

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Jay S. Parker, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
SOUTHERN PACIFIC COMPANY (PACIFIC LINES)**

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

(1) That the Carrier violated the agreement by failing to call for overtime service Water Service Mechanic Charles D. Woods, Jr., Gang No. 36, Brooklyn Yard, on Sunday, June 6, 1948;

(2) That Water Service Mechanic Charles D. Woods be reimbursed eighteen (18) hours at the time and one-half rate on account of the Carrier's violation of the agreement.

EMPLOYEES' STATEMENT OF FACTS: Mr. C. D. Woods is employed as a Water Service Mechanic.

On Saturday, June 5th, 1948, Mr. Woods was advised by his Foreman that certain work would have to be performed on Sundays at the Portland Union Station, and that in all probability Mr. Woods would be called upon to perform service in connection therewith.

Two Water Service Mechanics, having less seniority than Mr. C. D. Woods, were called to perform the required work. Water Service Mechanic C. D. Woods was not called.

The Agreement in effect between the parties to this dispute dated September 1, 1926, and all subsequent amendments and interpretations, are by reference made a part of this Joint Statement of Facts.

POSITION OF EMPLOYEES: As stated by the Employees in their Statement of Facts, Water Service Mechanic C. D. Woods was advised that in all probability his services would be required on Sunday, June 6, 1948. Mr. Woods was regularly assigned to work Monday through Saturday, and Sunday was recognized as an off day for his assignment. Instead of calling Mr. C. D. Woods on June 6, 1948, two junior Water Service Mechanics were called.

For the purpose of protecting employees in the Maintenance of Way Department against actions wherein seniority is not recognized, the parties to the agreement have inserted provisions in the agreement which read as follows:

"ARTICLE II—SENIORITY. Rule 1—Seniority begins at the time the employee's pay starts in the class which employed.

gang in which the claimant was employed had made a reasonable attempt to contact the claimant for the purpose of calling and using him to perform the work upon which the claim is based. In consideration of the evidence submitted, the carrier insists that the petitioner cannot consistently hold that on the occasion here involved those handling the matter had either disregarded or overlooked the seniority status of the claimant or in fact, the seniority status of any other member of water service Gang No. 36; that contrary thereto, the statement of Foreman Clare establishes not only that he was fully cognizant of the respective seniority standings of the claimant and the other members of his gang, but also establishes that he had endeavored to call said employes in their seniority order for the work to be performed, and that it was only by reason of the fact that the claimant was not available that it was necessary to call and use junior employes.

The carrier has no desire of depriving employes covered by the current agreement of any work that is recognized either by agreement provision or established practice to be rightfully theirs. Insofar as the instant docket is concerned it is obvious from the evidence presented, that the carrier had no desire of depriving the claimant of work on Sunday, June 6, 1948, and that had he been available to accept and respond to the call which the foreman attempted to make he would have been used to perform the work for which payment is sought; however, as previously stated, the claimant was not available to be called thereby making it necessary to call and use other employes who were available to perform the work. The result of the carrier's action of course was that junior employes covered by the current agreement performed the work and were compensated therefor in accordance with the applicable provisions of the current agreement.

CONCLUSION

The carrier asserts that it has established that the claim in this docket is without basis or merit, and therefore, respectfully submits that it should be denied.

(Exhibits not reproduced.)

OPINION OF BOARD: Claimant Woods holds a regular assignment as a Water Service Mechanic in the Carrier's home station Brooklyn yard, Portland Division, hours 7:30 A.M. to 12:00 noon and 12:30 P.M. to 4:00 P.M. daily except Sundays and holidays.

On Saturday, June 5, 1948, Woods was advised by his foreman that certain extra work might have to be performed on the following Sunday at the Portland Union Station and that it might be necessary to call him for service on that day. What had been a possibility on Saturday developed into a reality about 10:00 A.M. on Sunday and the services of a Water Service Mechanic were required on that day for the purpose of operating pumps at the Union Station in Portland.

Woods was the senior Water Service Mechanic in Water Service Gang No. 36 qualified to perform the work. However, he was not contacted by the Carrier or assigned to do it. Instead Water Service Mechanic Skiles, a junior employe, was used on the job from 1:30 P.M. to 10:00 P.M., Sunday, June 6. He was then relieved by Water Service Mechanic Tarver, also junior in point of service, who was called and used from 10:00 P.M. June 6 to 7:30 A.M. June 7, 1948. Within a few days thereafter Woods entered a grievance, claiming he was entitled to the work by virtue of seniority and in due time the organization perfected the instant claim which seeks to have him paid at the overtime rate for all hours worked by the two junior employes above mentioned.

So much for facts which are not disputed. Those in controversy will be detailed after we have disposed of an issue which, if sustained, would do away with all necessity for their relation. The Organization contends Woods was available and that Article II of the current agreement dealing with seniority

rights and in particular Rule 2 of such agreement entitled him to the work involved herein. Such rule reads:

"Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the railroad, as provided in these rules."

At the outset the Carrier raises the question that neither Rule 2 nor any other rule of the agreement dealing with and fixing seniority rights guarantees or grants claimant, or any other senior employe within a class, the right of preferred consideration or opportunity to perform service, overtime or otherwise. The claim has little merit and we are not disposed to labor it. It suffices to say that our awards hold that seniority is of the essence of collective agreements and that (1) under rules similar in character to those here involved (See Awards 2716 and 4393) or (2) under rules dealing with seniority in general terms (See Awards 2341 and 2490) or (3) in the absence of any express rule whatsoever so long as seniority rights are recognized in an agreement (See Award 4531), extra work the Carrier has performed on an overtime basis, except in certain cases of emergency not here involved, belongs to the employe holding seniority in the seniority district where it is performed if such employe is qualified and available to perform it.

Turning to the controverted facts it can be said that when contentions and arguments advanced by the parties in support of their respective positions are stripped of all excess verbiage it is apparent the all decisive factual issue in this case, once it has been determined claimant was entitled to the work by virtue of seniority, is whether a sincere, honest and reasonable attempt was made by the Carrier to call Woods for service. Strange as it may seem both parties rely on and cite our Awards Nos. 4200 and 4841, holding that if a senior employe entitled to overtime work, cannot be found after a reasonable attempt to contact him has been made the Carrier is justified in calling some one else.

In presenting the foregoing issue the parties go far afield and indulge in much speculation and conjecture not warranted by the record. We shall ignore those matters and depict the factual situation actually disclosed upon an impartial and unbiased analysis of what appears therein. All we find there on the point in question supporting the Carrier is a statement by A. Clare, Foreman of Water Service Gang No. 36, addressed to the Carrier's Water Service Supervisor, which reads as follows:

"On June 6, 1943 at 10:45 A.M. you phoned me to take some one to Union Station to operate pumps at 1:00 or 1:30 P.M. that afternoon.

"I then phoned Mr. C. Woods but could not get him. I phoned three more times until 12:00 o'clock noon and couldn't get an answer.

"I then called Mr. Skiles and he started to work at 1:30 P.M.

"I also called Mr. A. Traver and couldn't get him. I left my phone number with the Manager of hotel so later in afternoon Mr. Traver called me and I had him relieve Mr. Skiles at 10:00 P.M."

The only concrete evidence supporting the claimant's position consists of two verified statements, one from his brother, Eugene Woods, and the other from his sister-in-law, Juanita Woods. These statements are identical in form, except for words indicating the identity of the makers, and read:

"This will certify to the fact that I was visiting my brother, (brother-in-law) Charles D. Woods, Jr., at his residence, 3116 N. E. Pacific Street, Portland, Oregon, on Sunday, June 6, 1948, between the hours 10:30 A.M. and 7:00 P.M. and between such hours he did not receive telephone call or any other notification requesting him to report for duty with the Southern Pacific Company."

In its ex parte submission the organization states Mr. Woods spent the entire day at his residence and was available for service. However, it is to be noted his statement to that effect is not to be found in the record. Nor is there anything to be found there, even though such submission contains the additional statement he awaited a call all day, establishing that he or some other member of his family remained where some one of them could have heard the ringing of the telephone if he actually was called.

The Organization argues that under the rule announced in Awards 4200 and 4841 attempts to call an employe by telephone can never amount to a "reasonable attempt to contact him", within the meaning of that phrase as used therein. We do not agree. It will be noted telephones were not involved in those cases and no attempt whatsoever was made to call the employes at all. On that account we do not think they support the Organization's position. Moreover, while this question appears to be one of first impression so far as this division is concerned, we believe, in line with the holding of the First Division in Award No. 4790, that where an employe has a telephone the rule should be and is that a sincere and honest attempt on the part of the Carrier to call him through such modern and common method of communication, particularly where he has been advised of the possibility of that action, constitutes a reasonable attempt to contact him and, when after repeated calls he does not answer, justifies the Carrier in calling someone else on the assumption he is not available.

The principal point and the one most strenuously urged by the Organization is that the Foreman's statement is false and that he made no attempt, either by telephone or otherwise, to contact Wood at his home. It insists the statements of his brother and sister-in-law, heretofore quoted, conclusively establish the latter was available all day, even for purposes of answering the telephone. We do not think the statements are subject to that construction. Faced by that fact and others heretofore outlined it is asking too much to expect us to disregard the Foreman's statement as pure fabrication and accept the Organization's viewpoint as to the import to be given its evidence. To do so would require us to assume and supplement the record with facts it failed to see fit to establish by evidence. Therefore we are constrained to accept the Foreman's statement to the effect he called for Woods at least three times between 10:45 A.M. and 12:00 o'clock noon on Sunday, June 6, 1948, as true. That, in our opinion, under all the circumstances, satisfied the requirements of the rule and permitted the Carrier to call Skiles to fill the extra work position from 1:30 P.M. to 10:00 P.M. on that day.

It does not follow, however, from the conclusion just announced that the instant claim is to be denied in its entirety. It affirmatively appears from the record no attempt was made by the Carrier to contact Woods after 12:00 P.M. on Sunday to perform the work required at the Union Station from 10:00 P.M. June 6th to 7:30 A.M., June 7th, which it subsequently assigned to Tarver, a junior employe. This work also belonged to Wood by virtue of his seniority. We think that even though the Foreman failed to reach him by telephone on Sunday morning it was the Carrier's duty to try and contact him later in the afternoon and evening of that day for the purpose of offering him the work of this second shift and that its failure to make any effort whatsoever to do so resulted in a violation of the agreement. It follows the Claim must be sustained for the 9½ hours the position was worked commencing 10:00 P.M. on June 6 and ending 7:30 A.M. June 7. Reparation, however, is limited to the pro rata rate for the 7½ hours the position was worked on June 7th. Time and one-half is allowed for the 2 hours worked on June 6, that being the contract rate for Sunday work.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained in part and denied in part as per the Opinion and Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST: A. I. Tummon
Acting Secretary

Dated at Chicago, Illinois, this 15th day of September, 1950.