

PUBLIC LAW BOARD NO. 4138

Award No.: 25

Case No.: 25

PARTIES TO DISPUTE

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES

And

CSX TRANSPORTATION, INC.

STATEMENT OF CLAIM

First: The Carrier violated the Agreement by calling junior employee Jeff Leighton instead of claimant, Swann, the senior employee.

Second: Claimant Swann be paid 16 hours overtime and 46 hours double time from 6:00 p.m. June 27, 1986 through 8:00 a.m. June 30, 1986.

FINDINGS

On June 27, 1986, a major derailment occurred that inflicted extensive track damage near Vinemont, Alabama. The Carrier called in all available employees to repair the damage and restore service.

Rule 30(b) provides:

Employees, who desire to be considered for calls under Rule 31, will provide the means by which they may be contacted by telephone or otherwise, and will register their telephone number with their

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foreman or immediate supervisory officer. Of those so registered, calls will be made in seniority order as the need arises.

A reasonable effort must be made to contact the senior employe so registered, before proceeding to the next employe on the register. Except for section men living within hailing distance of either their foreman's living quarters or their tool house or headquarters station, and for men living in camp cars when they are present at the camp cars, an employe not registered as above shall not have any claim on account of not being worked on calls.

On the date in question, Claimant was regularly assigned as a Ballast Regulator operator on Tie Gang 5N76. June 27 was one of his regular rest days and he was not on duty. There is no dispute that Claimant was not called in to work overtime to restore the track to operating condition. The Carrier asserts that the reason Claimant was not called was that Claimant had not given his phone number or registered for overtime as required by Rule 30(b). Claimant alleges that his phone number was on file with Foreman Fitzgerald, the Roadmaster and Assistant Roadmaster at Mt. Pleasant and the Mt. Pleasant operator.

In the course of progressing this claim, Foreman Fitzgerald submitted a handwritten note, dated September 30, 1986, stating that Fitzgerald did not have Claimant's phone number at the time he was trying to contact employes to work overtime. Foreman Fitzgerald is a contract employee. There are also two typewritten notes with Claimant's name typed on them. One, dated December 8, 1986, states that Claimant's phone number has been registered with the Mt. Pleasant operator for more than three years. That statement includes a statement dated December 5, 1986, apparently from the Mt. Pleasant operator, that "Mr. Swann does have his phone number registered with me." The other, also typed, attached to an Organization letter dated

October 1, 1986, states that Claimant gave his phone number to Fitzgerald on April 1, 1986.

The issue to be resolved in this dispute is whether the Carrier violated the Agreement by not calling Claimant to work overtime to remedy the derailment; and if so, what should the remedy be.

The position of the Organization is that the Carrier has violated the Agreement by not calling Claimant to work on the derailment. The Organization contends that it has proved Claimant was registered with his foreman, his supervisor and the operator and therefore complied with Rule 30(b). Having done so, the Organization maintains, he should have been called to work the overtime. The Organization also asserts that Claimant has done more than is required to comply with the rule because he has registered with the operator.

The position of the Carrier is that it did not violate the Agreement by not calling Claimant to work the derailment, because Claimant had not complied with the registration requirement of Rule 30(b). The Carrier contends that Fitzgerald's statement is more credible because it is handwritten (as opposed to the typed letters with Claimant's name typed on them) and because Fitzgerald is a contract employee and therefore lacks any motivation to act against a fellow employee's interest. Finally, the Carrier maintains that since this is a dispute involving members of the same class of employees, the claim should be dismissed.

After review of the entire record, the Board finds that the Carrier did not violate the Agreement.

The Organization has not sustained its burden of proving that the Carrier violated the Agreement, because it has not established by substantial credible evidence that Claimant was registered with his foreman or supervisor as required by Rule 30(b). The Organization may have shown that Claimant had his phone number registered with the operator, although that is only as of December 1986, not necessarily in June.

Since there is no requirement of written notice in the rule, this comes down to a matter of the foreman's word against the Claimant's. In this matter, the foreman is not particularly persuasive. His statement, like Claimant's statements, is made substantially after the fact. The fact that Claimant's statement is typed and Fitzgerald's is handwritten does not influence credibility in this matter, because it is not significant or plausible that someone besides Claimant made the written statements attributed to him. It might even be sufficient that Claimant made a statement to someone else and that person typed the statement for him. Similarly, Fitzgerald's status as a contract employee does not remove any motive for fabrication; had he mistakenly not notified Claimant, that would supply motive enough to misrepresent as to Claimant's registration.

What is significant, however, is that after review of the record, there is a rough balance in the evidence. This is where the significance of the burden of proof becomes important. Since there is a balance in the evi-

dence, that means that the Organization has not sustained its burden to prove its case. In the absence of proving the registration of the phone number, the Organization cannot demonstrate a violation of the Agreement.

AWARD

Claim denied.

Nicholas Fumar  
Neutral Member

B. Claude Surett  
Carrier Member

Bryce L. Hall  
Organization Member

Date: April 3, 1990