

PUBLIC LAW BOARD NO. 1844

AWARD NO. 12

CASE NO. 5

PARTIES TO THE DISPUTE:

Brotherhood of Maintenance of Way Employees
and
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 it assigned junior trackmen to perform overtime service at Chicago Junction on October 18 and 19, 1974 instead of calling Trackman B. Viebrock who was senior, available and willing to perform that service (System File 81-19-102).
- (2) Trackman B. Viebrock be allowed seventeen and one-half (17 1/2) hours of pay at his time and one-half rate because of the aforesaid violation."

OPINION OF BOARD:

At the time this dispute arose, Claimant was employed as a trackman on the District Gang working in the vicinity of Spooner, Wisconsin. On October 19, 1974 a derailment occurred near Spooner and Carrier found it necessary to call out section forces to perform overtime work repairing derailment damage. Employees in the Section Gang assigned to the section on which the derailment took place were called out but additional forces were necessary. Therefore employees assigned to the Division Gang working in the area were called to augment the regular section forces. In calling these Division Gang forces Carrier officials passed over Claimant and called two junior employees from his Division Gang. The two junior

employees began working at 11:30 p.m. on Friday, October 18, and worked continually until 5:00 p.m. on Saturday, October 19, 1974. Thereafter, under date of November 26, 1974 the instant claim was filed alleging violations of Rule 4 -- Seniority and Rule 31 -- Calls. The claim was denied on the property essentially on the following grounds: (1) Rule 31 was complied with when the section gang was called in seniority order and that Rule does not apply when Carrier has to go outside the regular section crew for overtime service; (2) the derailment constituted an emergency and strict application of the rules must yield; (3) Claimant's seniority was only "a few weeks" over that of the employees called and therefore de minimus; (4) the employees used were "more available" than Claimant.

Carrier asserts, without serious contradiction by the Organization, that on this property it has been practiced that whenever a derailment occurs on a M of W section and it is necessary to call men to work at such wreck, the section men assigned to such section have preference to calls for such work over men not assigned to such section, regardless of seniority; and that entitlement to calls in the section gang is according to seniority order. Carrier errs however when it deduces from the foregoing that Rule 31 and its seniority order requirements apply only when members of the section gang on which the derailment occurred are called. The Rule itself contains no such express limitation nor does the practice described supra necessarily require such a restrictive reading of the contract language. Rule 31 requires that when men in a gang are called they will be called in seniority order. There is no question concerning the calls made to the members of the section gang and we assume that Carrier complied with Rule 31 in that respect. But when Carrier moved outside the section gang and called Division

Gang forces it did not escape the requirements of Rule 31. We find persuasive precedent for disposition of the instant case in Third Division Award No. 15840 which held in pertinent part as follows:

"Neither Claimant nor Peterson had seniority on Section 99 where the work was done and had no right, therefore, to the work. Petitioner's position is, however, that once Carrier elects to recruit from an Extra Gang it is obliged to do so on the basis of seniority.

"At issue here is not whether Claimant had a superior right to do this work. He did not. When, however, Carrier chose to seek an Extra Gang Laborer to do this work, Carrier made that work extra gang work and was then obliged to assign the work according to seniority. We have frequently held that where Carrier has the choice from which class of employees it should select men to perform work, it is obliged to choose from that class according to seniority. Awards 6306, 7062."

Once the "resident" section gang had been called and Carrier moved to call Division Gang employees, it was obligated under Rule 31 to call those Division Gang employees in seniority order because under the express words of that Rule "the senior available men in the gang will be called." Carrier avers that Claimant was not readily available and the employees it called were more available. But well established precedent teaches that Carrier is precluded from raising the defense of availability in such cases unless first it makes a reasonable effort to call the senior man. See Third Division Awards 5887, 11888, 16081, 17041, and 18425. Carrier herein made no effort at all to call Claimant and is precluded thereby from contesting his availability. Nor do we find persuasive the bare unsupported assertions that Carrier operated herein under emergency conditions. It is true that a recognized exception to strict application of seniority rules has been recognized in cases of bona fide emergencies but a derailment is not per se an emergency which would relax the ordinary obligations

of Carrier under the Agreement. Persuasive evidence is necessary to establish the existence of such an emergency and the instant record is devoid of such evidence. In the facts and circumstances of this case we find that Carrier did violate Rule 31 when it called out Division Gang employees junior to Claimant to work the derailment on October 18, 1974. The claim is sustained.

FINDINGS:

Public Law Board No. 1844, upon the whole record and all of the evidence, finds and holds as follows:


1. That the Carrier and Employee involved in this dispute are, respectively, Carrier and Employee within the meaning of the Railway Labor Act;
 2. that the Board has jurisdiction over the dispute involved herein;
- and
3. that the Agreement was violated.

AWARD

The claim is sustained.


Dana E. Eischen, Chairman


O. M. Berge, Employee Member


R. W. Schmiede, Carrier Member

Dated: Aug 18, 1977