

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 35989
Docket No. MW-33222
02-3-96-3-412

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
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed and refused to allow Mr. W. B. Miller to displace junior employee D. J. Flower and then failed and refused to compensate him for the lunch periods on October 27, 31, November 1, 2, 3, and 7, 1994 as required by Rule 18 (System Docket MW-3834).
- (2) As a consequence of the violation referred to in Part (1) above, Mr. W. B. Miller shall be compensated for three (3) hours' pay at his straight time 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.

The facts of this claim are unusual. Prior to the claim dates, the Claimant was assigned as a Crane Foreman. When his position was abolished, the Claimant displaced D. J. Flower, who was then assigned as the Rail Gang Pilot on the Youngstown Seniority District. Despite the Claimant's displacement, the Carrier retained Flower in the Pilot position during the claim dates. Thus, the Claimant did not actually take over Flower's duties until after the claim dates.

Although the statement of the claim appearing above refers to the Carrier's failure and refusal to allow the Claimant to displace Flower, that reference is somewhat misleading. No such contention was advanced in the initial claim, nor was it developed on the property. To the contrary, the only Rule violation asserted in the initial claim and later correspondence was Rule 18, which pertains to Meal Allowances.

The thrust of the claim is that Flower was not afforded the contractual 30-minute meal period during the fifth or sixth hour of his shift on the claim dates. The contention is that Flower was required to constantly monitor his radio while the rail gang had track and time authority. As a result, the Claimant maintains he was entitled to the 30-minute straight time penalty payment provided by Rule 18(b) because he had displaced Flower's former position even though he was not working in it. In short, the Claimant contends he was vicariously entitled to the same meal period penalty that Flower was entitled to receive.

The Carrier denied that Flower was required to work through his lunch period on any of the claim dates and further asserted that no Supervisor authorized such work. To counter these assertions, the Organization offered signed statements from the Claimant, Flower and J. March. The Claimant's statement says nothing about what he actually did on the claim dates nor does the March statement provide such information about the Claimant's actual activities - it explains only what March claims to have done. The Flower letter of July 14, 1995 does claim that he worked through his lunch period, but provides no details about what was done or when his lunch was actually taken. Nor does the Flower letter cite any Rule, regulation or policy that required constant monitoring of the radio during lunch periods. Finally, the letter does not contain any proper proof from a Supervisor or Dispatcher that corroborates Flower's contention that he was required to constantly monitor the radio.

Because of the Carrier's position, Flower apparently has not received any such payments. On this record, therefore, we do not know whether Flower ever filed a claim to pursue such compensation or, if he did, what the disposition of that claim may have been if it has, in fact, been resolved.

Despite the peculiarities of this evidentiary record, we see two significant burden of proof problems. The first arises from the contingently derivative nature of the claim; the merits of this claim depend on the merits of Flower's claim, if he indeed made one. But the merits of Flower's claim, if any, is not a question before us. We have no jurisdiction to resolve that dispute. And until that one is resolved, we are not in a position to resolve this one.

The second problem is the more fundamental one. Typically, Agreement provisions that provide a penalty for an "off-schedule" lunch period are personal to the employee who suffers the disrupted or off-schedule lunch. The use of the word "Employees" in Rule 18(c) and (e) strongly suggests that such is the intent underlying

this Agreement. Nowhere in Rule 18 is there found any terminology that suggests that the penalty payment also accrues to a position holder who does not, himself, actually work through his lunch period.

On these points, it is well settled that the Organization has the sole burden of proof to establish all elements necessary to resolve a claim. This record does not satisfy that burden.

AWARD

Claim denied.

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 19th day of March, 2002.