NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23032
THIRD DIVISION Docket Number MW-22952

Rodney E. Dennis, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
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(The Denver and Rio Grande Western Railroad Company

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

(1) The Carrier violated the Agreement when it assigned Section Laborers, Raymond Guccione and K. D. Armenta, from the Salida Section to perform track work on the Malta Section instead of Malta Section Laborers, J. J. Salazar and E. A. Giron, from 9:00 A.M. to 2:00 P.M. on October 16, 1977. (System File D-43-77/MW-10-78)

(2) Section Laborers J. J. Salazar and E. A. Giron each be allowed pay at their respective overtime rates for an equal proportionate share of the total number of man hours worked by the Section Laborers from the Salida Section, referred to above."

OPINION OF BOARD: Claimants were section laborers assigned to carrier's Malta Section. On Sunday, October 16, 1977, a car derailed at Mile Post 271, which was within the assigned Malta Section. Carrier called the section foreman from the Salida Section to rerail the car. He, in turn, called two laborers from the Salida Section to complete the work. Claimants allege that they were available for work on the day in question, that the work to be done was in the Malta Section, and that they had a right to do it. They filed a claim requesting five (5) hours at the punitive rate. Carrier denied the claim and it has been forwarded to this board for resolution.

The organization alleges that carrier violated the controlling agreement by not calling claimants to do work on their section. It cites Rule 15 (j) as its basis for this claim. That rule reads in pertinent part as follows:

> "Work on Unassigned Days. Where work is required by the company to be performed on a day which is not a part of any assignment it may be performed by an available extra or unassigned employe who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employe."

The organization argues that this rule leaves no latitude for carrier in this case. If no extra men were available, claimants, as regular employes, had a right to be called to do the emergency work on their section.

Carrier claims the foreman who was called did not have claimants' phone numbers. He therefore called two men from his own section, Salida. Carrier also claims that the required work was emergency work and, as such, carrier was not obligated to call claimants. In accordance with Rule 4, Classification Rule, employes from seniority groups, other than regular employes, can be used in emergency situations. The derailment on October 16, 1977 was an emergency. Thus, carrier was not required to call claimants.

A review of the record of this case and of the many awards cited on this point persuades this board that carrier did, in fact, violate the agreement when it failed to call claimants for the overtime work in the Malta Section on October 16, 1977. There is no question that Rule 15 (j), the rule that is operative in this case, requires that claimants, as regular employes should have been called, given the facts presented here.

As to the carrier's statement that the foreman did not have claimants' telephone numbers and was therefore unable to call them, this board is not impressed with this argument. First, the record of this case is not clear as to whether claimants' home numbers were available to the Salida Section foreman. What is clear, however, is that he made no attempt to try and contact them. Carrier has a greater obligation in such cases. It cannot merely say, "The phone numbers are not available; therefore, the men need not be called for the work." This board, and particularly this division, has consistently held that carriers must make a reasonable effort to call men to work, even in emergency situations, before the men can be bypassed. No showing is evident in the record before us that any effort was made by carrier to contact claimants.

Carrier also argued that given the fact that an emergency existed, it had the right to call those who could be reached most easily. While this issue need not be discussed here, the board does think that it should be noted that when carrier raises a defense of emergency, it is incumbent on carrier to prove that an emergency exists. A mere assertion in the record is not sufficient to result in such an action. There is no such showing in the record of this case; it contains only assertions, there are no facts to support it.

Carrier submitted a recent Third Division decision (Award No. 22948 - Scheinman) for consideration in this matter. A careful review of that award reveals it is totally out of phase with the facts of this case. In that award, a legitimate emergency existed. The section foreman had no way of knowing that claimant should have been called or how to get in touch with him. In considering the instant case before the board, it must be concluded that no emergency existed and that the foreman made no attempt to contact claimants. There is, however, a legitimate question in the record as to the availability of claimants' phone numbers. The two are quite different cases and Award 22948 cannot be considered on point here.

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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. W. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 28th day of October 1980.