

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26448
Docket Number MU-26459

Herbert L. Marx, Jr., Referee

(Brotherhood of Maintenance of Way **Employees**

PARTIES TO DISPUTE: (

(Consolidated Rail Corporation

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

(1) The Carrier violated the Agreement when it called and used junior **Trackman** B. J. Thiebeau to perform overtime service on January 21 and 22, 1984, instead of called and using **Trackman** B. W. Penny who was senior, available and willing to perform that service (System Docket CR-808).

(2) Claimant B. W. Penny shall be allowed twenty-two (22) hours of pay at his time and one-half rate and six and one-half (6 1/2) hours of pay at his double time rate in effect on the claim dates."

OPINION OF BOARD: An employee junior to the Claimant was called for overtime work on January 21-22, 1984. The Claimant seeks pay for the lost overtime work, and the Organization cites Rule 17 in his support. Rule 17 reads as follows:

"RULE 17 - PREFERENCE FOR OVERTIME WORK

Employees will, if qualified, and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them during the course of their work week or day in the order of their seniority."

The Carrier argues that this Rule was not cited in the **claim-** handling procedure on the property and thus may not be used as **the Organization's** basis for the Claim. A reading of the record leaves no doubt that the Carrier was aware throughout of the basis of the Claim. Indeed, no question was raised as to the Claimant's right to be called for work in seniority order; the dispute **rests** on another ground, to be discussed further below. The Claim is valid even if the clearly understood Rule was not cited until presentation to the Board.

The dispute is whether or not the Carrier made sufficient effort to call the Claimant. The initial response of the Carrier, through its Division Engineer, was that "an attempt was made to reach you by telephone, and the telephone company reported your phone being out of order." (This is in contrast to the Carrier's later correspondence alleging that "numerous attempts" had been made.) The Claimant stated he was at home during the days in question. A report from the telephone company indicated that there was no evidence of the telephone being out of order.

Rule 17 imposes on the Carrier the order of calling employees for overtime work. Its affirmative defense is not to deny the Rule's applicability but to state that the Claimant's telephone was out of order. Entirely lacking is any evidence of the Carrier's contention, such as a record as to the time of placing the call or calls. In this instance, the burden is on the Carrier to show that it complied with the Rule. In view of the Claimant's assertion to the contrary, the Carrier requires further demonstration in proof of its **contention**.

Public Law Board No. 2366, Award No. 27, citing other Awards, is to the same effect.

The Carrier also argues that, if the Claim is sustained, **the Claim** for punitive pay is inappropriate and that pay should be granted at straight time. This is contrary to the great weight of previous Awards of this Division, **and the Claim** will be sustained as presented.

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 Employee involved in this dispute are respectively Carrier and Employee 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

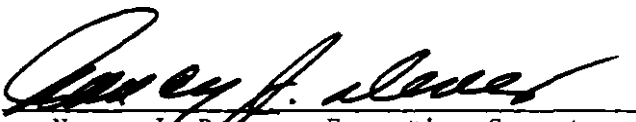
That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 24th day of August 1987.