

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 31653
Docket No. MW-31030
96-3-92-3-917**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Elgin, Joilet & Eastern Railway Company**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned junior employees J. M. Kozlica and M. J. Kubiak to perform second shift overtime service on 'Hot Crops' positions on November 8, 1991, instead of calling and assigning Industrial Elevating Transporter Operators (IETO) R. Rutherford and S. Weber to perform said work (System Files TS-005-91/MM-10-91 and TS-004-91/MM-11-91).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants R. Rutherford and S. Weber shall each be allowed eight (8) hours' pay at the applicable IETO 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 issue raised by this claim is whether the Carrier made a reasonable effort to contact the Claimants to offer them an overtime opportunity on November 8, 1991 prior to utilizing junior employees to perform the work. It is undisputed that the Claimants had the qualifications and a contractual right to perform the overtime in question.

The Claimants were operating Euclid trucks without radios on the property of its customer, the Gary Works of United States Steel, on the date in question. Carrier contended that its Trainmaster called the base location, an idled building on the customer's property where the drivers get their loading and unloading instructions from the customer. There is no evidence that the Claimants ever received any message from anyone at the base location. While polling for overtime that day, the Trainmaster was overheard saying that Claimants would not accept overtime anyway. Apparently, Claimants had declined offers to work overtime on a number of occasions during the prior week.

The Organization argues that no valid or meaningful attempt was made to contact the Claimants, and the Carrier cannot sustain its burden of proving unavailability by just one phone call to a customer. It contends that the Trainmaster could have traveled the mile to where Claimants were working, or could have offered them overtime at the trailer at the end of the shift. The Organization objects to any reference made by the Carrier to its routine and customary practice, since that argument was not raised on the property. The Organization seeks 8 hours of pay at the overtime rate for each Claimant.

The Carrier contends that the Trainmaster's attempts to contact the Claimants were reasonable and consistent with ongoing procedure and routine action. It argues that the prior week's declinations of overtime increased the probability that the Trainmaster's telephone inquiries were ignored. The Carrier argues that the Organization has failed to sustain its burden of proving that the lack of contact was its fault. It states that the claims are excessive, since the overtime rate should not be paid for work not performed.

The Board concludes that the Organization has sustained its burden of proving that the Claimants were qualified, senior employees to those assigned the overtime in issue, and were contractually entitled to be offered that work first.

The burden thus shifts to the Carrier to show that the Claimants were offered the overtime and were properly deemed unavailable to work it. The record on the property reveals that there was no proof offered by the Carrier to show that the Trainmaster actually made the phone call to the customer, or what his normal or customary practice was in offering overtime to drivers in vehicles not equipped by radio. Neither are the Claimants' denials of receiving any message disputed. The Board is of the opinion that the Trainmaster's undenied statement that the Claimants would not accept overtime anyway overheard by others on the radio indicate that he stopped short of attempting to make any meaningful contact with the Claimants on November 8, 1991. This Board cannot consider evidence and arguments not submitted on the property, and thereby cannot agree with the Carrier's assertion that the actions allegedly taken by the Trainmaster were in compliance with routine procedure. Under these circumstances, we find that the Carrier did not sustain its burden of showing that the Claimant's were unavailable to perform the disputed overtime.

A monetary award for a violation of the Agreement is designed to place the Claimants in the same position they would have been in had the violation not occurred. In this case, it cannot be said that, based upon the prior week's rejections of overtime offered, the Claimants would again have refused this opportunity to work overtime. Thus, the violation herein represents a lost overtime work opportunity, which would have been compensated at time and one-half. Absent any showing by the Carrier of any practice or established precedent on this property of anything less than actual pecuniary damages for work not performed, the Board grants the remedy requested.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders than award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

**NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division**

Dated at Chicago, Illinois, this 29th day of August 1996.