Award No. 13974

Docket No. MW-14106

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(SUPPLEMENTAL)

Daniel House, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

MONON RAILROAD

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

(1) The Carrier violated the Agreement when, on May 16, 1962 it called and used an employe junior to Crossing Watchman O.C. Huff to perform eight (8) hours of overtime service without extending any effort to call Crossing Watchman O. C. Huff.

(2) Crossing Watchman O. C. Huff be allowed eight (8) hours' pay at his time and one-half rate."

EMPLOYES' STATEMENT OF FACTS: On Wednesday, May 16, 1962, the regular relief crossing watchman at the State Street crossing, Hammond, Indiana, was unable to work his regularly assigned hours from 6:00 A.M. to 2:00 P.M. The Carrier called and used Crossing Watchman Clarence Wallace and compensated him for his services at the time and one-half rate of pay.

The Carrier did not attempt to call Crossing Watchman O. C. Huff, who is senior to Crossing Watchman Wallace. The claimant's home was located three blocks from the State Street crossing and he was at his home when the junior employe was called.

The Agreement in effect between the two parties to this dispute dated December 1, 1952, together with supplements, amendments, and interpretations thereto is by reference made a part of this Statement of Facts.

POSITION OF EMPLOYES:

Rule 3 reads:

"Rights accruing to employes under their seniority entitle them to consideration for positions in accordance with their relative length of service with the railroad, as hereinafter provided."

This Division has frequently interpreted rules which are similar or identical to aforequoted Rule 3. For example, in Awards 2716 and 6136 this Division held:

means of notification in order to be called for extra work; therefore, any loss of work was of his own choosing.

Carrier requests this claim be denied in its entirety.

OPINION OF BOARD: There is no dispute about the fact that Carrier made no effort to call Claimant for the involved overtime work, calling instead a junior employe.

Carrier had previously issued a form asking all Gatemen to fill in by check mark whether they desired overtime, overtime on day off, and locations at which they would accept overtime. The form also included the following statement:

> "Employes signing that they will accept overtime calls will be expected to provide a means whereby they may be called . . ."

There was no special place on the form where it was indicated that the employes were expected to note that means. Claimant had filled in such a form, checking among other things, that he would accept overtime calls at the crossing herein involved. He did not indicate on the form any means for calling him. While Carrier had Claimant's home address, it had no telephone number at which he might be reached. Claimant lived four blocks from the involved location and six blocks from the office of the foreman who would be responsible for calling him.

Carrier appears to take the position that Claimant in effect made himself unavailable for the call by not notifying Carrier of what it considered a reasonable means of being notified of a call.

Carrier did not rebut Employes' statement that "In the past, it has been an established practice to call employes who lived in close proximity to their headquarters by having the foreman call at their homes." In Director of Personnel's letter of July 19, 1962, denying the claim, he says, without denying that there was such an Agreement, that he does not have a copy in his possession of the Agreement granting a $35.00 a month raise to the Foreman for calling employes who could not be reached by telephone; he asked that the General Chairman send him a copy of it if he had it in his files.

In any event, it is well established that, under a rule such as Rule 3 herein involved, the Carrier has the obligation to make a reasonable effort to call the senior available employe entitled to overtime work, before calling a junior to do the work. Carrier notes in its Ex-parte Submission that Employes never named a particular rule on the property, and reserve the right to answer if a rule is named. But the record shows that the issue was clearly joined on the property, and the naming of the involved rule in Employes' Ex-parte Submission did not change or add to the dispute.

Carrier's argument that a heavy burden might have been built up for it if it had a call senior employes other than by telephone until it found an employe available to take the assignment is speculative (in this case it would be as reasonable to speculate that if the Foreman had called at Claimant's home, he would have had him on the job more quickly than he got the junior employe); every contract obligation imposes some burden, but fear that it may become an unreasonable burden, does not permit disregarding of the obligation. The fact is that Carrier made no effort to call Claimant who had listed

himself as available for the involved work and who lived reasonably close to the headquarters from which he had to be called. We will sustain 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 Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division
ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 22nd day of November, 1965.

CARRIER MEMBERS' DISSENT TO AWARD 13974, DOCKET MW-14106

(Referee House)

The Majority refused to follow **Awards 13741 and 13283**, the latter award belonging to the same Referee, requiring the Petitioner to identify the rules allegedly violated on the property. The Majority excuses this failure by holding:

"* * * But the record shows that the issue was clearly joined on the property, * * *"

Assuming this were a fact, it was only joined as to the subject found in the correspondence in the record. That correspondence belonged to the Carrier and clearly stated it was "unable to locate the Agreement you referred to where the Foreman was granted a $35.00 per month increase for calling employes who could not be reached by 'phone'." The General Chairman was then asked to produce the Agreement, which he was relying upon and the record contains no evidence that he ever did so. In this respect, the issue was joined and the Petitioner failed to support their allegation.

Beyond this, however, the Carrier notified its employes they would be expected to provide a means whereby they could be called. This is not an unreasonable requirement, particularly where short notice calls were usually involved, and is one which Carrier had every right to insist upon. The Majority simply danced around this requirement by mentioning it and then in the true traditional manner of ignoring something they could not meet, they discussed another facet of the case.

The Majority holds that Carrier failed to rebut the Petitioner's assertion that

> "In the past, it has been an established practice to call employes who lived in close proximity to their headquarters by having the foreman call at their homes."

The Majority fails to reveal that this assertion was made for the first time in the Petitioner's Ex Parte, and that it was not supported by the record. Moreover, we said in **Award 9266** (Hornbeck):

> "* * * the Claimant can not succeed on the weakness of a specific defense of the Carrier. He must maintain his Claim on the strength of his own proof."

The Majority concludes with the observation:

> "* * * The fact is that Carrier made no effort to call Claimant who had listed himself as available for the involved work and who lived reasonably close to the headquarters from which he had to be called. * * *"

The fact is that Carrier had no obligation to do so until the Claimant complied with the Carrier's directive to provide a means whereby he should be called, and Carrier had every right to insist upon compliance with this requirement even if it were a departure from the "practice," a fact not established by this record. See **Award 13619.**

W. F. EUKER

R. A. DeROSSETT

C. H. MANOOGIAN

G. L. NAYLOR

W. M. ROBERTS