

PUBLIC LAW BOARD NO. 7098

PARTIES TO DISPUTE: (BROTHERHOOD OF MAINTENANCE OF WAY  
(EMPLOYES DIVISION  
(  
(UNION PACIFIC RAILROAD COMPANY

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign Machine Operator B. Rumler for machine operator overtime service on November 2, 2003 and instead called and assigned junior employees T. Witt and S. Pettis (System File 7RM-9510T/1388480 CNW).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Rumler shall now be compensated for twelve (12) hours at his respective time and one-half rate of pay.”

FINDINGS:

Public Law Board No. 7098, 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.

The Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

Claimant B. Rumler has a Machine Operator Common seniority date of June 12, 1998.

On Sunday, November 2, 2003, Carrier MTM D. Zelasney called out two employees, T. R. Witt and S. J. Pettis, to work on a derailment. Each of the employees worked 12 hours of overtime that day on the derailment. Both employees had Machine Operator Common seniority dates that

were junior to the Claimant's. The Organization, on December 17, 2003, filed a claim alleging that under Rules 4 D. and 31 A. of the Agreement Claimant Rumler, as the senior employee, should have been called and been assigned the work. At 8:00 p.m. on November 2, 2003, and again at 9:30 p.m. that evening, MTM Zelasney did call and speak with the Claimant on the telephone and arranged for the Claimant to report for duty early the next morning to begin work.

The Carrier does not contest that Claimant, as the senior employee in the classification, was entitled to be called and assigned the work prior to the two above-named junior employees. The Organization contends that MTM Zelasney did not call the Claimant for the Sunday overtime assignment. The Carrier contends that MTM Zelasney did call the Claimant but that apparently the Claimant did not answer the phone.

In support of their respective positions the Organization and the Carrier produced written statements respectively from the Claimant and Mr. Zelasney. The Claimant's statement represented as follows:

In response to my claim on Nov. 2, 2003. I claim that I was home all day, have a phone with caller I.D. that works, and have a working answering machine. I know the phone works because M. Zelasney called me 2 different times to plan for work the next day. Mr. Zelasney never called me until around 8:00 p.m. on the night of Nov. 2, 2003 and then again around 9:30 p.m. on the same day.

Furthermore I confronted Mr. Zelasney about him not calling me in to work. His response was that he didn't know why he didn't call me and then said that I would have to turn in a time claim.

Mr. Zelasney provided the following statement:

I attempted to phone all employees Sunday between 8 am and 10 am. I finally got ahold of Mr. Rumler Sunday nite and at that time lined him up for a early start on Monday am to bring down OTM to the derailment site.

The Carrier argues in its submission before this Board that the parties have a fundamental disagreement regarding the facts. In contrast to the Organization's contention that the Carrier failed to offer the work in question to the Claimant, the Carrier asserts, it has consistently maintained that Claimant was called in an effort to offer him work on an overtime basis, but no contact was made until later in the evening that same day. The Carrier contends that there is a direct conflict in the evidence, which is irreconcilable, and that, in such circumstances, since the Organization has the burden of proof and has been unable to carry it, the claim must be denied.

The Board notes, first, that in his statement Mr. Zelasney does not state that he actually called the Claimant between 8:00 a.m. and 10:00 a.m. on the date in question. He merely asserts that he "attempted to phone all employees." At best that statement is ambiguous. For example, he could have had a list of employees that he thought was complete but which did not have the Claimant's name on it. If he called every name on the list, erroneously believing at the time that it contained the Claimant's name, he could truthfully later assert that he attempted to phone all employees.

Another possible example would be a situation where A begins to telephone B but is interrupted in the middle of the call and never completes the call. A could truthfully state that he attempted to call B even though he never completed the call. The point is that the word "attempted" is vague and can subjectively mean a number of different things. Mr. Zelasney's written statement should be compared, for example, with the written statement in Third Division Award No. 33895, relied on by the Carrier, where the Timekeeper provided a written statement "that he had tried to contact the Claimant, but got no response and therefore called [the junior

employee].” By contrast Mr. Zelasney’s statement does not even assert that he specifically called the Claimant or provide any reason why contact was not made (e.g., got no response when the call was made).

In addition, Mr. Zelasney’s statement did not meet the allegation in the Claimant’s statement that the Claimant confronted him about not calling the Claimant in response to which Mr. Zelasney said that he did not know why he did not call the Claimant. The Claimant was thus alleging that Mr. Zelasney implicitly admitted to the Claimant that he did not call him. Mr. Zelasney’s written statement does not address that allegation and it remains undisputed in the record.

The Board finds that the Organization has proved by substantial evidence that Mr. Zelasney did not call the Claimant to offer him the overtime opportunity in question. The claim will be sustained.

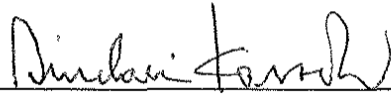
### A W A R D

Claim sustained.

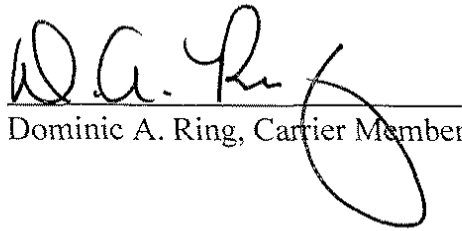
### O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant be made. The Carrier is ordered to make the Award effective

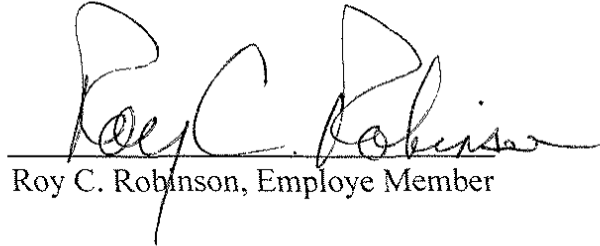
on or before 30 days following the postmark date the Award is transmitted to the parties.



Sinclair Kossoff, Chairman & Neutral Member



Dominic A. Ring, Carrier Member



Roy C. Robinson, Employee Member

Chicago, Illinois

Dated: August 24, 2008