

Award No. 15640
Docket No. MW-16284

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

George S. Ives, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES
MONON RAILROAD**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it called and used an employe junior to Crossing Watchman M. E. Peters for overtime service on January 27, 1965. (Carrier's file MW-2-63.)

(2) M. E. Peters be allowed the same amount of compensation paid to the junior employe who performed the overtime service on January 27, 1965.

EMPLOYEES' STATEMENT OF FACTS: Claimant M. E. Peters and Mr. J. A. Basham had established and held seniority as crossing watchmen within Group 5 of the Track Sub-Division, with Claimant Peters being the senior in that class.

On Wednesday, January 27, 1965, the Carrier required the services of a crossing watchman to operate the crossing gates at the Douglas Street Tower from 3:00 P. M. to 11:00 P. M. It called and used Crossing Watchman J. A. Basham to perform the work and compensated him for his services at the time and one-half rate.

The claimant was available, willing and qualified to have performed the subject overtime service but the Carrier did not make any attempt whatever to call and use him.

Claim was timely and properly presented and handled by the Employees at all stages of appeal up to and including the Carrier's highest appellate officer.

The Agreement in effect between the two parties to this dispute dated December 1, 1952, together with supplements, amendments and interpretations thereto is by reference made a part of this Statement of Facts.

CARRIER'S STATEMENT OF FACTS: Claimant was employed as a crossing watchman at Hammond, Indiana, working the 6:00 A. M. to 2:00 P. M. shift at Sibley Street Crossing. He resides in Lansing, Illinois, approximately 12 miles from his place of employment.

OPINION OF BOARD: On January 27, 1965, the regularly assigned watchman during the second shift at Carrier's Douglas Street Crossing in Hammond, Indiana was absent from duty. The incumbent of the first shift position was assigned by Carrier to fill the temporary vacancy instead of the Claimant, who possessed substantially more seniority as a crossing watchman with Carrier. Petitioner contends that Carrier violated Rule 3 of the applicable Agreement between the parties which reads as follows:

"RULE 3. SENIORITY

Rights accruing to employes under their seniority entitled them to consideration for positions in accordance with their relative length of service with the railroad, as hereinafter provided."

Petitioner maintains that Carrier's failure to even call the Claimant for the purpose of ascertaining his availability to fill the temporary vacancy constitutes a violation of the applicable Rule because Claimant was the senior Crossing Watchman available for the service required on January 27, 1965.

While the dispute was considered on the property, Carrier's denial of the instant Claim was based entirely upon Claimant's prior refusal to accept such calls, including three alleged occasions during the 10 days period immediately preceding the claim date. The rationale of Carrier's defense on the property was that Claimant was obligated to make himself available when called in order to protect his continuing right to be called under the Agreement.

Carrier submitted new defenses and evidence to this Board not discussed on the property concerning the availability of Claimant to fill the temporary vacancy and Carrier's reasons for using the junior employe. Such new matter cannot now be considered. Award 13946.

There is no dispute concerning the established fact that Carrier made no attempt to call Claimant, but instead, used a junior employe to perform the dispute overtime work. No probative evidence is before us which would sustain a finding that an emergency situation existed that prevented Carrier from calling the Claimant at his home in accordance with established practice on the property.

We have frequently held under rules, such as Rule 3 of the applicable Agreement, that a Carrier has an obligation to make a reasonable effort to call the senior available employe entitled to overtime work before using a junior employe to perform such work. Awards 105, 2341, 2994, 5078 and 9391. The mere fact that Claimant has refused other calls on prior occasions does not relieve Carrier from its obligation. Awards 8260 and 8373. Despite Carrier's contention that Claimant had frequently refused such calls immediately preceding the instant dispute, we must conclude that Carrier had an obligation to call Claimant before using a junior employe to perform the disputed overtime work. Award 13974.

Accordingly, we will sustain the Claim.

FINDINGS: The Third Division of the Adjustment Board, after giving the parties to this dispute due notice of hearing thereon, and upon the whole record and all the evidence, finds and holds:

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 16th day of June 1967.