Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 29418
THIRD DIVISION Docket No. MW-28312
92-3-88-3-69

The Third Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Southern Pacific Transportation Company (Eastern Lines)

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

(1) The Carrier violated the Agreement when it called junior Track Laborer W. G. Yzaguirre instead of Track Laborer A. R. Paul for service on Extra Gang T-72 at Avondale, Louisiana on January 5, 6, 7, 8 and 9, 1987 (System File MW-87-397461-28-A).

(2) Track Laborer A. R. Paul shall be allowed forty (40) hours of pay at his pro rata rate as a consequence of the violation referred to above."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

This dispute concerns the reasons for the recall of a junior employee rather than Claimant on the dates set forth in the Claim. At the relevant time, Claimant, a Track Laborer, held greater seniority than the Track Laborer who was called.

The parties agree that recalls for short-term positions are accomplished by phone. However, the on-property handling developed different views of the facts surrounding this Claim. According to the Carrier:

> "On January 2, 1987, Mr. A. R. Paul was recalled to service to relieve on System Extra Gang 72 via telephone but there was no answer. Labor Clerk D. H. Rush made several attempts to notify Mr. Paul that he was being recalled to service. Again, on January 5,

> 1987, Mr. Rush attempted to contact Mr. Paul and again failed to get an answer. Finally on Tuesday, January 6, 1987, Mr. Rush was able to make contact with Mr. Paul and was advised that he was being recalled to service and to report to System Extra Gang 72. Mr. Paul stated he had something to take care of and would report on January 12, 1987. In the meantime, Mr. Rush sent System Track Laborer V.G. Yzaguirre [sic] to relieve on said position account System Track Laborer A. R. Paul failed to respond to his recall and protect his assignment in a timely manner."

According to the Organization's view of the facts:

> "During the conference... [y]ou were also advised and furnished letters from the claimant stating he had not been called, and he also states he did in fact return to duty as soon as he was advised.
>
> Mr. Paul clearly states he was not contacted by Mr. Rush and also states Mr. Rush was upset about this claim which would indicate that Mr. Rush did in fact fail to call Mr. Paul in seniority order."

The Organization bears the burden in this matter. The parties agree that for short-term recalls, use of the phone is appropriate. But, at best, there is a conflict over whether, in fact, Claimant was called. Given that conflict, and not being able to resolve which version is the more credible, we cannot say that the Organization carried its burden. See Third Division Award 21423:

> "Carrier asserts that Claimant was called by telephone on the two dates involved but he failed to answer the telephone. The Claimant contends that he was at home and available but the telephone calls from the Carrier never came.
>
> Obviously, at this level, the Board has no way of resolving evidentiary conflicts. We have neither the authority nor the competence to resolve such conflicts in the evidence of record."

See also, Third Division Awards 27824, 25833, 18871, Second Division Awards 11363, 10946.

The Organization's reliance upon the quoted letter of Claimant dated May 21, 1987, denying that he was called does not change the result. First, although quoted in the Organization's Submission, that specific letter was not made part of the record developed on the property and attached to the parties' Submissions. Second, even if this Board could consider that specific letter (and giving the Organization the benefit of the doubt because on the property the Organization did make reference to the furnishing of letters from Claimant), we would not change our conclusion. The Organization asserts that Claimant's denial of being called as specified by the letter was unchallenged by the Carrier. However, the sequence of events shows that on May 19, 1987, the Carrier informed the Organization that "we have obtained the following regarding recall of Mr. Paul" and quoted the Carrier's evidence concerning the facts as set forth above, specifically that Claimant was called by the Labor Clerk. In response to the Carrier's statement of the facts, Claimant then wrote his letter of May 21, 1987 (which the date stamp indicates was not received by the Organization until June 3, 1987) as set forth in the Organization's Submission. Thus, this is not a situation where Claimant made a statement of fact that remained unrefuted. Rather, Claimant's assertion was in response to the Carrier's factual assertion. Therefore, even if we could consider Claimant's specific letter, when all is said and done, a conflict in the evidence remains. Claimant says he was not called and the Carrier says he was called. Because of that conflict (which we are unable to resolve), under the governing authority, the Organization has not carried its burden.

We must therefore deny the Claim.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 21st day of October 1992.