NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 23401
THIRD DIVISION Docket Number MW-23235

Martin F. Scheinman, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Chicago, Milwaukee, St. Paul and Pacific Railroad Company

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

(1) The Carrier violated the Agreement when it failed to recall furloughed employe Thomas Coman to fill a vacancy as laborer on Extra Gang 5529 June 12, 1978 to July 25, 1978 (System File C#104/D-2244).

(2) As a consequence of the aforesaid violation, the claimant be allowed thirty (30) days pay (eight hours each day) at the applicable laborer's straight-time rate."

OPINION OF BOARD: Claimant, Thomas Coman, was furloughed prior to June 12, 1978. Claimant was reemployed on July 25, 1978. The Organization claims that Carrier violated the Agreement when it failed to recall Claimant to fill a vacancy on Extra Gang #5529 from June 12, 1978 through July 25, 1978. An employe junior to Claimant filled that vacancy. The Organization asked that Claimant be paid thirty (30) days, eight hours a day, at the applicable laborer's straight-time rate.

Carrier contends that it attempted to contact claimant to fill the vacancy on Extra Gang #5529. It asserts that Claimant was telephoned at his home on June 8 and June 9, 1978. Carrier contends that, in all, three calls were made to Claimant's residence on each of these days. Therefore, it maintains that Claimant was not available. Carrier also urges that it was informed by other employes that Claimant had other employment.

Claimant, on the other hand, insists that neither he nor his wife ever received a call from Carrier. He asserts that he did not have another job but, instead, was at home available for work.

"Rule 11

Increase in Force

When forces are increased, except as provided in Rule 8 (c), the senior, available, laid off employes in the respective classifications will be notified and they will return to service within seven (7) days after being notified at their last known address, unless prevented from doing so by reason of sickness or other unavoidable cause. Failure to return to service in accordance with the provisions of this rule will cause forfeiture of seniority rights."

There is really no dispute but that Claimant was entitled to be called for the position. After all, he was a senior laid off employe in the classification. Thus, the only issue to be decided is whether Claimant was available for work.

This Board has repeatedly held that Carrier must make a reasonable effort to contact an employe and inform him of available work. See Awards 18425, 20109, 21090 and 21222. In a series of Awards we have held that a single call is insufficient. See Awards 16279 and 21222. We have also held that more than two calls would likely be sufficient. See Award No. 22422.

Here, Carrier asserted that six calls were made over the course of two days. Clearly, had Carrier established that such calls were placed we would conclude that a reasonable effort was made. In fact, we have previously concluded that if a conflict in direct evidence existed, a claim would normally fail because the Board has no basis for reconciling such conflicting statements. (See for example Award #22403)

Here, however, Carrier has failed to introduce any probative evidence that the calls were actually made. While it may be true that Carrier, attempting to fill a Gang has little reason not to seek out a qualified employe, the fact remains that Carrier must establish through reliable evidence that Carrier made a reasonable effort to contact the employe. Mere assertions will not suffice.

For example, Carrier presented no evidence on the property as to which employe actually made the calls. See Award No. 23235. It failed to introduce a statement from any employe stating that he or she attempted to contact Claimant. Similarly, no specific times were provided as to the time of the alleged calls.

Given this absence of any concrete evidence, we must conclude that Carrier did not establish that it made a reasonable effort to contact Claimant. As such, we are constrained to conclude that Claimant was available within the meaning of Rule 11. Therefore, we will sustain the claim.

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 6th day of October 1981.

CARRIER MEMBERS' DISSENT
TO
AWARD 23401, DOCKET MW-23235
(REFEREE SCHEINMAN)

Dissent to this Award is required because the Majority improperly held the Carrier to a higher degree of proof than was required of the petitioning employees.

In the initial denial of this claim, Carrier's Assistant Division Manager pointed out the following:

> "Attempts to reach Mr. Coman were made repeatedly when hiring personnel back for Extra Gang 5529 early this summer.
>
> "However, each time there was no answer at his home."

The Employees were also advised that:

> "You were also advised that on June 8 and 9, 1978 three attempts were made on each of the dates in an effort to contact Mr. Coman with regard to the work in question. There was no answer received on any of these occasions."

Except to allege that Claimant received no phone calls, no evidence whatsoever was submitted that would rebut the Carrier's statement of fact.

It is not the Carrier that must make the claim for the Employees; that is their burden as the one asserting the claim. There was no evidence, other than allegations submitted in this case, that rebutted the Carrier's statements of fact. Yet, the Majority simply concludes at page 2 of the Award that such unrebutted statements "will not suffice". Obviously, the Employees' unsubstantiated allegation, under this construction, cannot begin to meet its burden.

In Third Division Award 9266 (Hornbeck) it was pointed out:

"....the Claimant cannot succeed on the weakness of a specific defense of the Carrier. He must maintain his claim on the strength of his own proof." (Emphasis added)

Third Division Awards 22760 (Scheinman), 22161 (Weiss), 22180 (Norris), 22292 (Scearce), 21677 (Caples), 21658 (Sickles), 21842 (Mead), 21894 (Roukis), are but some of the recent Awards that properly placed the burden of proof on the proper party.

By ignoring the Employees' burden of proof in this case, the Majority has altered the existing practice concerning the application of Rule 11 on this property to the detriment of all.

We dissent.

P. V. Varga

W. F. Euker

D. M. Lefkow

J. E. Mason

J. R. O'Connell