

Award No. 5483
Docket No. 5318
2-AT&SF-EW-'68

NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

The Second Division consisted of the regular members and in addition Referee Paul C. Dugan when award was rendered.

PARTIES TO DISPUTE:

SYSTEM FEDERATION NO. 97, RAILWAY EMPLOYEES'
DEPARTMENT, AFL-CIO (Electrical Workers)

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY
(Coast Lines)

DISPUTE: CLAIM OF EMPLOYEES:

1. That the Railway Company party to this dispute, erred and violated existing Agreement and practices between the parties to the dispute when they called Electrician M. R. Fenily to work on MTC Car No. 1762, on December 18, 1964.

2. That accordingly Electrician R. M. D'Arezzo be compensated for five and six-tenths (5.6) hours at his regular overtime rate of pay.

EMPLOYEES' STATEMENT OF FACTS: Mr. R. M. D'Arezzo, hereinafter referred to as the Claimant, is an hourly rated regularly employed, qualified electrician employed by the Atchison, Topeka and Santa Fe Railway Company, hereinafter referred to as the Carrier, in their Los Angeles Terminal Mechanical Department.

This dispute has been handled with the proper Carrier officers designated by the Company to handle such disputes, with the net results that all have denied the claim and refused to make any corrections and/or changes in the conditions which generated this dispute.

The Agreement effective August 1, 1945, as subsequently amended, is controlling.

POSITION OF EMPLOYEES: At the Los Angeles Terminal of the Carrier there exists between the Employees and the Carrier, agreements and practices governing the distribution of overtime to the Electrical Workers at this location. These agreements and/or practices are predicated on and in compliance with Rule 10(b) of the General Agreement effective August 1, 1945, as amended.

to which the carrier can only say its record set forth hereinabove proves the calls were made and the telephones did ring several times. It cannot say why these individuals did not respond to the telephone. Apropos thereto, please see that part of First Division Award No. 18406, reading:

"The Division is here called upon to decide a question of fact as to whether or not claimant was called. This presents a conflict which the Division is unable to resolve and the claim must, therefore, be and is dismissed."

The Board's attention is directed to the fact that Item 2 of the Employees' claim seeks payment of the penalty at the overtime rate of pay, which is contrary to the firmly established principle of all Divisions of the National Railroad Adjustment Board that the proper compensation for time not worked is at the pro rata rate.

The claim is not in order and should be declined.

The Carrier is uninformed concerning the argument the Employees may advance in their ex parte submission, and accordingly reserves the right to submit such additional facts, evidence or argument as it may conclude are necessary in reply to the Employees' ex parte submission or any subsequent argument or briefs presented by the Employees in this dispute.

(Exhibits not reproduced.)

FINDINGS: The Second 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 were given due notice of hearing thereon.

The issue involved herein is whether or not Carrier called Claimant in connection with overtime work.

The position of the Employees is that Rule 10(b) of the Agreement requires that there be an equal distribution of overtime for Electrical Workers at the Carrier's Los Angeles Terminal; that Carrier should have called Claimant inasmuch as he had the least number of overtime hours on the date in question, having 1684.1 hours of overtime as compared to 2518.1 hours of M. R. Fenily, who was called by Carrier to perform the work. The petitioners submitted an affidavit signed by him and his wife stating that the telephone did not ring at his home on the date in question.

The Carrier contends that it consulted the list of Employees showing the amount of overtime worked and called in proper order, seven men, including Claimant, ahead of Mr. Fenily, but that each of these seven Employees either refused to work, or that there was no answer; that the Claimant herein was third on the list, and that he failed to answer his home telephone after he was permitted to ring on several occasions before the call was discontinued.

In this case we have the Carrier stating that efforts were made to call the Claimant, but that he did not answer his telephone; and the Employees state unequivocally that no call was made to Claimant. Thus, we have an irreconcilable dispute as to the facts before us. Aside from such assertions by either party, the record is lacking in evidence supporting both assertions. Under these circumstances, it is impossible to resolve this dispute. Absent proof, it must be held that the Carrier did not violate the Agreement and the Claim must, therefore, be denied.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of **SECOND DIVISION**

ATTEST: Charles C. McCarthy
Executive Secretary

Dated at Chicago, Illinois, this 28th day of June, 1968.

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