

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37141
Docket No. MW-36128
04-3-00-3-309

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(Duluth, Missabe and Iron Range Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call regularly assigned Class B Machine Operator B. Berglund for overtime service on December 27, 1998 and instead called and assigned junior employee T. Miller (Claim No. 03-99).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant B. Berglund shall now be compensated for eight (8) hours' pay at his respective time and one-half rate of pay."

FINDINGS:

The Third Division of the Adjustment Board, 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.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

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

This overtime claim involves snow removal service performed on Sunday, December 27, 1998 between 7:00 A.M. and 3:00 P.M. at Keenan, Minnesota. The Claimant worked Wednesday through Sunday on the 3:00 P.M. to 11:00 P.M. shift at Keenan as a Class B Machine Operator and was senior to Miller, who was called for the overtime and also regularly worked the afternoon shift as a Crane Operator.

The correspondence on the property reveals that the Carrier did not dispute the Claimant's entitlement to be called for this overtime prior to Miller, but asserted that Track Inspector D. Strand and Foreman R. Hunt called everyone on the list at Keenan and had trouble finding anyone. Within the Track Engineer's denial of the claim he wrote in quotations that Strand stated that the Claimant was one of the first ones called and there was no answer. The Organization took issue with this assertion, questioning how this could be so when Hunt told the Claimant when he got to work on December 27, 1998 that he was not called because they had misplaced his phone number. The Carrier's response indicates that it cannot verify this and that it trusts Strand and stands by its evidence that the Claimant was one of the first ones called. The Organization submitted a written statement from the Claimant indicating that Hunt told him he was not called because they misplaced his phone number and that he showed Hunt that his number was on the list on the board. The Carrier's final denial indicates that the Claimant's statement is self-serving, dated six months after the incident, does not indicate that he was home to receive the call, and there is no reason to believe that he was not called as asserted by the supervisors because his number was admittedly on the board.

The Organization contends that the Carrier violated Rule 20(b) requiring overtime to be offered to the senior qualified employee working in the classification at the headquarters point where the overtime is performed, because the Claimant met those requirements and was admittedly senior to Miller. It asserts that the Carrier's sole defense, that the Claimant was called, was not proven by direct evidence, but merely asserted as hearsay in the Track Engineer's initial denial, and that the Carrier failed to rebut the Claimant's direct statement that he was informed by Hunt that he was not called when he reported to work for his regular shift on December 27, 1998. The Organization argues that this state of the record does not create an irreconcilable dispute of fact, because only it presented direct evidence, citing Third Division Awards 29854, 29763, and 26448. Before the Board the Organization also contends that, even if one phone call was made to the Claimant, a single attempt does not amount to a reasonable effort to reach the Claimant, relying upon Third Division Awards 22422, 21222 and 20534.

The Carrier argues that, at best, this case presents an irreconcilable dispute of facts, because the Claimant's self-serving statement six months after the fact asserts that Hunt told him he was not called, but Strand indicated that he was one of the first ones called. The Carrier contends that what Hunt may have said, which it was unable to confirm, is irrelevant because Strand, known to be a long-term reliable employee, called the Claimant. The Carrier further asserts that the Claimant never rebutted its evidence that he was called but did not answer the phone by stating that he was home and available. For all of these reasons, the Carrier argues that the Organization failed to sustain its burden of proof and requests that the claim be dismissed, relying upon Third Division Awards 35497, 35496, 33900, 33416, 33163, 32942, 31078, 30548, 28790, 21423, 20408 and 18871.

Initially we note that the Organization did not argue on the property that a single call was insufficient to meet the Carrier's burden of making a reasonable effort to contact an employee for overtime, so that issue is not properly before the Board for resolution in this case. A careful review of the record convinces the Board that this case does not present an irreconcilable dispute of fact, as the Carrier asserts. The initial denial letter from the Track Engineer is the only one in the record that contains what the Carrier argues is its direct evidence that the Claimant was called by Strand. Such letter states that both Strand and Hunt called out people to work, and that Strand stated that the Claimant was one of the first ones called, but did not answer the phone. What it does not state is that it was Strand himself who made the phone call to the Claimant, rather than Hunt, making the Claimant's written statement that Hunt told him he was not called irrelevant, as argued by the Carrier. The Board concludes that the Organization met its prima facie burden of proof by submitting the Claimant's statement that he was specifically told on December 27, 1998 by one of the two supervisors who allegedly made the overtime calls, that he was not called because his number was misplaced. Because he was informed that he was not called, the Claimant's failure to state that he was home and available to take such call does not change this conclusion.

At that point, it became incumbent upon the Carrier to provide direct evidence from Hunt to negate making such comment and/or from Strand indicating that it was he, not Hunt, who specifically placed the call using the phone number on the board. In the absence of either of this direct evidence, we must conclude that the Carrier did not adequately rebut the Organization's prima facie case. As noted in Third Division Award 29854, the Carrier must do more in responding to first hand statements than have someone far removed from the situation simply state that it is

not so and that its evidence is more credible. See also, Third Division Award 29763. Unlike the situation in the cases relied upon by the Carrier, this record does not contain evidence of equal weight on each side supporting a finding of an irreconcilable dispute of fact. Accordingly, the claim must be sustained.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) 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.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 25th day of August 2004.