

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 23834
Docket Number MW-23462

Herbert Fishgold, Referee

PARTIES TO DISPUTE: { Brotherhood of Maintenance of Way Employees
 { Missouri Pacific Railroad Company

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

(1) The Agreement was violated when Trackman R. D. Hall was not called to perform overtime service on his assigned position (Trackman, Patrolling Gang 5646, Henryetta, Oklahoma) on July 8 and 9, 1978 and the Carrier instead called and used a junior trackman assigned to Section 5641 for such services (Carrier File S-310-275).

(2) Trackman R. D. Hall be allowed thirteen (13) hours of pay at his time and one-half rate because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: Claimant R. D. Hall was regularly assigned as a Trackman to Patrol Gang 5646, Monday - Friday, with Saturday and Sunday as rest days. On Saturday, July 8, 1978, and Sunday, July 9, 1978, Carrier decided to have portions of its track patrolled between Mile Post 120 and Mile Post 217 on the Oklahoma Sub-division, Claimant's assigned territory. Instead of assigning Claimant, Carrier called and used a junior trackman, W. B. Barnett, who is assigned as such to Section Gang 5641.

The Organization maintains that Claimant, as the regularly assigned trackman on Patrol Gang 5646, is contractually entitled to perform all track patrol work on his assigned territory, including overtime. Claimant claims that he returned home from work at 10:00 p.m. on Friday, July 7, 1978, and was thereafter home and available for a call which he never received. Moreover, the Organization maintains that the decision to work overtime was made prior to July 8 and 9, and that on July 7, Foreman C. W. Mustin instructed Trackman Barnett, while on the job, to work on those dates. Inasmuch as Claimant was also at work on January 7, he, as the senior employe, should have been notified.

Carrier does not dispute that Claimant was entitled to this work if he had been available. However, Carrier maintains that Foreman Mustin was not told about the work in question until Saturday morning, July 8, and again on Sunday morning, July 9, and that he made several attempts to telephone Claimant on both dates but was unable to contact him. It was only then that Mustin called the junior employe.

Thus, throughout the investigation of this claim on the property, two issues remained in dispute: whether Carrier made adequate efforts to call Claimant to perform the work, and whether Foreman Mustin and Trackman Barnett were notified in advance, on Friday, July 7, of the need to work overtime on July 8 and 9.

This Board has accepted unavailability as a defense only after Carrier made a reasonable effort to ascertain if the employee entitled to a call was in fact available. Here the Carrier has contended from the beginning that several attempts were made to contact Claimant by telephone on both Saturday and Sunday, but Foreman Mustin was unable to contact him. However, Claimant contends that he was at home and available for duty, but Carrier did not call him. In this regard, both Carrier and Claimant contend that the other has failed to offer any proof or evidence other than statements quoted in their submissions that Carrier, through Foreman Mustin, attempted to call Claimant, or that Claimant was at home at the time the calls were allegedly made.

Furthermore, during the course of investigating the claim on the property, each party provided signed statements supporting their respective positions as to whether Mustin and Barnett had been notified of the decision to work overtime prior to Saturday, July 8. The Organization provided signed statements from Claimant and his Foreman, K. R. Austin, contending that Mustin and Barnett were notified at work on Friday, July 7. Carrier presented signed statements from Mustin and Barnett stating, to the contrary, that they had not been notified in advance.

Thus, as to both issues, there are disputed facts which were not resolved by evidence developed on the property, and which this Board is, therefore, unable to resolve. That being the case, this Board has consistently held that when such conflicts in evidence arise in essential aspects of a claim, there is no alternative but to dismiss the claim. See, e.g., Awards 19501, 19531, 19702 and 20053. Accordingly, since we cannot properly decide the merits of this claim without resolving these issues, we have no choice but to dismiss the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees 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 claim be dismissed.

A W A R D

Claim dismissed.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Acting Executive Secretary
National Railroad Adjustment Board

By Rosemarie Brasch
Rosemarie Brasch - Administrative Assistant

Dated at Chicago, Illinois, this 26th day of March 1982.