

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 39475
Docket No. MS-39832
08-3-NRAB-00003-060480
(06-3-480)

The Third Division consisted of the regular members and in addition Referee Lisa Salkovitz Kohn when award was rendered.

(Kenneth Attinelly, et al
PARTIES TO DISPUTE: (
(Metro-North Commuter Railroad Company

STATEMENT OF CLAIM:

“It is the claim and request of petitioning claimants (K. Attinelly, S. M. Habinowski, L. Buffone, Sr., and V. Angelo) that:

1. Respondent Carrier violated Rule 26 of the effective agreement between Metro North Railroad and Local 808, International Brotherhood of Teamsters.
2. Respondent Carrier violated Rule 17 of the effective agreement between Metro North Railroad and Local 808, International Brotherhood of Teamsters.
3. As a result of these violative actions, Repondent Carrier be required to make whole to each Claimant any and all wages lost, plus interest.”

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.

The Claimants contend that the Carrier violated Rule 17 by failing to notify them of overtime planned for Sunday, June 5, 2005, on Project BR 55.77. According to the Claimants, they had declined planned overtime for Saturday June 4, 2005, but that overtime was completed the same day. The work planned for Sunday, June 5, 2005, was a new planned overtime situation, the Claimants contend, so that they, as senior employees, were eligible for the call for that work. All were available for that work, they assert. The Carrier responds that all four Claimants were offered the overtime work; two (Attinelly and Habinowski) declined the work, and two (Buffone and Angelo) accepted and worked it. The Claimants answered that none of them had refused Sunday (June 5) work, which was neither planned nor offered in advance.

Under Rule 26 (b) a claim denied by the designated Carrier official at the first step (Rule 26(a)) is considered closed unless it is listed for discussion with the Director-Labor Relations by the employee or his union representative within 45 days after the denial. Once it is listed, and after discussion of the claim with the local committee, the Director-Labor Relations must provide written notice of the denial of a claim or grievance to "whoever listed the claim or grievance (employee or his union representative) within forty-five (45) days after the date the claim or grievance was discussed," and "[w]hen not so notified, the claim will be allowed." The Claimants contend that the Carrier violated Rule 26 by failing to meet these time limits, and the claim must therefore be sustained.

Based on the parties' correspondence of record, the Board finds that the Carrier did not violate the 45-day limit of Rule 26(b). Rule 26(b) requires the Director-Labor Relations to respond within 45 days after the date the claim was discussed, not within 45 days after the claim was listed for discussion. The Director-Labor Relations sent a letter denying the appeal to both the Organization and the Claimants on November 1, 2005, well within 45 days of the discussion held on October 14. This was sufficient to satisfy Rule 26(b) and there is no reason to deem the claim allowed due to any violation of the time limits. In particular, the correspondence from

the individual Claimants to the Carrier on January 12 and June 12, 2006, was not part of the procedure established under Rule 26 and the Carrier's failure to respond did not violate the Agreement.

As to the merits of the claim, we find that the Organization and the Claimants failed to sustain their burden of proving a violation of Rule 17. Where there is a conflict of material fact, the Board, as an appellate body, is not in a position to resolve that conflict, and must find that the party making the claim failed to satisfy its burden of proof. In this case, there is an irreconcilable conflict: the Claimants assert that they were never requested to work the Sunday overtime, and the Carrier asserts that they were. The record does not contain sufficient information for the Board to determine what actually happened that weekend. For this reason, we must dismiss the claim.

AWARD

Claim dismissed.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of December 2008.