

(R-53-548-3)

AWARD NO. 12

CASE NO. 12

SPECIAL BOARD OF ADJUSTMENT NO. 280

PARTIES : The Brotherhood of Maintenance of Way Employees
TO :
DISPUTE : St. Louis Southwestern Railway Company

STATEMENT OF CLAIM:

"Claim of sixteen hours' pay at time and one-half rate for Sunday, April 27, 1958, for regularly assigned Dragline Operator C. W. Whitus account Carrier calling Track Apprentice Smith to perform work."

FINDINGS:

The employees state that dragline operator C. Whitus, the claimant, had been regularly assigned to the operation of dragline machine with headquarters at Tyler, Texas. That on Friday, April 25, 1958, operator Whitus completed his tour of duty with his crane stationed at Tyler. On Sunday, April 27, 1958, trouble developed due to a washout along the carrier's lines. The carrier had need for the use of this dragline machine and instead of calling operator C. Whitus for this overtime work, the carrier called track apprentice J. B. Smith and assigned him to load the dragline machine and go with it in a work train to the site of the trouble and operate the machine 16 hours. The claimant holds seniority in the class and owns the job of operating the piece of machinery referred to.

The employees further state that the claimant resides at Golden, Texas, about 30 miles from Tyler. He was at home and available Sunday morning of the day in question. He has a telephone connection listed with the carrier through its Division Engineer, J. R. Leguenec. The claimant had been called by the carrier's officer prior to claim date to perform overtime work and had been easily contacted and covered the assignment called for.

The employees state that the carrier violated Rule 2-2, Seniority.

The carrier states that the telephone number of the claimant was unknown to it, and that he could not be reached at his home. Therefore, it had a right to use a junior employee; that an emergency existed over the entire southern portion of the railroad, particularly between Tyler and Mt. Pleasant; that Leguenec, Division Engineer, began about midnight, April 26th, to assemble materials, men and equipment to run a work train north out of Tyler to make immediate temporary repairs and re-open the main line for movement of traffic. The dragline used by the claimant was on the ground at Tyler; that the claimant lived six miles north of Mineola and 31 miles north of Tyler; that in the past, when it became necessary to contact the claimant on his rest days, or while he was off for other reasons, he had been contacted during daylight hours by long distance telephone through some of his neighbors who would either call him on the telephone or deliver the message to him; that

difficulty had been experienced in reaching him at times; that the claimant had not been contacted at night by telephone. He told the carrier he was endeavoring to have a telephone installed, but had not furnished any telephone number of such telephone to the carrier. That the claimant was not available and the Division Engineer, Leguenec, called junior operator Smith because he resided at Tyler, Texas, and was immediately available to report and perform the work required. That the carrier did not know the claimant's home telephone number.

On Friday, April 18, 1958, the carrier's chief clerk had heard nothing from the claimant relative to his reporting to work on Monday, April 21st; that in order to advise the employee protecting the claimant's job that he would be relieved, the chief clerk placed a long distance call to Mr. Whitus at Golden, Texas, at 9:45 a.m. to determine if the claimant would report for duty the following week. The telephone operator was advised that the claimant possibly had a telephone. The call was not completed until about 3:30 p.m. or 4:00 p.m. During the intervening period, between placement and completion of the call, the chief clerk had several conversations with the telephone operator who had difficulty in locating the correct party, and when the call was finally completed the chief clerk was advised by claimant Whitus that he would return to duty April 21st, but the chief clerk did not question the claimant as to whether he was talking over his own telephone. The chief clerk expected that the claimant would give notice of his home telephone number as soon as it became available and when he desired that it be used to contact him. That if the claimant had given the chief clerk his telephone number it would have been furnished to Division Engineer, Leguenec, and he would have called the claimant if he considered that he could arrive at Tyler by the time the service of an operator was needed.

The carrier states that the claimant could not expect the carrier to contact him by long distance at night through neighbors, particularly without making quite clear that he has arranged for a particular neighbor to call him without fail, and under all conditions, including inclement weather.

From the evidence presented to this Board by the employees, we find a letter from the claimant addressed to W. E. Cox, General Chairman of the Brotherhood of Maintenance of Way Employees, dated May 15, 1958, which reads as follows:

"Mineola, Texas
May 15, 1958

Mr. W. E. Cox
General Chairman, BMWE

Dear Sir:

April 25, 1958, I was working in Tyler, which was Friday. On Sunday April 27 a work train was called out of Tyler to go work at a washout, and instead of calling me they called J. B. Smith to load the Dragline and work that day. He made 16 hrs. time-and-one-half. I ask why I wasn't called and they said they didn't know my telephone no. but they had my telephone no. because they had called my residence not 10 days before. Please advise about this.

Sincerely,
C. W. Whitus"

The Board also finds that Rule 2-2, Seniority, reads as follows:

"2-2. Rights accruing to employees under their seniority entitle them to consideration for positions in accordance with their relative length of service as hereinafter provided."

The carrier admitted in its evidence that it did have a telephone number to call the claimant, which was the telephone number of the claimant's Minister, and had been informed by the claimant that he could be reached anytime through this Minister; that the claimant had lived in Golden, Texas, for 20 years; that he had been contacted through this telephone number by the carrier. The evidence was brought out by the claimant that he had been contacted through his own telephone number nine days previous to this incident by the carrier and when the chief clerk of the carrier placed a call to this claimant nine days prior to this incident on or about April 18, 1958, he asked the long distance operator to contact the claimant by name, and he did reach the claimant, although it took a considerable length of time. The carrier at that time did not call the telephone number that it had on file for the claimant, which would indicate that the carrier knew that the claimant had a telephone of his own on April 18, 1958.

The carrier submitted into evidence a letter dated February 15, 1960, which was shortly before this case was heard by Special Board of Adjustment No. 280, which reads as follows:

"Tyler, Texas - February 15, 1960

"Mr. M. L. Erwin:

"Regarding statements made in Employee's Exhibit 'A' in the claim of C. W. Whitus that he should have been called April 27, 1958:

"As I stated at the time this claim arose, and at the time the submission was made, my recollection is as follows:

"Mr. Whitus had been away from duty for some time account sickness and during the period he was off his position as drag-line operator was filled by a junior employee. He came by the office on Monday or Tuesday, April 14 or 15, 1958, after a visit to his doctor and I asked him when he expected to return to work. He stated that he expected to return the following week if his doctor would permit him to. He also mentioned that he would have his residence telephone installed very soon. I requested that he advise definitely later in the week if he would return to work in order that I could notify the junior employee who was protecting his (Whitus') position that he would be relieved after completing tour of duty on Friday, April 18th. He stated that he would do so.

"I did not hear anything further from him and on the morning of April 18, 1958 (Friday) I placed a long distance call to Golden, Texas, where Mr. Whitus lived, and told the PBX operator it was possible he might have a telephone at his residence (we had previously contacted him through one of his neighbors). Before the call was completed I talked to both the PBX operator and the long distance operator several times as they could not readily locate the correct party. The call was completed late in the afternoon and I talked to Mr. Whitus who stated he would report for duty the following Monday, April 21, 1958. I did not question Mr. Whitus as to where he was talking from as it was getting late and I had to get a telegram off to the employee relieving him in order that he could make arrangements to return to his own assignment.

"Some time after the date of claim, Mr. Whitus came to the office and asked me why he was not called for the work involved. I advised him that we did not have his residence telephone number and that Mr. Leguenec had not wanted to try to contact him through neighbors at that time of morning. Whitus told me that he had written Mr. Leguenec a letter furnishing his telephone number but I did not recall having received such a letter. I questioned Mr. Leguenec about such a letter and he had no knowledge of it. I have no recollection of telling Mr. Whitus that I had received a letter from him furnishing his telephone number. To the contrary, it is my recollection that we had no knowledge of his residence telephone number until after he came in the office.

"Regarding his allegation that I couldn't reply to his question as to how I called him the time before. It is my recollection that I stated to him that I did not know how the call had been handled, that I had placed the call with the operator and she had completed the call.

"Regarding his statement that he was called 3 or 4 days after March 25, 1958. This was checked with the Communications Department and there is no record of such a call having been made. Please note Superintendent Communications Stone's letter to that effect on file.

"These statements are to the best of my recollection. I note Mr. Whitus' letter was written more than a year after date for which he claims pay and in my opinion he is confused as to the actual occurrences.

(s) R. L. Davidson"

From the evidence presented, the Board finds that the carrier's explanation of why they did not call the occupant of this position and the senior employee was that they did not wish to disturb his neighbor at that time of morning, is not well taken because the claimant had been employed by the carrier for a period of 20 years and during part of the time did not have a telephone listed in his own name, but had furnished the carrier a telephone number where he could be contacted. The carrier was obligated, under the rules of the Agreement, to attempt to call the claimant and if the telephone number that was called did not answer, or if the person that answered the telephone that was called refused to call the claimant to the phone due to the time of morning or inclement weather, then the carrier would not have violated the agreement. However, the carrier admitted that it did not attempt to call the telephone number that the claimant had listed with it.

There is another factual situation in this claim which must be taken into consideration. The claimant states that he did send to the carrier his own personal phone number and the carrier denies receiving such a letter. However, the evidence brought forth by the carrier on the date of the hearing of this case showed that the claimant was contacted on April 18, 1958, nine days before the date of claim, at a telephone number listed in the name of claimant, because that is how the call was placed through the operator by the chief clerk. Therefore, the carrier violated the agreement and the claim must be sustained.

This Referee is in accord with the findings in Awards 4371, 5579, 9309 and 9324, and later Awards of the Third Division, wherein it was held that since the regular occupant of the position was denied the overtime work because the carrier violated the effective agreement, the claimant should be compensated at the time and one-half rate even if he did not perform the work. If the carrier had not violated the effective agreement, he would have been compensated at the time and one-half rate. Therefore, the penalty rate for the work lost, because it was given to one not entitled to it under the agreement, is the rate which the regular occupant of the position would have received if he had performed the work. Therefore, the claim will be sustained for the time worked by junior employee J. B. Smith on April 27, 1958, at the time and one-half rate.

AWARD:

Claim sustained.

(s) Thomas C. Begley
Thomas C. Begley, Chairman

(s) A. J. Cunningham
A. J. Cunningham, Employee Member

(s) M. L. Erwin
M. L. Erwin, Carrier Member

Dated: May 18, 1960