

Award No. 5999
Docket No. 5859
2-SCL-(CM)-'70

NATIONAL RAILROAD ADJUSTMENT BOARD

SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Nicholas H. Zumas when award was rendered.

PARTIES TO DISPUTE:

**SYSTEM FEDERATION NO. 42, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Carmen)**

SEABOARD COAST LINE RAILROAD COMPANY

DISPUTE: CLAIM OF EMPLOYEES:

1. That under the current applicable agreement Carman A. M. Tyner, wrecker fireman, employed at the West Jacksonville Shop, Jacksonville, Florida, is entitled to compensation for eleven and one-half (11½) hours at time and one-half rate of pay beginning April 21, 1968 at 7:30 P.M. for service he would have performed had he been called properly.

2. That accordingly, the Carrier be ordered to compensate Carman Tyner for eleven and one-half (11½) hours at the time and one-half rate of pay for said violation on April 21, 1968.

EMPLOYEES' STATEMENT OF FACTS: Carman A. M. Tyner, hereinafter referred to as the claimant, is the regularly assigned fireman on the West Jacksonville derrick. Mr. Tyner was at his home at Jacksonville, Florida on April 21, 1968 at 7:30 P.M., in the company of his wife, his sister and her daughter-in-law. Mr. and Mrs. Tyner, Mrs. Mary Williams and Mrs. Genie Williams were all present in the living room from 6:00 P.M. until 8:45 P.M. within ten (10) feet of the telephone. It did not ring. Mr. Tyner had experienced no trouble with his telephone prior to this time, nor did he experience any after this occurrence.

This dispute has been properly handled with all carrier officers authorized to handle disputes of this type with the result that all of them had declined to adjust it. The agreement effective March 10, 1923 as subsequently amended and the agreement effective January 1, 1968 between System Federation No. 42 and the Seaboard Coast Line Railroad Company are controlling.

POSITION OF EMPLOYEES: Carmen's Special Rule 103 of the current working agreement was clearly violated when Carman A. M. Tyner was not called to fill his bid-in position on the wrecker on the date in question. It is the Carrier's obligation under the rule to contact and call all employes to

service. The Employes find it incredible that Supervisor Carroll called Carman Tyner five times from 7:40 P. M. through 8:40 P. M., ringing the phone eight times and receiving no answer. On May 27, 1968, almost identical circumstances and events occurred, as was called to the attention of the director of personnel in conference. Mr. Carroll was able with no trouble at all to contact the other wrecker crew members, but again contended that he could not reach Mr. A. M. Tyner. The representatives of the employes find this unbelievable. It becomes inescapably clear that Mr. Tyner is not called to accompany the derrick by the aforementioned foreman deliberately. The employes believe in the theory of probability, but cannot tolerate premeditated discrimination.

CARRIER'S STATEMENT OF FACTS: Mr. A. M. Tyner, the claimant, is employed by carrier as a carman at its West Jacksonville Shops, and is a member of carrier's regularly assigned wrecking crew at this location. On April 21, 1968 (the date involved in this dispute), Mr. Tyner worked his regular assignment as carman on first shift, with assigned hours 7:00 A. M. to 3:30 P. M., and was properly compensated for his service that date.

At approximately 7:30 P. M. on April 21, 1968, it became necessary for carrier to call the regularly assigned wrecking crew to accompany its West Jacksonville wreck derrick to Live Oak, Florida, for the purpose of performing certain re-railing service. The crew dispatcher at West Jacksonville was engaged in calling crews to operate several trains at the time, and requested the assistance of Mr. J. D. Carroll, supervisor car department, to call the wrecking crew members for this assignment. Mr. Carroll promptly called each of the regularly assigned members of the wrecking crew for this assignment, including claimant Tyner. All of the members of this crew, except claimant Tyner, responded to Mr. Carroll's call.

Mr. Carroll made five (5) attempts to reach Mr. Tyner by telephone to advise him of this call for service on April 21, as attested by his statements dated April 29 and November 7, 1968. When Mr. Carroll was unable to reach Mr. Tyner after these repeated efforts, a junior employe was then called and used in his place for the assignment.

On April 23, 1968, the local chairman filed time claim in behalf of Mr. Tyner for additional compensation in the amount of eleven and one-half (11½) hours at time and one-half rate. The claim was based on the allegation that carrier failed to call claimant Tyner for the April 21 wrecking service assignment, and thus violated Rule 103 (b) of the agreement.

The claim has been appealed and declined at each level of appeal on the property. When declining the claim at the highest level of appeal on November 14, 1968, carrier's director of personnel advised the general chairman in part as follows:

"My investigation of this matter fails to disclose any justification for this claim. When it became necessary to provide this wrecker service on the date in question, all employes of the wrecking crew, including claimant Tyner, were called for this service. The calls were placed by Supervisor J. D. Carroll at the Crew Dispatcher's request, and statement signed by Mr. Carroll on April 29, 1968, has been furnished to your Local Chairman, which attests to the fact that Mr. Carroll called Mr. Tyner a total of five times in this connection.

Attached hereto is supplemental statement signed by Mr. Carroll on November 7, 1968, certifying as to the time those calls were placed.

While Mr. Carroll stated he did not check with the Telephone Company to ascertain that Mr. Tyner's telephone was operative, Mr. Tyner attested in his affidavit of June 10, 1968, that his telephone was in working order.

Carrier made more than a reasonable effort to call claimant for the service in question, but he did not respond. His unavailability to receive carrier's call was his own responsibility, and there was no violation of Rule 103 (b) or any other rules of the agreement in this instance."

Agreement between the parties effective January 1, 1968 is controlling. Copy is on file with your Board, and by reference is made a part of this submission.

POSITION OF CARRIER: The only issue in this case is whether or not carrier made a reasonable effort to call claimant Tyner for the work in question on April 21. This, Carrier maintains, was done when Supervisor Carroll made a total of five (5) attempts to call Mr. Tyner by telephone and got no answer, after which he called another employe in the claimant's place.

Carrier made a sincere and reasonable attempt to call Mr. Tyner for the wrecking crew service on the date involved in this dispute. He was not used on the assignment only because of the fact that he did not respond to Mr. Carroll's repeated telephone calls to notify him.

Supporting carrier's position in this instance are two statements signed by Supervisor Carroll attesting that he called Mr. Tyner's telephone number at 7:40 P. M., 7:55 P. M., 8:00 P. M., 8:25 P. M. and 8:40 P. M. on April 21; that Mr. Tyner's telephone rang properly each time he called it; and, that in each instance Mr. Carroll received no answer.

As "additional proof" to support his claim, Mr. Tyner submitted a letter to his Local Chairman dated June 10, 1968. Your Board, however, will note that in this letter **the claimant does not allege that his telephone did not ring during the time in question on April 21.** He, likewise, does not deny that it did ring. On the other hand, he simply confirms in his letter that his phone was in working order. The signature of claimant's wife on his letter of June 10, as well as statement signed and submitted by his relatives, can only be classed as self-serving and inconclusive, and do not constitute any probative proof upon which your Board can or should reach a conclusion or make a finding in this instance that the Agreement was violated. The "additional proof" that was furnished in June, in fact, only makes it appear the claimant may not have desired to respond to carrier's repeated telephone attempts to notify him of the assignment on April 21, inasmuch as he states he had unexpected visitors (relatives) at the time in question.

Rule 103 (b) of the agreement, under which this claim was presented, reads as follows:

"When wrecking crews are called for wrecks or derailments outside of yard limits, a sufficient number of the regularly assigned crew will accompany the outfit."

This rule imposes upon carrier only a duty to make a reasonable effort to communicate with the employe by a method known and acceptable to the parties, and on this property the telephone is commonly used for the purpose of calling employes. Carrier's effort to notify Mr. Tyner in this instance, therefore, was both reasonable and in accordance with the agreement, and was further in accordance with your Board's ruling in Award 4855, as follows:

"The Rule involved imposes upon the Carrier a duty to make a reasonable effort to communicate with the employe by a method known and acceptable to the parties. We find that Carrier's effort to reach Claimant by telephone was reasonable and in accordance with the Agreement. The claim, therefore, is denied.

See Third Division Awards 10376 (McDermott), Award 11743 (Engelstein), Award 11994 (Seff)."

In ruling on a dispute that included a situation similar to the issues here involved, the Third Division in its Award No. 10771 held, in part, as follows:

"The Carrier states that it called Wroblewski twice to fill the position. Being unable to contact him, the Carrier requested Perry to do the work. The Employes state, however, that Wroblewski received no such call, although he was at home during all times in question.

Wroblewski's claim for compensation, either at the straight or overtime rate, depends on whether or not he was called to do the work. It is undisputed that he had priority over Perry to fill the vacant position. To decide that Wroblewski was not called requires a finding that the Carrier did not tell the truth, or that it made an insufficient effort to call him. We do not make either of these findings.

There is no showing of motivation or other evidence to suggest that the Carrier deliberately intended to bypass Wroblewski. There can be no presumption that either party deliberately misstates the truth. Therefore, Carrier's assertions that the calls were made are accepted as true. In addition, we conclude that the effort made by the Carrier to call Wroblewski was sufficient. . . .'

In conclusion, carrier reaffirms its position that there has been no violation of the agreement in this instance, and respectfully requests that your Board deny this claim in its entirety.

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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.

Claimant was regularly assigned from 7:00 A.M. to 3:30 P.M. on the date in question. At approximately 7:30 P.M. it was necessary to dispatch a wrecking crew. Claimant, according to Carrier, was called at his home five times from 7:40 P.M. to 8:40 P.M., and there was no answer. Claimant contends that he was in fact at home during this period entertaining visiting relatives, the phone was no more than 10 feet away, and it did not ring. There was no effort on the part of Carrier to determine whether or not the telephone was in working order, or that the "no answer" was verified with the telephone company.

Under the facts in this dispute, given the well known uncertainties and malfunctions of telecommunications equipment, Carrier in order to protect itself has a duty to determine whether the telephone equipment is in working order. Award No. 4815.

AWARD

The claim is sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of SECOND DIVISION

ATTEST: E. A. Killeen
Executive Secretary

Dated at Chicago, Illinois, this 24th day of September, 1970.