

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 29854  
Docket No. MW-30033  
93-3-91-3-429

The Third Division consisted of the regular members and in addition Referee Dana Edward Eischen when award was rendered.

(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 assigned junior Foreman J. A. Snouffer to perform overtime service on April 14, 21 and 22, 1990, instead of using Foreman S. R. Woytowicz, who was senior, available and willing to perform that service (System Docket MW-1263).
- (2) Claimant S. R. Woytowicz shall be allowed twenty-nine and one-half (29 1/2) hours of pay at his time and one half rate."

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 employe 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.

The question presented in this case is whether Carrier violated Rule 17 by assigning a junior Foreman in lieu of Claimant to perform overtime service on April 14, 21 and 22, 1990. Rule 17 states: "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 readily admitted that the Claimant was senior to the foreman called for the overtime in question, as well as being qualified to perform the overtime service.

Claimant held a position as track foreman, headquartered in Altoona, Pennsylvania, hours 7:00 a.m. to 3:00 p.m. with rest days Saturday and Sunday. On Saturday, April 14, 1990, a derailment occurred at MP 286.5 in New Florence, Pennsylvania. The Carrier maintains that it made "several attempts to call the Claimant for the overtime work at the derailment site", but was not successful. A junior foreman was called and worked 7:00 a.m. to 3:30 p.m. that day. A week later on Saturday, April 21, and Sunday, April 22, 1990, overtime work was necessary to repair the track at the site of the derailment which occurred on April 14, 1990. Carrier asserted that it attempted to contact the Claimant, but was again unsuccessful. A junior foreman was again contacted and worked from 7:00 a.m. to 3:30 p.m. on April 21, and 7:00 a.m. to 4:00 p.m. on April 22.

On May 1, 1990, the Organization filed a claim alleging that "no attempts were made to contact the Claimant on any of the above dates, and the Manager provided no proof that Supervisor Little tried to contact Woytowicz for the overtime." The Organization further argued that "Claimant was the senior of the two foremen and was willing and available to work." The claim requested compensation at the time and one-half rate for all three dates totaling 29 1/2 hours.

The Carrier replied stating that "Supervisor Little advised several attempts were made to contact Claimant, however, he was not available." The issue for this Board to decide is whether or not the Organization has shouldered its burden to provide probative evidence to refute the Carrier's assertion that good-faith attempts were made to contact the Claimant on each of the three claim dates, prior to contacting a junior foreman for the overtime work.

Close examination of this record shows that there is not, as Carrier would have it, an irreconciled conflict of material fact. Rather, we are persuaded that the Organization and Claimant met the initial burden of going forward to prove a **prima facie** case which was not adequately rebutted by Carrier. Specifically, the only evidence to buttress the countervailing assertions is a written statement, signed by both Claimant and a corroborating witness who was called to work the overtime in question:

"June 23, 1990

Dear Sir,

I was available and I was not contacted by telephone for the overtime that Junior Employee J. A. Snouffer received

4-14-90	7:00 AM to 3:30 PM	8½ OT	#3 trk MP 286.5
4-21-90	7:00 AM to 7:00 PM	12 OT	Huff Yard New Florence, PA
4-22-90	7:00 AM to 4:00 PM	9 OT	Repairing yd tracks due to derailment on #3 track the previous week

W R Little Supv. called his men out and did not contact me and he was informed by me that if there was any overtime that I was the senior foreman in District Gang, camp cars headquartered in Altoona, PA and would be available and Employee W. W. Miller was present and heard me tell him that. W. W. Miller worked that overtime and when contacted told W R Little to call me but he did not.

Thank you

/s/ S. R. Woytowicz

/s/ W W Miller - this statement is  
correct"

Carrier provide no dissenting statement from the Supervisor even when challenged to do so by the Organization; rather answering only with a third-hand hearsay assertion from the Carrier that the Supervisor had tried to call Claimant. Given this state of the record, we find the following observations by PLB No. 2960 in Award 109 on point:

"The Carrier has a greater duty in investigating and responding to first-hand factual statements such as those made by the Claimants. They must do more than to have an individual -- far removed from the actual situation -- simply state it is not so. If there was a statement in the record from the Foreman, or a statement from the Roadmaster

saying he was in the presence of the Foreman at all times on the afternoon in question, and that the Claimants were not advised not to come to work, then there might truly be an irreconcilable difference in facts. However, in the absence of such statements, under these circumstances, we must accept the statements of the Claimants as factual."

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest: Catherine Loughrin  
Catherine Loughrin - Interim Secretary to the Board

Dated at Chicago, Illinois, this 26th day of October 1993.