Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31928
Docket No. MW-31504
97-3-93-3-518

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.

(Brotherhood of Maintenance of Way Employes
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 failed to call Foreman W. Miller, I&R Foreman D. Flower and Vehicle Operator C. Berry to perform overtime service repairing a broken rail at Mile Post 82.1 on the Salem, Ohio Subdivision on February 29, 1992 and instead called and used junior employes B. Byrne, D. Doak and D. Trussel (System Docket MW-2617).

(2) As a consequence of the violation referred to in Part (1) above, Foreman W. Miller and Vehicle Operator C. Berry shall each be allowed seven (7) hours' pay at their respective time and one-half rates. I&R Foreman D. Flower shall be allowed seven (7) hours' pay at his applicable 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 were given due notice of hearing thereon.

It is undisputed on this record that Claimants were entitled to be called for the overtime work pursuant to Rule 17 of the effective Agreement. The primary issue in controversy is whether Carrier properly attempted to telephone the Claimants before moving on to call junior employees.

The claim asserts that Claimants were not called. Carrier admitted one Claimant, D. Flower, was overlooked. Accordingly, Carrier allowed him seven hours of straight time pay. Carrier asserted that the other two Claimants were called. It maintained the line was busy with one Claimant and the call was not answered by the other.

Given the requirements of Rule 17, Carrier's position is an affirmative defense. As such, Carrier shoulders the burden of proof to establish this defense. Given the opposing assertions regarding whether such calls were made, it was incumbent upon the Carrier to produce evidence to support its assertions.

Although Carrier's Submission contains the statement of the Supervisor who purportedly made the calls, the Organization objected to the exhibit as being new material. Our review of the on-property record supports the Organization's objection. We find no reference to show that the Supervisor's statement was exchanged or discussed during the handling of the matter on the property. Because it is well settled that new material may not be considered by the Board, we have disregarded the Carrier's exhibit. As a result, Carrier's affirmative defense must be rejected for lack of proof. Moreover, it is also noted that the record contains no indications that Carrier attempted to call each Claimant more than once to verify that the correct telephone number had been dialed.

The remaining issue deals with the proper compensation. Flower claims the difference between the straight time and punitive rate. The other Claimants seek the punitive rate.

Once again, our review of the on-property record fails to reveal that Carrier took exception to the claims for the punitive rate. Moreover, according to the prior Awards between these same parties, the proper remedy is payment at the punitive rate. See Third Division Awards 26431, 27181, 27335 and 27638.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an 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 4th day of March 1997.