

PUBLIC LAW BOARD NO. 1844

AWARD NO. 82

CASE NO. 100

PARTIES TO 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 on January 9, 10, and 11, 1980 when Bridge and Building forces from the Iowa Division were used to perform work on the Illinois Division. (Carrier's File 81-1-270)
- (2) The Bridge and Building crew headquartered at Clinton, Iowa shall each be allowed an equal proportionate share of the one hundred twenty (120) hours expended by the Iowa Division Bridge and Building forces.

OPINION OF BOARD:

On January 9, 10 and 11, 1980 Claimants were assigned to perform maintenance work on a bridge over the Mississippi River near Clinton, Iowa. The situs of this work is in the Illinois Division - Seniority District 3, upon which Claimants all hold seniority. In addition to the Claimants, on the dates in question Carrier also assigned to this work a B&B gang from the Iowa Division - Seniority District 4. The Organization maintains that such assignment was a patent violation of the seniority rights of Claimants which would warrant payment of the present claim initiated on their behalf on February 12, 1980, as follows:

I am filing this claim in behalf of the B&B crew headquartered at Clinton, Iowa.

On January 9, 10, and 11, 1980 five men from an Iowa Division B&B crew worked at Clinton which is part of the Illinois Division. A total of 120 man hours were spent on the Illinois Division by this crew.

It is the claim of the Brotherhood that the men on the Clinton B&B crew receive an equal proportion of these hours at their applicable rate of pay. The Carrier has violated Rules 4 and 5 of the August 1, 1974 Agreement in which mentioning become part of this claim.

Please notify General Chairman Jorda and myself which pay period this claim will be allowed.

The claim was appealed and denied at all levels of handling on the property, culminating in a denial letter of April 11, 1980, reading in pertinent part as follows:

During the winter of 1979-1980, the Illinois Division was plagued by several casualties in the bridge and building area because of fires, derailments and other losses. Because of the immediate attention required to deal with these casualties, much of the scheduled work and projects had to be deferred. One such project that was deferred was work on the bridges at Clinton, Iowa. After an inspection late in December 1979, the carrier's system bridge engineer and his staff determined that an emergency condition did in fact exist because of the deferred work on the bridges at Clinton. In order to correct these deficiencies as quickly as possible, the Iowa Division B&B crew was used to assist the Illinois Division crew in working on the bridges at Clinton.

Under these circumstances, I cannot agree that a violation of Rules 4 and 5 are in evidence. In fact, the movement of forces as described above is clearly supported by the provisions of Rule 11(b). I cannot agree that the Illinois Division crew was deprived of their seniority or lost any work as a result of the Iowa Division assisting them in this project. Lacking support of schedule rules and agreements, your claim is denied.

The Organization cites a number of awards to support the proposition that B&B crews headquartered in a particular division have a right through seniority to perform work arising at that division in preference to other crews from outside the division on which the work is performed. See Rules 4 and 5 and Appendix F. See also, Awards 3-2050; 3-4667; 3-11752; 3-19840; 3-20891; 3-22374.

Carrier apparently does not refute the foregoing general principle, but maintains that the temporary use of this outside B&B crew was specifically authorized by the express language of Rule 11(b), reading as follows:

Rule 11 - Transfers

(a) Except as provided in Article III of the February 7, 1965 Agreement, employees will not be permanently transferred from one seniority district to another seniority district.

(b) An employee may be temporarily transferred by the direction of the Company for a period not to exceed six (6) months from one seniority district or division to another, and he shall retain his seniority on the district or division from which transferred. Such employee shall have the right to work temporarily in his respective rank on the district or division to which transferred, if there are no qualified available employees on the district or division. The six (6) month period may be extended by agreement between the Company and the General Chairman. When released from such service the employee shall return to his former position.

Additionally and alternatively, Carrier notes that even in the absence of contractual authority like Rule 11(b) it has an inherent or retained management authority to make such temporary transfers to meet emergency conditions, notwithstanding Claimant's entitlement to such work under ordinary circumstances. Finally, Carrier contends that if, arguendo, Claimants' rights under the Agreement were violated no basis for the

damages claimed have been demonstrated because they were "fully employed" on claim dates.

The first inquiry in this case concerns the effect, if any, of Rule 11(b). On its face the second sentence thereof seems to render Rule 11(b) inapplicable in the facts before us. Carrier urges, however, that it has shown that there were "no qualified available employees on the district or division" because Claimants already had been assigned by Carrier to the bridge maintenance work at issue herein. We find this argument unpersuasive not only because of the bootstrapping implications, but also because the assignment of Claimants to perform bridge maintenance on January 9, 10 and 11 during straight time hours does not show that they were unavailable to perform the contested amount of that work either on overtime or at straight time rates on days before or after January 9, 10 and 11. In that connection, Carrier made a colorable assertion that conditions might arise under which it would be unreasonable or impractical or impossible to consider qualified employees physically present on the division as "available for service." But there is no evidence to support such a conclusion on the present record and neither advocacy nor speculation serve to fill that evidentiary gap. Giving the words of Rule 11(b) their plain and unambiguous meaning, we conclude that Carrier has failed to prove fulfillment of the condition precedent to the temporary transfer and utilization rights granted by said Rule. In the absence of such a showing, Rule 11(b) provides no comfort to Carrier in this case.

Carrier avers that notwithstanding Rule 11(b) there were "emergency conditions" on the bridge in question which justified the unilateral use of the outside crew to perform work in the Illinois Division seniority

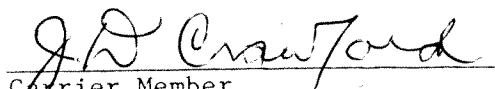
district. This assertion is in the nature of an affirmative defense or justification for a prima facie violation, however, and accordingly Carrier has the burden of developing persuasive evidence of a bona fide emergency. The principles governing such determinations are not unknown to these parties, having been developed fully in Awards concerning the same Agreement, contract provisions and parties as does the present case. We adopt the rationale of Award 3-19840 in holding that Carrier on this record has failed to present persuasive evidence of the existence of an "emergency" which would warrant the violation of Claimants' seniority rights on their home district. General deterioration caused by deferred maintenance does not carry with it the element of sudden crisis or unforeseeable trauma normally associated with the term "emergency". Nor do the relative inconvenience and/or increased cost associated with having Claimants perform the work over six rather than three straight time days or with overtime constitute the urgency or immediacy normally associated with the term "emergency". In our judgement, therefore, Carrier has not provided sufficient evidence to establish the validity of its contentions of emergency.


With respect to the question of damages, we find Award 3-19840 to be persuasive and controlling. We shall sustain the claim as presented.

AWARD

Part 1 of the claim is sustained. Part 2 of the claim is sustained. Carrier is directed to implement this Award within thirty (30) days of issuance.


Employee Member


Carrier Member


Dana E. Eischen, Chairman

Date: Sept. 10, 1982