



Award No. 16584
Docket No. MW-17213

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Nathan Engelstein, Referee

PARTIES TO DISPUTE:

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES

**THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY**

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

(1) The Carrier violated the Agreement when it failed to call and use Section Laborer E. D. Quintana for overtime work from 7:00 A. M. to 3:30 P. M., on Saturday, September 24, 1966, but called and used junior laborers therefor. (System file MW-22-66/D-7-62)

(2) Section Laborer E. D. Quintana be allowed eight (8) hours' pay at his time and one-half rate because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: Section Laborer E. D. Quintana is senior to Section Laborers Alfredo G. Garcia and Henry Teixeira and they are all regularly assigned to the section gang at Littleton, Colorado, with an assigned work week extending from Monday through Friday (Saturdays and Sundays are rest days).

On Saturday, September 24, 1966, Section Laborers Alfredo Garcia and Henry Teixeira were used to perform eight (8) hours of overtime work but no effort was made to call and use senior section laborer E. D. Quintana. The claimant, was available, willing and qualified to have performed this overtime work and Section Foreman Tom Nidig was fully aware of the claimant's availability and that his vacation had ended on Friday, September 23, 1966.

Claim was timely and properly presented by the Employees at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated February 1, 1941, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Mr. E. D. Quintana, Section Laborer at Littleton, Colorado, began a one week vacation on Monday, September 19, 1966, and reported back to work on Monday, September 26, 1966.

1. That the carrier violated our current agreement when on September 24th, 1966, they failed to call senior section laborer E. D. Quintana for overtime work and used the two junior laborers listed above for this overtime work from 7:00 A. M. to 3:30 P. M.

2. That Mr. E. D. Quintana now be paid for eight hours at his punitive rate of pay or the amount of \$29.56 account of this violation.

During this conference I showed you letters from Mr. D. A. Noell, Section Foreman at Florence; Mr. A. C. Sipes, Section Foreman at Pueblo; Mr. J. L. Roberts, Section Foreman at Cotopaxi and Mr. P. J. Kelly, Section Foreman at Pueblo, all stating that it has been the custom not to call an employe for any overtime work on the week end following the end of his vacation unless the employe has notified his foreman that he is available for overtime work.

These letters confirm my statement to you in regard to past practice on this property.

In view of this past practice, your claim remains denied.

Yours truly,

/s/ E. B. Herdman
E. B. Herdman
Director of Personnel"

OPINION OF BOARD: Section Laborer E. D. Quintana, regularly assigned to a gang at Littleton, Colorado, began a one week vacation on Monday, September 19, 1966. On Saturday, September 24, 1966, Carrier called two junior Section Laborers to perform work.

Mr. Quintana makes claim that as the available, willing, and qualified senior employe, he should have been called to perform this overtime work. He maintains that the Foreman was aware of his availability since his scheduled vacation ended on Friday, September 23rd, 1966, and his regular work week did not begin until Monday, September 26, 1966, because of his Saturday and Sunday assigned rest days. He supports his position with the Note to Rule 11½ of the effective Agreement which provides that overtime work will be given to the senior employe working on the gang handling the work in question.

Carrier takes the position that it had never been the practice to call an employe for work on his rest days following his vacation unless the employe had notified the Foreman that he was available.

The record as handled on the property clearly shows that employes may upon making their availability known to their Foreman be considered available for "call" on rest days following their vacation.

The burden of proof rests upon the employe to make his availability known; in the instant dispute, as handled on the property, we find no competent evidence submitted by Claimant to his Foreman indicating his availability for work on the date here involved. We must for this lack of evidence deny the instant claim.

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

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 not violated.

AWARD

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 13th day of September 1968.