

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35600
Docket No. MW-33198
01-3-96-3-666

The Third Division consisted of the regular members and in addition Referee Robert E. Peterson 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 Agreement was violated when the Carrier assigned junior Foreman M. E. McCorkle to perform overtime service (inspecting a switch) at Burns Harbor, Indiana on March 23, 1995, instead of assigning Foreman D. R. Russell to perform said work (System Docket MW-3945).
- (2) The Agreement was violated when the Carrier assigned junior Foreman F. Pratt to perform overtime service (change a broken rail) at Burns Harbor, Indiana on February 27, 1995, instead of calling and assigning Foreman D. R. Russell to perform said work (System Docket MW-3946).
- (3) As a consequence of the violation referred to in Part (1) above, Foreman D. R. Russell shall be allowed 2.7 hours' pay at his time and one-half rate.
- (4) As a consequence of the violation referred to in Part (2) above, Foreman D. R. Russell shall be allowed five and one-half (5.5) hours' 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 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 to be first noted, as the Organization submits, that the dispute here before the Board was handled as two separate claims on the property, but since both claims were found to involve the same Claimant, Rule 17, and instances where the Carrier called or assigned employees junior in seniority to perform overtime service, that it was decided that the claims be combined for presentation to the Board.

Rule 17, in part pertinent to the dispute at issue, reads:

“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 claim for February 27, 1995 involves the contention of the Claimant that he should have been used to work overtime in supervising or assisting a gang changing a broken rail that resulted from a derailment at Burns Harbor, Indiana.

It is the position of the Carrier that the claim is lacking in merit or Agreement support in that the Claimant was called by the Track Supervisor, with the latter reportedly leaving a recorded message on the Claimant's answering machine. In this respect, the Carrier points to the Track Supervisor's emergency call log as showing that this telephonic message was made at 12:18 A.M. on February 27, 1995.

The Claimant maintains, as set forth in a handwritten statement signed by him and his wife, that he was home at the time the call was allegedly made and that the phone never rang. The Carrier disputes the import of such statement, offering that it is self-serving and belated, having been presented at an appeals conference on October 4, 1995.

There is no question that presentation of the Claimant's statement was made in a belated manner. It came some five months after the Carrier presented copy of the Supervisor's log to show that a call had been made to the Claimant's telephone of record at 12:18 A.M. on February 27, 1995, and that a message had been left on the Claimant's answering machine. The belated presentation of the Claimant's statement also followed several interim conferences at which the call log was principally discussed as the basis for denial of the claim.

The Organization argues that the Carrier had the means to present direct evidence to conclusively establish its affirmative defense by presentation of a certified statement by the Track Supervisor who was said to have made the call, but chose instead "to proffer copy of a purported emergency call sheet with the simple notation that the answering machine came on to justify its assignment of a junior foreman." Nothing of record shows that this particular argument had been made during the handling of the claim on the property. Thus, this Organization argument must be rejected as a matter that was not raised or explored on the property in the manner contemplated for the handling of disputes by the Railway Labor Act and the Rules of Procedure as set out in Circular No. 1 of the Board.

The second claim alleges that the Claimant should have been called for overtime worked by a junior Track Foreman at Burns Harbor Yard on March 23, 1995.

According to the Carrier, a metal object was found wedged in a turn out switch point that prevented the switch from being lined for normal operations. This, in turn, the Carrier says, caused the lead to shut down and switching operations to cease until repairs could be made to the switch.

The Carrier submits that notwithstanding that the Claimant possessed seniority greater than that of the Track Foreman utilized, the latter resided but seven miles from Burns Harbor whereas the Claimant's residence was approximately 45 miles away from such location. Thus, the Carrier maintains that the emergency nature of the situation supports its calling of a Track Foreman who could most quickly respond to the location in order to correct a problem that was substantially affecting its operations with a minimum of delay.

In defense of the claim, the Organization contends that the incident was not one of an emergency nature, and the Claimant could have readily responded to the situation

because he commutes daily to Burns Harbor with no record of his reporting late or being absent from duty.

Clearly, the fact that an employee is punctual in arriving for a normal tour of duty is not sufficient reason to conclude that a carrier need call such employee from a location that is a substantial distance away from the location of an existent emergency situation when there are other qualified employees who reside but a short distance from the location in demand of immediate emergency attention.

It being evident in our study of the record that the Organization, as the moving party in this dispute, has not met a necessary burden of proof to establish the material aspects of either of the two claims, they will 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.

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

Dated at Chicago, Illinois, this 24th day of July, 2001.