

PUBLIC LAW BOARD NO. 2366

DOCKET NO. 39

AWARD NO. 27

CASE NO. 1407 MW

FILE: A1-127-T-80

PARTIES TO DISPUTE:

Illinois Central Gulf Railroad

and

Brotherhood of Maintenance of Way Employees

STATEMENT OF CLAIM

- "(1) The Agreement was violated when a trackman junior to R. A. Parish was called and used for overtime service on October 18 and 19, 1980.
- (2) Claimant R. A. Parish shall be allowed twenty-seven (27) hours of pay at his time and one-half rate."

OPINION OF BOARD

The Claimant was a regularly assigned Trackman with rest days of Saturdays and Sundays. On Saturday, October 18, 1980 and Sunday, October 19, 1980, certain work was required; however rather than utilizing the services of the Claimant, the Carrier used a junior Trackman.

Our review of the record indicates that the Carrier seems to concede that the Claimant had a greater right to the work, however there is a significant credibility dispute as to whether or not the Employee was at home between 5:00 and 6:00 a.m. on Saturday, October 18, 1980, in order to receive a telephone call instructing him to report to work.

These cases are difficult, indeed, because the Board is called upon to decide if, in fact, the Foreman attempted to contact the Employee, or if the Employee was not at home or failed to answer the telephone. In the final analysis,

there is no precise manner in which a Board such as this can make the ultimate factual determination with a total degree of certainty. Nonetheless, we are required to issue an Award in the case.

Unquestionably, there is the burden of proof involved, however inasmuch as a junior employee was utilized, then, of course, there is also present the question of an affirmative defense; and it can be asserted that the burden shifts to the Carrier in that regard.

There are numerous Awards which have spoken to the issue, and which have a bearing on this case. For instance, Award 20534 of the Third Division, which was authored by the Neutral Member of this Board, considered the status of the record as it was compiled on the property, and the failure to show how many attempts might have been made was, to some extent, persuasive. That Award cited Third Division Award 19658, which held that the Carrier should have "...re-dialed the phone number at least a second time to provide greater assurance that the proper number was being dialed." See, also, Award 110 of Special Board of Adjustment No. 280 and Third Division Award 21222, which held that even in an emergency situation, an obligation still persists to make a reasonable effort to call the employees who are entitled to the work.

Again, recognizing the difficulty of proof and the problems which surround an obligation to disprove a negative, we have considered the matter as it was handled on the property. Notwithstanding the Carrier's statements in the Submission that the Foreman called the Claimant "several times", and that the "last effort to contact the Claimant" was at approximately 6:00 a.m., we find nothing presented on the property which purports to be a statement from the actual caller.

Although the Claimant submitted a handwritten statement which was attached to the initial claim, in which he stated that the Foreman had told him that he (Foreman) "...tried to call me Sat. morning", no contrary statement was submitted by the Carrier.

The Division Engineer stated that the "last effort" to contact the Claimant was made at 6:00 a.m., but he does not state how many other efforts were made prior to that time. Further, the Manager of Labor Relations states that the Foreman made "several attempts" to call the Claimant, but the number of attempts which constitute "several" are never defined, nor are the times specified.

Certainly, one can recognize that an emergency situation will have a bearing on the number of attempts that are

made, but this Board is inclined to find that the record as it was progressed on the property does not support the Carrier's affirmative defense in this regard, and we will sustain the claim.

### FINDINGS

The Board, upon consideration of the entire record and all of the evidence finds:

The parties herein are Carrier and Employee within the meaning of the Railway Labor Act, as amended.

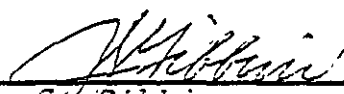
This Board has jurisdiction over the dispute involved herein.

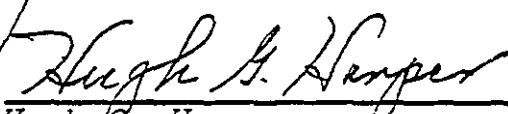
The parties to said dispute were given due and proper notice of hearing thereon.

### AWARD

1. Claim sustained.
2. Carrier shall comply with this Award within thirty (30) days of the effective date hereof.

  
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Joseph A. Sickles  
Chairman and Neutral Member

  
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J. S. Gibbins  
Carrier Member

  
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Hugh G. Harper  
Organization Member

2/23/82  
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DATE