

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 32749
Docket No. SG-32727
98-3-96-3-30**

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

**(Brotherhood of Railroad Signalmen
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Consolidated Rail Corporation (Conrail):

Claim on behalf of W. T. Chrusciel for payment of three hours at the time and one-half rate, account Carrier violated the current Signalmen’s Agreement, particularly Appendix ‘P’, when it failed to call the Claimant for trouble involving maintainer’s work on June 28, 1993, and deprived the Claimant of the opportunity to perform the work. Carrier’s File No. SG-819. General Chairman’s File No. RM2674-28-195. BRS File Case No. 9703-CR.”

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.

Appendix "P" of the Agreement sets forth "a procedure for calling C&S Department employees for trouble involving maintainer's work outside their regular working hours." For those employees who place their name on the call list, the following procedure is followed:

"8. Employees will be called from the appropriate list for work in the order in which their names appear on the list.

9. A reasonable effort will be made to comply with the procedure outlined above but this shall not be permitted to delay getting a qualified employee to report promptly at the point necessary to cope with the situation."

Claimant is a Signal Maintainer headquartered at Trenton, Michigan with assigned work hours of 7:00 A.M. to 3:30 P.M. Claimant was also on the call list.

During his regular tour of duty on June 28, 1993, Claimant was dispatched at 2:30 P.M. for signal trouble. At 3:15 P.M., a trouble call came in concerning a track circuit malfunction. At 3:30 P.M., the Carrier dispatched Signal Maintainer V. Kalen to work on that malfunction. Kalen was junior to Claimant and behind Claimant on the call list. Kalen worked that trouble call until 6:10 P.M.

According to the Carrier, Claimant did not call in and mark off before the end of his tour at 3:30 P.M. According to the Organization, Claimant was not obligated to mark off before the end of his tour, but, in any event, prior to the end of his tour, Claimant did call in and mark off.

Later that evening, Claimant received a trouble call at 7:30 P.M., which he accepted. Claimant worked that trouble call until 8:20 P.M.

A violation of the call procedure has been demonstrated. Under paragraph 8. "Employees will be called . . . in the order in which their names appear on the list." Claimant was ahead of Kalen on the list and was not called.

The Carrier has failed to demonstrate that Claimant was not available for the call given to Kalen. It is not necessary to decide whether there is a Rule or practice requiring Claimant to mark off at the end of his tour. The Carrier's assertion that Claimant was not available for the call given to Kalen amounts to an affirmative defense. The Carrier therefore has the burden to demonstrate that Claimant was not available. The Carrier asserts that Claimant did not mark off. The Organization asserts the contrary. Because the burden to substantiate its affirmative defense is on the Carrier, and because this Board has no way in this record to resolve that conflict, the factual dispute must be resolved against the Carrier.

But more fundamentally, Paragraph 9 of the call procedure requires that "[a] reasonable effort will be made to comply with the procedure outlined above." Carrier made no effort to ascertain Claimant's status prior to assigning the call to Kalen. See Third Division Award 31154 between the parties involving the same provisions ("... [T]here is nothing in the record to indicate that any effort was made to attempt to contact Claimant to ascertain his ability to perform the required work. . . ."). The Carrier's obligations under Paragraph 9 were not met.

We are therefore satisfied that the Organization has demonstrated that Claimant was deprived of a call to which he was entitled by Rule and was improperly deprived of the work opportunity given to Kalen. However, with respect to the remedy, we note that although Claimant was deprived of the work opportunity given to Kalen, Claimant worked a call later that day. The call worked by Claimant was of shorter duration than the earlier call worked by Kalen which Claimant should have received. The call Claimant worked was for 50 minutes. Kalen's call resulted in two hours and 40 minutes of work. To make Claimant whole, Claimant shall be entitled to pay for the difference between the calls at the appropriate contract rate.

AWARD

Claim sustained in accordance with the Findings.

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 23rd day of September 1998.