

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 35380  
Docket No. MW-34130  
01-3-97-3-675**

**The Third Division consisted of the regular members and in addition Referee Gerald E. Wallin when award was rendered.**

**PARTIES TO DISPUTE: (**  
**(Brotherhood of Maintenance of Way Employees**  
**(Soo Line Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned a junior employe to perform overtime service removing debris from a culvert at Mile Post 72.84 on the Paynesville Subdivision on April 20, 1996 instead of assigning Assistant Foreman Vernon E. Kostrzewski (System file R1.082/8-00289).**
- (2) As a consequence of the afore-stated violation, Assistant Foreman Vernon E. Kostrzewski shall now be allowed nine (9) hours of pay at the B&B assistant 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 were given due notice of hearing thereon.**

**In the Carrier’s August 6, 1996 reply denying the claim and its November 27, 1996 reply to the Organization’s appeal from that denial, the Carrier advanced only a single defense to the claim. The thrust of its assertion was that an attempt had been made to contact the Claimant for the work assignment but he could not be reached and was, therefore, not available.**

The Carrier attempted to retroactively add to this sole defense at the conference held June 4, 1997, more than one year after the claim date. It produced a medical report showing the Claimant was restricted to performing eight hours of work per day and reasoned that because the junior employee was paid for nine hours, the restriction precluded the Claimant from receiving the assignment.

The Carrier's position lacks merit for three compelling reasons. First, the sole defense raised in the Carrier's first two responses on the property shows clearly that the medical restriction played no role whatsoever in bypassing the Claimant. Second, it was unrefuted that the nine hours of paid time included time for traveling the 73-mile distance between the headquarters point and the site of the work. The Carrier failed to establish what the actual work time was and whether the medical restriction was inclusive or exclusive of travel time. The Claimant's signed statement says the restriction would not have prevented him from performing the work in question. Third, and finally, the Claimant's statement confirms that he was available for the work assignment but he received no assignment call and no such call was registered in his Caller ID equipment. The Carrier's purported rebuttal consisted of an unsigned memo from a Carrier official reporting only what somebody else supposedly told him. At best, this is but an unsupported assertion. It does not constitute probative evidence that creates an irreconcilable conflict in facts.

Accordingly, we must sustain the claim.

#### AWARD

Claim sustained.

#### 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 March, 2001.