

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 31514
Docket No. MW-30582
96-3-92-3-341

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(
(Consolidated Rail Corporation

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

- (1) The Agreement was violated when the Carrier assigned Mr. R. Mummey to perform overtime work (change a rail defect) on the Bethlehem Subdivision on Sunday, June 10, 1990 (System Docket MW-1751).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. Walukiewicz shall be allowed six (6) hours' pay at the foreman's time and one half rate."

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 waived right of appearance at hearing thereon.

On June 8, 1990, Claimant notified the Carrier that he would not be available to work on his rest day, Saturday, June 9, 1990. The work in dispute was performed on Sunday, June 10, 1990 (Claimant's second rest day). On that Sunday, the Carrier called junior employee R. Mummey over Claimant. This claim seeks overtime for Claimant for the lost overtime opportunity for Sunday, June 10, 1990.

Rule 17 states:

"RULE 17 - PREFERENCE FOR OVERTIME WORK

Employees will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them during the course of their work week or day in the order of their seniority."

The facts show that the Carrier used a junior employee over Claimant on Sunday, June 10, 1990. On its face, Rule 17 entitled Claimant to the work as the senior employee.

Claimant's unavailability was for June 9, 1990—not June 10, 1990. According to the Organization, Claimant was unavailable on June 9, 1990 because he was working on his home. Based on what is in this record, Claimant's unavailability for work on June 9, 1990 because of the work he was performing on his home cannot be equated with his being unavailable for notification by the Carrier on that date in accord with Rule 17 for an overtime opportunity to occur on June 10, 1990.

Contrary to the Carrier's assertion, there is no evidence in the record that Claimant was, in fact, contacted on June 9, 1990 and did not respond. Had those been the facts in this case, the claim would have been denied. Nor does the evidence sufficiently establish that the work was performed in a manner that would have otherwise entitled the junior employee to perform the work on June 10, 1990.

The claim will therefore be sustained. If, under the overtime provisions of the Agreement, the number of hours that would have been worked by Claimant on June 10, 1990 would have entitled him to overtime for the pay period in which June 10, 1990 fell, Claimant shall be paid at the overtime rate for the lost work opportunity resulting from the Carrier's violation of Rule 17. Were it not for the Carrier's contract violation, Claimant would have worked. If that work would have resulted in Claimant receiving overtime, he is entitled here to be made whole accordingly.

AWARD

Claim sustained in accordance with the Findings.

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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 20th day of June 1996.