

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION

Award No. 37670  
Docket No. MW-37342  
05-3-02-3-367

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

**PARTIES TO DISPUTE:** ( *Brotherhood of Maintenance of Way Employes*  
(CSX Transportation, Inc.

**STATEMENT OF CLAIM:**

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier called and assigned C&O employes C. Borchers, P. Barnes and T. Abbott, headquartered at Queensgate Yard, Cincinnati, Ohio, to perform work at a derailment between Mile Posts BE 41.6 and BE 44.0 at Carlisle, Ohio on the B&O Toledo East Seniority District on February 10 and 11, 2001, instead of calling and assigning B&B employes D. George and D. Gentry [System File I52229300/12(01-0264) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, Claimants D. George and D. Gentry shall each be allowed ‘ . . . sixteen (16) overtime hours and seven (7) double time hours each at their respective rate, account of the aforementioned rules violations as well as this loss of work opportunity.’ ”

**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.

Claimants D. George and D. Gentry hold seniority as Welder and Welder Helper, respectively, in the B&B Department on the B&O Toledo East Seniority District. On the dates involved, they were regularly assigned as such with headquarters in Dayton, Ohio. C. Borchers, P. Barnes and T. Abbott hold seniority in their respective classes on the former C&O Seniority District. On the dates involved, they were regularly assigned to positions headquartered at Queensgate Yard, Cincinnati, Ohio. It is uncontested that the Claimants maintained superior seniority as Trackmen relative to Borchers, Barnes and Abbott on the B&O Toledo East Trackman roster.

On February 10 and 11, 2001, the Carrier required the services of various employees to work at a derailment that had occurred between Mile Posts BE41.6 and BE44.0 at Carlisle, Ohio, on the B&O Toledo East Seniority District. According to the Carrier, attempts were made to reach the Claimants for the overtime work, but they were unavailable. Also according to the Carrier, its payroll records failed to establish that employees worked overtime on the derailment as alleged by the Organization.

Pursuant to this action, the Organization submitted a claim contending that the Carrier violated the Agreement when it did not assign the overtime opportunity to the Claimants who were the senior employees. As a result of this alleged violation, the Organization requested that each Claimant be compensated for a total of 16 hours of overtime and seven hours of double time at their respective rate for this loss of work opportunity.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. It contends that the work was properly

performed by Borchers, Barnes and Abbott. It argues that although attempts were made to reach the Claimants for the overtime work, they did not respond to the telephone calls from Assistant Regional Engineer R.A. Neff. In addition, while the claim asserts that Borchers, Barnes and Abbott worked overtime on the days in question, the Carrier contends that no such overtime could be proven.

The Board finds that the Organization has not been able to meet its burden of proof. In situations where the conflict revolves around the question of whether the Claimants were properly called, the Board cannot resolve such questions of fact. In Third Division Award 28790 the Board held:

“ . . . It is apparent that there is an irreconcilable conflict on the crucial facts of this case. Carrier alleges that attempts were made to telephone the Claimant to notify him of the vacancy; Claimant denies receiving any calls. Since the Board functions as an appellate body, it has no way of resolving such evidentiary conflicts or factual disputes. Third Division Award 21436, 21423. Accordingly, we must hold that the Organization has failed to meet its burden of proof.”

Also see Third Division Awards 32166 and 32762.

In the instant case, there is just such an evidentiary dispute. The Carrier contends that it attempted to reach the Claimants, while the Organization claims that no such attempt was made. As noted above, the Board is an appellate body and cannot resolve such evidentiary disputes. Without more, the claim must fail.

**AWARD**

**Claim denied.**

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**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 21st day of December 2005.**