

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39851
Docket No. MW-37523
09-3-NRAB-00003-020614
(02-3-614)

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(CSX Transportation, Inc.)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign regularly assigned Force 5G96 Machine Operator E. Peters to overtime service (operate ballast regulator) on March 23 and 24, 2001 and instead called and assigned Mr. R. Tinsley [System File G32305501/12(01-0363) CSX].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant E. Peters shall now be compensated for thirty-six hours' pay at his respective time and one-half rate of pay.”**

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.

Claimant E. Peters established and holds seniority as an "A" Machine Operator. The Claimant was assigned as a Ballast Regulator Operator on Gang 5G96 headquartered at Scottsville, Virginia, and was working on the James River Subdivision on the dates involved in this dispute. The Claimant was scheduled to work ten hours per day Monday through Thursday, with Friday, Saturday and Sunday as designated rest days.

On Friday and Saturday, March 23 and 24, 2001, the Carrier required the overtime services of an "A" Machine Operator to run the ballast regulator on Gang 5G96 in connection with a derailment at Mile Post 224.5 near Eagle Rock, Virginia. According to the Organization, rather than assign the Claimant who was a senior employee, the Carrier called Machine Operator R. Tinsley to operate the ballast regulator. According to the Organization, Tinsley worked 36 hours at the time and one-half rate operating the ballast regulator. It claims that the Claimant should have been assigned instead of Tinsley.

According to the Organization, the Carrier refused to recognize the Claimant's superior seniority when it assigned Tinsley to work the overtime on March 23-24, 2001. According to the Organization, the Carrier failed in its obligation to call the Claimant to perform the work and, therefore, the Claimant is entitled to 36 hours at the appropriate rate of pay. The Organization claims that the Carrier was in error when it called Tinsley instead of the Claimant.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that it acted appropriately by contacting Tinsley on March 23-24, 2001. The Carrier contends that it attempted to contact the Claimant several times, but that on all occasions, the Claimant's line was busy. The Carrier contends that the Organization cannot meet its burden to prove that the Claimant was home and available for work on the days in question.

The issue in this case is relatively simple. The Organization claims that the Carrier failed to contact the Claimant. Conversely, the Carrier asserts that it did

attempt to contact the Claimant. Therefore, because the Claimant's line was repeatedly busy, it was appropriate to contact Tinsley. We remind the parties that the burden of proof in this matter is on the Organization.

We have carefully reviewed all evidence regarding whether the Organization proved that the Claimant was denied the opportunity to work overtime on March 23-24, 2001. We conclude that sufficient evidence has not been presented to prove that the Carrier violated the Parties' Agreement.

We find, based on the record evidence presented on the property, that the Carrier did not violate the Agreement. The Carrier presented credible evidence to prove that it fulfilled its obligations by attempting to contact the Claimant by telephone. However, the Claimant's line was repeatedly busy. Insufficient evidence was presented by the Organization to adequately rebut the Carrier's contention that the Claimant's line was repeatedly busy. In this case, there is an irreconcilable conflict of fact and the Board has no way to resolve such conflict. See Third Division Award 28790. Based on these conclusions, we find that the Organization failed to meet its burden of proof and the claim is therefore denied.

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 31st day of July 2009.