

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35440
Docket No. MW-34318
01-3-97-3-924**

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 Employes
(CP Rail System (former Delaware and Hudson
(Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Foreman J. Demianovich to perform overtime service (operating the Claimant’s truck) on January 8 and 9, 1996 instead of Mr. A. Klemash, Jr. who was regularly assigned thereto (Carrier’s File 8-00022 DHR).**
- (2) As a consequence of the violation referred to in Part (1) above, Mr. A. Klemash, Jr. shall be compensated for eleven (11) hours’ pay at the trackman-truck driver’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.

Careful review of the on-property record presents us with a conflict of material fact concerning the Claimant's availability. The Claimant's letter of June 26, 1996 states: "On January 7, Mr. Hobbes, my foreman called me at home at 7:00 PM stating not to go to work on January 8 to Nescopeck, since there was a Governor's {sic} order not to travel due to the Blizzard. Therefore, I did not report. . . ."

In his September 27, 1996 appeal, however, the General Chairman wrote: "On January 7, 1996, Mr. Klemash called Roadmaster Wydeen to discuss his ability to get [to] work on January 8, 1996 due to heavy snow. Mr. Wydeen told Mr. Klemash that the Governor of the State had declared a State of Emergency and he should not report for work on January 8, 1996. With this information, Mr. Klemash followed his supervisor's order and requested to be put in for a vacation day."

In its November 7, 1996 reply, the Carrier acknowledged the existence of the conversation between Wydeen and the Claimant, but disputed its content. The Carrier said, "... These statements are not entirely true. Mr. Wydeen and Mr. Klemash did discuss the State of Emergency, however the decision on whether to work or not was left up to Mr. Klemash and it was Mr. Klemash who decided to stay home and request a day's vacation."

Our role provides us no proper basis for resolving factual conflicts in the record the parties develop. Accordingly, it is well settled that when we are confronted with irreconcilable conflicts in material facts, we have no choice but to dismiss the claim.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 26th day of April, 2001.