

PUBLIC LAW BOARD NO. 6249

PARTIES) **BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES**
TO)
DISPUTE) **UNION PACIFIC RAILROAD COMPANY (FORMER SOUTHERN**
 PACIFIC TRANSPORTATION COMPANY (EASTERN LINES))

STATEMENT OF CLAIM

Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier failed to call and use Track Foreman H. R. Magallanes to perform overtime service on his assigned territory on January 12, 1997 and instead called and used Extra Gang Foreman J. A. Gutierrez (System File MW-97-90/1048351 SPE)

2. As a consequence of the violation referred to in Part (1), furloughed Track Foreman H. R. Magallanes shall be allowed twenty (20) hours' pay at his time and one-half rate.

OPINION OF BOARD

Claimant held seniority as a Track Foreman on Gang 394 headquartered in Uvalde, Texas under supervision of Roadmaster S. Garcia. On January 12, 1997 (Claimant's rest day), J. A. Gutierrez — a Track Foreman on Extra Gang

307 headquartered at San Antonio, Texas — was called and assigned overtime duty repairing a broken rail on the Uvalde District in the vicinity of Mile Post 325, Anacacho Siding and Mile Post 317.50.

There is no dispute that in ordinary circumstances, Claimant should have been called for the work which was performed in his district (Uvalde). However, the Carrier justifies the assignment of Gutierrez on two grounds: (1) the Carrier contends the broken rail was an emergency permitting it to use an out of district employee; and (2) the Carrier contends that Claimant was called but did not respond, thereby permitting the assignment of the work to Gutierrez.

We shall sustain the claim.

First, putting aside the fact that on the property the Carrier did not specifically articulate in the correspondence that the broken rail constituted an "emergency", without

more, we are unable to find that emergency conditions existed which would allow the bypassing of ordinary assignment procedures. All we know from the exchanged correspondence is that there was a broken rail. While in certain circumstances a broken rail certainly could be considered an emergency, there is insufficient evidence in this record for us to conclude that conditions existed causing this *particular* situation to be an emergency. The Carrier has the burden to establish that the work was a result of an emergency. That burden has not been met.

Second, with respect to whether Claimant was called, the record at first appears in dispute. The Carrier asserted that Roadmaster Garcia called Claimant at home and on Claimant's mobile phone, both without response. The evidence supporting that assertion is contained in the positions of the Carrier during the handling of the claim and from a statement from Director of Track Maintenance D. W. Morrow.

The Organization contends that Roadmaster Garcia did not call Claimant as the Carrier contends. The Organization furnished to this Board along with its submission a

statement from Claimant stating that he was available for work on January 12, 1997, but received no contact from Roadmaster Garcia on his beeper or home and cell phones. The Carrier objects to Claimant's statement, contending that it was not properly exchanged on the property.

Therefore, in this case we have been presented with a record where the Carrier contends Claimant was called without success, but there is no statement from the individual (Roadmaster Garcia) who made the call and the Organization contends Claimant was not contacted, but there is a question over whether Claimant's statement to that effect was properly exchanged on the property.

We need not resolve the question over whether Claimant's statement was properly exchanged on the property. On the property, the Organization contended that Claimant was not called by Roadmaster Garcia. See *e.g.*, the Organization's January 16, 1997 claim ("Mr. Magallanes ... was not called for the overtime work on the territory that he works") and the Organization's April 8, 1997 letter ("I take great exception to your denial letter whereby you have stated

that Road Master, Mr. Garcia tried to contact Mr. Magallanes by telephone.”). In response to the Organization’s position that Claimant was not called, the Carrier contended that Roadmaster Garcia made the calls.

The problem the Carrier has here is that there is no *direct* evidence from Roadmaster Garcia that the calls to Claimant were made. The only evidence offered by the Carrier to support its position that Claimant was called was the hearsay assertions by those other than the caller Roadmaster Garcia. Moreover, there were no call records presented that could show that the calls were made to Claimant as the Carrier contends.

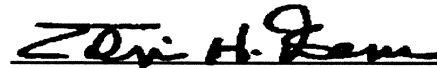
The Carrier’s position that Claimant was called is an affirmative defense. The evidence relied upon by the Carrier does not sufficiently support that defense. On the basis of what is before us, we cannot find that Claimant was called by Roadmaster Garcia as the Carrier contends. The claim therefore has merit.

With respect to the remedy, as a result of not being called, Claimant was deprived of a work opportunity involving overtime. Claimant shall therefore be made whole at the ap-

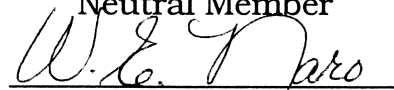
propriate Agreement rate for that lost overtime opportunity based upon the number of hours worked by Gutierrez on the date in question.

AWARD

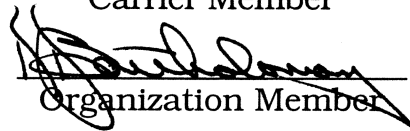
Claim sustained.



Edwin H. Benn
Neutral Member



Carrier Member



Organization Member

Dated: 6-21-02