awarded as the measure of damages, in a number of which the Referee in this case sat as a member of the Board, are **contra** to the great body of Federal Labor Law and the Law of Damages. The loss suffered by an employe as a result of a violation of a collective bargaining contract by an employer, it has been judicially held, is the amount the employe would have earned absent the contract violation. Where this amount is the overtime rate an arbitrary reduction by this Board is **ultra vires.** Therefore, we will sustain the claim for damages as prayed for in paragraph (2) of the Claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

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

That the Carrier violated the Agreement.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1965.