

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25968
Docket Number MW-25782

Herbert L. Marx, Jr., Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Burlington Northern Railroad Company
(Former St. Louis-San Francisco Railway Company)

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

(1) The Carrier violated the Agreement when it assigned Special Equipment Operator J. V. Davis instead of Trackman G. Blackwood to perform overtime service on December 26 and 27, 1982 (System File B-2169/MWC 83-6-9B).

(2) The claimant shall be allowed fourteen (14) hours of pay at his time and one-half rate because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: The Carrier required work involving Gang 653 of the Irving District on Sunday, December 26, and into the early morning hours of December 27, 1982. According to the Organization, the Carrier failed to call the Claimant, a Gang 653 Trackman, for such work and instead called an employee not assigned to Gang 653. The Organization argues that this is in violation of Rule 57(b), which reads as follows:

"(b) When overtime service is required, the foreman of gangs needed will be called and the foreman will call, in seniority order, the number of men in the gang necessary to perform the work for which called."

Among the Carrier's defenses is that the use of the other employee, rather than the Claimant, was proper, but examination of the record and the applicable rules demonstrates to the Board that the Claimant was entitled to be called in preference to another employee not on Gang 653. The central issue concerns the Carrier's position that the Claimant was in fact called and could not be reached. This is supported, however, only by the Carrier's statement in its claim denial that "The Foreman did try to contact Mr. Blackwood but was unable to do so". In a later denial, the Carrier states, "the claimant could not be reached after repeated attempts"

If in fact Claimant was called for service and was not available, then his claim is without merit. The Organization states, however, that the Claimant denies being called. During the claim handling procedure, the Organization presented a letter from a resident of the same address as Claimant's which stated that no telephone call had been received. Of substantial significance is the Organization's showing, based on Carrier documents, that the Claimant's Foreman was not himself called to duty on December 26, thus making it unlikely that the Foreman had attempted to reach the Claimant.

In utilizing an employee not assigned to Gang 653, the Carrier may properly contend that it had called the Claimant without success. This affirmative defense, however, requires some showing of proof beyond the simple statement in the claim denial. No statement from the Foreman (or anyone else representing the Carrier) was offered describing the circumstance of the call.

The allegation that "the Foreman" made the call is without support in view of the undisputed showing that the Claimant's Foreman was not on duty. The Carrier's defense is insufficient in view of the Claimant's entitlement to the work in preference to the employee who was utilized.

Also in dispute is the amount of time worked by the other employee. Records presented by the Carrier show that he worked nine hours overtime on December 26-27, not 14 as claimed by the Organization. The claim will be sustained to this extent, at the time-and-one-half rate in keeping with the predominant practice on this Division.

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 violated.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Nevers - Executive Secretary

Dated at Chicago, Illinois, this 14th day of March 1986.