

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 39030
Docket No. MW-37826
08-3-NRAB-00003-030196
(03-3-196)

The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin 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 Carrier violated the Agreement when it failed to call and assign regularly assigned Force 5M18 Vehicle Operator J. Kelton to operate the rail change out truck in connection with Force 5M18 performing overtime service changing out rail in Radnor Yard on December 16 and 26, 2001 and January 5, 2002 and instead assigned said vehicle operation to other Force 5M18 employes [System File I56631102/12(02-0298) CSX].
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Kelton shall now be compensated for ‘. . . twenty three and one-half (23½) hours time and one half at the vechile (sic) operator’s time and one half rate of pay for the dates of December 16 and 26, 2001 and January 5, 2002.’”

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.

The claim dated February 7, 2002 asserted that the Carrier violated Rules 1 (Seniority Classes) and 17 (Preference for Overtime Work) by failing to call the Claimant for the disputed assignment. Rule 4 (Seniority) was also cited in the claim, but was not advanced further on the property. It is undisputed that the Claimant held a position on Gang 5M18 as a Vehicle Operator at all times relevant to the claim.

In its April 6, 2002 denial of the claim, the Carrier gave only two reasons: First, it asserted that the Claimant was called on the dates claimed and could not be reached. Second, it asserted that a vehicle operator was not needed unless six men are working. The Carrier did not challenge the number of hours claimed or the Claimant's seniority as a Vehicle Operator on the gang in question. Moreover, the Carrier did not take exception to the applicability of Rule 17(a) which grants preference for overtime work to the ". . . senior employee in the required job class. . . ."

The Organization's April 30, 2002 appeal refuted the Carrier's assertion about a six-employee threshold. Later, in its October 14, 2002 appeal on the property, the Organization provided a statement from the Claimant that effectively refuted the Carrier's assertion that the Claimant was called on the claim dates without success. The Claimant's statement noted that he had Caller ID as well as an answering machine. It went on to state that there was no evidence on either machine that attempts were made to try to reach him.

Although the Organization did not file its Notice of Intent to progress the dispute to the Board for nearly six months after providing the Carrier with the Claimant's statement, the Carrier did not refute its contents nor respond to it in any manner whatsoever. Nor did the Carrier ever provide any evidence to support its assertion about the existence of a six-employee threshold requirement.

In its Submission, the Carrier's primary position is that the on-property record created a critical conflict of fact that must be resolved in its favor. We

disagree. When the Organization effectively refuted the Carrier's assertion that attempts had been made to contact the Claimant, it became the Carrier's obligation to support its defense by providing probative evidence to support the assertion. The Carrier never did. Accordingly, no issue over a so-called critical fact was ever properly joined on the property.

Given the foregoing discussion, the Carrier did not satisfy its burden of proof to show that the claim was properly denied. Accordingly, we must sustain the claim as presented.

AWARD

Claim sustained.

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 22nd day of April 2008.