

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISIONAward No. 31078  
Docket No. MW-30642  
95-3-92-3-414

The Third Division consisted of the regular members and in addition Referee Peter R. Meyers when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(Consolidated Rail Corporation

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

(1) The Agreement was violated when the Carrier assigned junior employe G. Hoffer to perform overtime work (operate torsion beam raising sink) at Mile Post 12 on the Cleveland Line, Midland, Pennsylvania on November 9, 1990 (System Docket MW-1846).

(2) As a consequence of the violation referred to in Part (1) above, Claimant J. Betteridge shall be allowed thirteen (13) hour's pay at his respective 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 employee or employees involved in this dispute are respectively carrier and employee 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 Claimant was employed by the Carrier as a Class 1 Machine Operator assigned to surface Gang SE 422. His regular work days were Monday through Thursday with Friday through Sunday designated as his rest days.

On November 8, 1990, the Claimant observed an approved personal leave day. On Friday, November 9, the Carrier had an overtime vacancy on the torsion beam tamper. After allegedly

attempting to contact the Claimant on November 8 and having no success in reaching him, the Carrier then contacted junior employee G. Hoffer, Jr. Mr. Hoffer performed 12 hours of overtime.

The Organization filed the instant claim contending that the Carrier never afforded the Claimant the opportunity to work overtime on November 9, 1990, and instead assigned a junior employee to do the work to which the Claimant was entitled. The Organization argued that "the Claimant was fully qualified, ready, willing and available to perform such work, however, the Carrier failed to call him to perform the work." Therefore, the Organization contends that the Carrier was in violation of Rule 17.

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."

This Board has reviewed the record in this case and we find that the Organization has not met its burden of proof that the Carrier did not make an effort to contact the Claimant to determine whether or not he wanted to work the overtime vacancy on November 9, 1990. It is fundamental that in cases of this kind the Organization bears the burden of proof. The Carrier presented evidence that the Claimant's supervisor attempted to contact him at home but received no answer. The Carrier is only required to make an attempt to reach the Claimant. Although the Claimant alleges that he was at home and his telephone never rang, the burden of proof shifted to the Organization to prove with sufficient evidence that the Carrier failed to make the appropriate effort to bring in the Claimant. The Organization has not shown that the Carrier failed to make the calls it alleges the supervisor made. Consequently, the Organization has not met its burden and the claim must be denied.

**AWARD**

Claim denied.

**ORDER**

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

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NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Dated at Chicago, Illinois, this 1st day of September 1995.

Labor Member's Dissent  
Third Division Award No. 31178  
Referee Wallin

I dissent to this Award as I find that the decision of the majority ignores the spirit, meaning and intent of Rule 5, Section 2 (e), the Claimant's rights thereunder as well as the reason and purpose of seniority provisions. Considering the importance of Claimant's demand right to the work in question, his quick action in returning the call indicates his understanding that the Carrier needed to fill the position promptly. In the handling of this claim on the property, the Carrier expressed no reasonable purpose in refusing to called the junior employee back to at least attempt to cancel the assignment. As the Employees state in their submission (page 6);

"Carrier's callous refusal to immediately remedy the situation herein by at least attempting to call the junior employee back, is tantamount to a total disregard for [the employee's] rights in the first place."

Plainly, Carrier failed to make any reasonable effort to afford the Claimant his contractual rights under the agreement.

It may be true, as the majority points out, that the Awards cited by the Organization are not directly on point with the factual circumstances in this case. However, they collectively demonstrate that at a minimum there must be a reasonable effort made to afford employees their contractual rights. In this case, all that was needed was for the Carrier to make a simple phone call to the junior employee to cancel his assignment. Had that call been made, even if the Carrier was unable to cancel the junior employee's assignment, this matter would not have been presented to this Board.



L. A. Parmelee, Labor Member