NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 19840
THIRD DIVISION Docket Number MW-19843

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(Chicago and North Western Transportation Company

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

(1) The Carrier violated the Agreement when, during the period from September 21, 1970 to November 6, 1970, both dates inclusive, it used employes holding no seniority rights on the territory formerly comprising the Minneapolis and St. Louis Railway Company to perform B&B work on the Roland Branch Line which is encompassed within the Minneapolis and St. Louis Division (System File 81-24-17).

(2) B&B Foreman K. C. Thompson and B&B Carpenters J. W. Ramey, M. E. Leatherman, W. G. GeMiner and R. C. Blouin each be allowed two hundred eighty (280) hours of pay at their respective straight time rates because of the violation referred to in Part (1)hereof.

OPINION OF BOARD: The claim is that the Agreement was violated when Carrier brought B&B employees from another seniority district to perform bridge repair work on the Roland Branch line in the seniority district of the claimants. Notwithstanding different dates in the statement of claim, the record shows that the disputed work extended from September 28 through November 5, 1970, exclusive of October 2 and 27, for a total of 27 work days.

The claim was denied on the grounds that: 1) an emergency existed in respect to both the Roland Branch work and the home district work performed by claimants during the claim period; 2) Rule 13 of the Agreement permits the use of employees from another seniority district in the case of an emergency; and 3) the claimant's were on duty and lost no pay by reason of the work performed by employees from another seniority district.

The Organization's position is that there was no emergency in respect to either the Roland work or the home district work; that the Roland work was ordinary repair work on bridges which has been performed by claimants on their home seniority district for many years in the past; and that the Roland work was necessitated by the neglect of ordinary wear and tear, which is not one of the conditions referred to in the Agreement as an emergency such as washouts, high water, snow blockades, fires, tornadoes, wrecks, or other conditions beyond Carrier's control. Carrier asserts that the Roland line was out of service during October 5-26 and November 2-5, 1970, and that a track out of service is a condition which constitutes an emergency, regardless of what caused the condition. As to the work by claimants on their home seniority district, the Carrier said that, without this work, one bridge would not have stayed in line, and two other

bridges could not have been safely used. Carrier concedes that removal of driftwood from certain bridges could have been deferred, but to have done so would have increased the possibility of damage to these bridges. The following additional information on the nature of the disputed work is found in Carrier's Submission:

> "There are a large number of pile bridges on the former M&StL territory made of untreated material and the majority of piling replacements on the Central Division are in the claimants' territory.
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> During the period involved in this claim, the claimant crew, under B&B Foreman K. C. Thompson, was performing emergency work on main line bridge D-221.22 near Gifford, Iowa due to very poor ties in stringers. This work was completed October 7th and Thompson's crew was moved to Eddyville to perform emergency work on main line Bridge R320.44 account very poor stringers and ties. This work was completed October 23rd. The next five working days, Thompson's crew was engaged in pulling driftwood from various bridges in the vicinity of Eddyville. On November 2, Thompson's crew was moved to Union, Iowa to take care of emergency work on main line Bridge E-221.74 account poor stringers and the very poor tie condition was such that the bridge would not stay in line, and worked at this location through December 22, 1970.
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> While the claimant crew was busy performing emergency work on bridges in their territory, it was necessary to perform additional work on the Roland Line. Accordingly, the B&B crew of Foreman Merle Aukes was moved from Mason City to Clemons Grove, Iowa on the Roland Branch to repair the following bridges:
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> J-242.40 - Stringers crushed and bulkheads completely gone.
>
> J-248.30 - Stringers crushed out completely.
>
> J258.32 - Ties in such poor condition, unsafe for traffic.
>
> J267.32 - Ties and stringers both unsafe for traffic.
>
> J245.50 - Ties in such poor condition, unsafe for traffic."

Prior Awards of this Board have established that when an emergency exists, as asserted here in grounds 1) and 2) of Carrier's denial of the claim, the Carrier "may assign such employes as good judgment dictates and must be allowed great latitude when an emergency situation exists." See Awards 13858, 13626, 12299, and 12777. These criteria could possibly justify Carrier's action here, if applicable, so the determinative issue in this dispute is whether the evidence of record factually establishes that emergencies did exist as asserted

by Carrier. In reviewing the Awards cited by Carrier, we note that this Board has held an emergency condition to have existed in situations involving such factors as a freighter striking a drawbridge, resulting in interruption of main line service and the cessation of all river traffic under the bridge; the derailment of engines and/or cars; a bridge washed out by high water resulting from heavy rain; the possibility of a washout of a track due to heavy rain; delays to trains; and overtime work by the employees working on the emergency condition. See Awards 1137, 12537, 12597, 12917, 13853, 15597, 15846, and 16754 among others. However, none of these factors obtain in the instant facts, in respect to either the Roland work or the home district work by claimants. Indeed, the nature of the work in dispute here is quite far removed from the fact of emergency as dealt with by these prior Awards. Here, though the asserted emergency lasted for a total of 27 work days, neither the Roland nor the home district work by claimants gave rise to any overtime or work on rest days; nor was there any evidence of delays to trains or other significant disruption to Carrier's service. Also, there is no evidence that the work at either location was required by any sudden or unforeseeable event and, in addition, the Roland work was suspended for a full day on two different occasions, Friday, October 2 and Tuesday, October 27. These facts are clearly incompatible with the notion of emergency and, consequently, the record will not support a finding of emergency on the Roland or home district work within the meaning of the term emergency as used in our prior Awards.

However, the Carrier has advanced an argument on the Roland work which does not depend upon the existence of conditions such as derailments, washouts, etc. The Carrier submits that a track being out of service is an emergency condition, in and of itself, regardless of what caused the condition. We recognize some degree of plausibility in this argument; however, without some realistic limitations such as the necessity of a showing of an unforeseeable event causing the condition, the argument espouses a principle which we consider too broad for sound application to the kind of dispute now before us. We observe here that, even if we found this argument persuasive, which we do not, that would not be dispositive of this dispute. The Carrier has properly perceived that, in order to prevail in this dispute, it must not only show that the Roland repairs was emergency work, but also must show that the home district work performed by claimants was emergency work. This burden arises because, presumably, the claimants were at least as available for emergency work on their home seniority district as were employees from another district; hence, the claimants should have been used on the Roland work unless they, too, were engaged in emergency work. But, as we have indicated, the record contains insufficient evidence to establish that an emergency condition existed at either location. Accordingly, we find that Carrier violated the Agreement by using employees from another seniority district to perform non-emergency work on claimant's home seniority district.

Carrier contends, though, that, even in the event of an Agreement violation, the herein claims for compensation should be denied on the basis that claimants were fully employed during the claim period. We do not concur.

A multiplicity of viewpoints on this question is reflected in our prior Awards and we shall not attempt here to reconcile or explain the bases for the various viewpoints. It suffices to say here that this record presents an obvious

loss of work opportunities by claimants who have averred that they were available and would have performed the Roland Branch work if Carrier had assigned them thereto. Carrier's explanation of claimant's non-availability for the Roland work, i.e., that claimants performed other emergency work concurrently with the Roland emergency work, is not supported by the record and Carrier has offered no other evidence to explain why the Roland work was not assigned to claimants. If compensation were not allowed in these circumstances, the result would be that Carrier could with impunity assign employees to cross seniority district lines so long as employees such as claimants are fully employed. The net effect would be that employees would have seniority rights but no effective remedy for the instant violation thereof and, consequently, the Agreement provisions protecting such seniority would be partly nullified. We do not believe it is in the interests of the parties for the Board to encourage that result and we shall therefore follow prior authorities awarding compensation where a violation has occurred in circumstances involving a loss of work opportunities. Awards 18500, 19337, 19441, 19552, 19444, and 19635. We sustain the claim for September 28 through November 5, 1970, exclusive of October 2 and 27, 1970.

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

That the parties waived oral hearing;

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.

A W A R D

Claim sustained in accordance with Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: R. W. Paulson
Executive Secretary

Dated at Chicago, Illinois, this 13th day of July 1973.