

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 31596
Docket No. MW-30813
96-3-92-3-621

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc. (former Louisville
(and Nashville Railroad Company)

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

- (1) The Agreement was violated when the Carrier recalled junior employe F. L. Martin instead of Mr. J. G. Wiglesworth to fill a track repairman's position at Livingston, Kentucky on March 25 through 29, 1991 [System File 1(39)(91)/12(91-1152) LNR].
- (2) As a consequence of the aforesaid violation, Mr. J. G. Wiglesworth shall be compensated eight (8) hours' pay for each day during the period cited above at the track repairman's straight time rate of pay."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Rule 22 (Return After Force Reduction) states in pertinent part:

"(e) In filling temporary vacancies of section or extra gang repairmen that are expected to last less than 50 working days, the senior cut-off man in the gang in which the temporary vacancy occurs will be called, if reasonably available; and if there are no cut-off men in that particular gang, the senior man or men in the seniority district will be called. It is optional with the division officials as to whether they will require the senior man to take the work.

(f) Employees will forfeit all seniority rights if they fail to return to work, or give satisfactory reason for not returning, within 10 calendar days from date of notification by mail or telegraph sent to the address last given."

Claimant, who established and holds seniority as a Track Repairman in the Track Subdepartment, was furloughed at the time of this dispute. Beginning March 25 and extending through March 29, 1991, Carrier required one Track Repairman to fill a vacancy on a gang assigned to unload concrete cross-ties at Livingston, Kentucky. Track Repairman F. Martin, junior to Claimant, was contacted to fill the vacancy and worked on claim dates.

On May 14, 1991, the Organization filed a claim alleging that Carrier had violated Rule 22 of the Agreement when it recalled the junior Track Repairman in lieu of Claimant, the senior employee.

Carrier denied the claim, maintaining that:

"Mr. Ernie Rich (Corbin Division Clerk) attempted to contact J. Wigglesworth by telephone on March 25, 26 and 27, 1991. J. Wigglesworth's telephone was not answered."

The General Chairman promptly replied to Carrier's denial asserting:

"I find it very odd that Mr. Tucker's office tried to contact claimant after Mr. Martin had already been contacted and started this extra work. Claimant was at home on all days that Mr. Rich allegedly tried to contact him. The only way Claimant learned of this Agreement violation was when a fellow employee called him to advise that a junior employee was working.

If a fellow employee could get Claimant by telephone, why couldn't Carrier. Without waiver of the above, the Carrier is obligated to contact employees by mail or telegraph when work is available. It is apparent the Carrier knew of this work the week prior to assigning it to Mr. Martin, and therefore, had ample time to send claimant a telegraph."

Carrier supplied the General Chairman with a hand written document which stated: "I attempted to call Mr. Wiglesworth by phone on March 25, 26 & 27, 1991 and got no answer." The initial "E" was on the signature line of the statement.

The Organization responded with a similar handwritten statement from Claimant who alleged:

"On the week of March 25, 1991 to March 29, 1991 Mr. F. L. Martin was called to work at Livingston, KY unloading concrete ties. I am a senior man and I was not called. Mr. Doug Simpson, the foreman, called Mr. Martin because Mr. Martin lives two miles from Livingston. I live 95 miles away. This move was convenient for the company. I want to claim 8 hrs. S. T. a day for five days, March 25-March 29, 1991."

Finally, the Organization submitted a second statement from R. D. Simpson which supported Claimant's above statement. Mr. Simpson maintained:

"On March 25, 1991, I needed one man to fill my gang unloading concrete ties at Livingston, KY. Ernie Rich told me, by telephone to call someone to fill a vacancy. I called F. Martin and made no attempt to call J. Wiglesworth."

Although the Organization presented both of the aforequoted statements, Carrier reiterated its earlier declinations. Therefore, the issue was placed before this Board for resolution.

At the outset, the Organization asserted that it was incumbent upon Carrier to contact Claimant, by any means necessary, to inform him of the vacancy which occurred March 25-29, 1991. The Organization's obvious reliance upon paragraph (f) of Rule 22, rather than paragraph (e) of the Rule, was misplaced. Paragraph (e) clearly states that: "... the senior cut-off man in the gang in which the temporary vacancy occurs will be called...." In this context, paragraph (e) of that Rule is applicable, and in the current vernacular, "called" connotes use of a telephone.

For its part, Carrier maintained that it did attempt to contact Claimant and was unsuccessful in doing so. That assertion was countered by the Organization's proffered statement in which Mr. Simpson alleged that he made "no attempt" to call Claimant. The record evidence indicates that throughout the handling on the property, Carrier failed to deny or challenge the accuracy of those two written statements. The burden of persuasion was shifted to Carrier in this dispute, and Carrier failed to carry that burden by way of tangible evidence that it did indeed, attempt to contact Claimant with respect to the vacancy in dispute. Therefore, this claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of August 1996.