

NATIONAL RAILROAD ADJUSTMENT
THIRD DIVISIONAward No. 30209
Docket No. MW-28538
94-3-88-3-361

The Third Division consisted of the regular members and in addition Referee Elliott H. Goldstein when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(CSX Transportation, Inc. (former
(Chesapeake and Ohio Railway Company)

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

- (1) The Agreement was violated when the Carrier failed to call Trackmen E.B. Cyrus, B.J. Cooper and E.R. Bragg to perform overtime service at a derailment between Mile Post 418 and 420 on July 19, 1987 [System File C-TC-3912/12(87-1050)].
- (2) Messrs. E.B. Cyrus, B.J. Cooper and E.R. Bragg shall be compensated at the appropriate time and one-half and double time rates for all overtime hours lost as a consequence of the violation referred to in Part (1) above."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe 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 waived right of appearance at hearing thereon.

On July 17, 1987, at about 5:00 P.M., a derailment occurred between MP 418 and MP 420 at Kanawah Falls, West Virginia. The Organization contends that Carrier called Trackmen junior to the Claimants and instructed them to report at 7:00 A.M. on July 18, 1987, to repair the track damaged by the derailment. Junior Trackmen were also called and assigned on July 19, 1987, to perform track maintenance work at the derailment site. According to the Organization, Claimants were available, qualified and willing to perform the overtime service at issue here.

Carrier defends by arguing that Claimants were called and unavailable on the dates in question. Carrier further argues that, in any event, there was an emergency situation caused by the derailment which required immediate action. Given these facts, Carrier maintains that it has considerably more latitude in assigning its forces than under normal circumstances.

The Organization claims, based on written statements by Claimants Cyrus and Bragg, that they were never contacted by Carrier to perform the work in question. Carrier, on the other hand, asserts that the Roadmaster did attempt to telephone the Claimants, without success. Carrier contends that since the underlying facts of this claim are sharply disputed, the Board must dismiss the claim because it is not in a position, as an appellate body, to resolve credibility disputes or make factual determinations when there are irreconcilable conflicts in the record.

Carrier is correct that, when there are disputed facts on the record as it has been developed on the property, we have no choice but to dismiss the claim. However, "an irreconcilable factual dispute does not arise merely by declaration." Public Law Board No. 2960, Award 109. In the instant case, the Organization presented signed statements by two Claimants, and their wives, attesting that these employees were home on July 17 and 18, 1987, and that no contact was made by Carrier. Carrier did not, on the property, offer any probative evidence to support its assertions as to the Roadmaster's attempts to contact the Claimants. The Carrier's September 23, 1987 letter relies on a statement from the Roadmaster regarding his attempts to contact employees for the derailment work, but there is no actual statement from the Roadmaster in the record on the property.

It is our view that Carrier must affirmatively rebut firsthand factual statements such as those made by Claimants. Carrier is required to do more than to have an individual, far removed from the actual situations, simply to present hearsay accounts of the incident or make general denials. If there was a statement in the record from the Roadmaster directly rebutting Claimants' accounts, then there might truly be an irreconcilable difference in facts. However, in the absence of such a statement, we must accept the statements of Claimants as factual. The claims of Cyrus and Bragg must be sustained. See Public Law Board No. 2366, Award 27; Third Division Award 27115.

Claimant Cooper stands on a different footing. He did not present any statement concerning his availability on July 17 or 18, 1987, during the handling of the dispute on the property. Without any actual basis to support his claim, it must be denied.

AWARD

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:



Linda Woods - Arbitration Assistant

Dated at Chicago, Illinois, this 8th day of June 1994.