

****CORRECTED****

**Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40345
Docket No. MW-40516
10-3-NRAB-00003-080337**

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

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Soo Line 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 Carrington Maintenance Foreman C. Broadwell to perform overtime service (inspect track) on February 4, 2007 and instead called and assigned Carrington Section Foreman T. McConnell and Carrington Maintenance Crew Assistant Foreman D. Krumweide (System File C-07-160-011/8-00219-144).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant C. Broadwell shall now be compensated for five and one-half (5.5) hours 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 claim protests the failure of the Carrier to make a reasonable effort to contact the Claimant for Sunday overtime work performing track inspections as a result of cold weather, and assigning the job of Super Truck Driver to a less senior employee. It raises the issue of whether the claim originally filed by the Organization citing Rule 11, 22 "and any other Rules of the Schedule Agreement" was improperly and untimely amended on the property to add reliance on additional Rules and a new theory of a violation.

The Claimant was a regularly assigned Foreman on the Carrington Maintenance Crew, and junior employee Krumwiede, who was assigned the disputed overtime work, was an Assistant Foreman on the same crew, which performs track work over a designated territory including the Carrington Section. A decision was made by the Carrier on Sunday, February 4, 2007 that due to the severely cold weather, it was necessary to inspect the track for broken rails and pull apart. A statement by the Engineering Manager indicates that such inspections are mandatory and created an emergency situation which could have affected train service prior to completion. Carrington Section Foreman McConnell was directed to perform the inspection and he contacted the Claimant on his cell phone to offer him the overtime work. A statement from the Claimant indicates that he had informed McConnell and his superior the week prior to contact him on his home phone for weekend overtime work because he shut off his cell phone on weekends. There is no dispute that McConnell did not attempt to contact the Claimant on his home phone. When the Claimant could not be reached, Krumwiede was called and performed the 5.5 hours of Sunday overtime work in dispute.

As noted, the initial claim filed on February 12, 2007 protested the Carrier's failure to call the Claimant on his home phone to offer him the overtime opportunity which the Organization contends he had preference to under Rules 11 and 22. The initial denial relies upon the provisions of Rule 11(f) which state that emergency work can be performed without regard to seniority, and notes that McConnell is senior to the Claimant. The Organization's April 27, 2007 appeal clarifies that the claim is not for the work performed by McConnell, but for the work done by Krumwiede, and cites Rule 26, arguing that the Claimant was the employee regularly assigned to this

position; it also takes issue with the Carrier's assertion that this was an emergency. During the processing of the claim on the property, the Organization also raised Rule 4(f) and argued that the Claimant was entitled to the overtime by virtue of his seniority and regular assignment, and that a single attempt to call the Claimant on his cell phone was not a sufficient effort. The Carrier took issue with the Organization's attempt to untimely amend a vague and unspecific claim relying on Rules 11 and 22 into one relying upon a totally different Rule and theory of the case. The Carrier asserted that there was no obligation under Rules 11 and 22 to use the Claimant for this overtime, no Agreement Rule giving him priority for the assignment, or requiring it to use the Maintenance crew on a Section crew's territory, a reasonable attempt was made to contact the Claimant on the cell phone on file with the Carrier, it was unreasonable for the Claimant to shut off his cell phone all weekend, there was no proof offered to show that the Carrier was given the Claimant's home phone number to use, and that it was an emergency situation. The Organization attached a copy of the Section consist with a list of names, addresses and phone numbers. The Carrier pointed out that the phone numbers listed for the Claimant did not match either the cell phone number on its records, or the one set forth in the claim as his home number.

The Organization argues that the Carrier failed to prove its affirmative defense of an emergency situation, because mandatory inspections are preventative, cautionary, and conducted regularly and there was no evidence to indicate that any trains were stopped in this instance, citing Third Division Award 33937. It notes that, even in an emergency, the Carrier is obligated to make efforts to use senior employees. The Organization contends that McConnell did not make a reasonable effort to contact the Claimant because he only called his cell phone once when previously told to use his home phone number, relying on Third Division Awards 35577 and 21222.

The Carrier contends that the case should be dismissed because the Organization improperly and untimely materially amended the claim, and went from seeking overtime for track inspection work to arguing that the Claimant was entitled to drive the Hy-Rail Super Truck under a Rule 26 preference, citing Third Division Awards 27883 and 31758, as well as Second Division Award 11032. It asserts that under Rule 11(f) it is not obligated to fill an emergency vacancy with the Claimant, nor is there an obligation to use the Claimant under Rule 22. Even if the Board were to consider Rule 26, the Carrier argues that the Claimant, who operated the Hy-Rail Super Truck, was not the regular employee to perform track inspections McConnell was. It notes that the Claimant had no right to work on a specific territory under Rule 4, and that he was on the Maintenance crew, and had no priority for Section crew

work. Finally, the Carrier posits that a reasonable effort was made to contact the Claimant on the phone number routinely used to call him and listed on his record, no reliable proof was furnished that he gave his home number to McConnell or that the Carrier was even in possession of the number he wished to be reached at, and that it was unreasonable for the Claimant to turn off his cell phone all weekend if he truly desired to be reached for overtime.

A careful review of the record convinces the Board that this case does not represent a substantial variance between the claim handled on the property and the one presented to the Board to form a valid basis for dismissal, as existed in Third Division Award 27883. The factual basis underlying the claim never changed, despite the Organization adding reference to Rule 26 in its first appeal to clarify the "and any other Rules language" in its initial claim, and later to Rule 4. Unlike the cases cited by the Carrier, the Organization did not change its argument to the Board from that pursued on the property as in Third Division Awards 27883 and 31758, or progress the claim on a totally different theory of violation from that which was initially filed and presented on the property, as was the case in Second Division Award 11032. The Carrier knew the underlying facts and contentions of this claim from the start and also had an opportunity to respond to all Rules cited and relied upon during the handling on the property.

The issue presented in this case is whether the Organization met its burden of proving that the Carrier was obligated to assign the Claimant to the work in question and failed to make a reasonable attempt to contact him. The record makes clear that the Carrier always contended that this was an emergency due to cold weather, and that the decision to have a cautionary track inspection on Sunday was made that morning due to the frigid temperatures. Even if this situation was not technically an emergency permitting the Carrier to obtain employees without regard to seniority under Rule 11(f) there is no dispute that McConnell attempted to call the Claimant on his cell phone to offer him the work. It is unclear whether the attempt was made more than once, whether any message was left, or whether the Claimant had actually given the Foreman his home phone number in lieu of his cell phone number, which the Carrier asserted, was his phone number of record. Although the Claimant said that he told his supervisor to call him at home for weekend overtime the prior week because he kept his cell phone off all weekend, the Section consist produced by the Organization to show that the Carrier was in possession of the Claimant's home phone number did not contain the phone number alleged to be the Claimant's home number, but had an entirely different number. Under such circumstance, the Board cannot say that the

Carrier's attempt to contact the Claimant on his cell phone for the overtime was insufficient, or that it was reasonable for the Claimant to turn off the phone normally used by the Carrier for the entire weekend and then assert that he was available and willing to work. These facts are clearly distinguishable from the situations in Third Division Awards 35577 (a single phone call with a busy signal and no call back) and 21222 (use of supervisory personnel in a non-emergency situation after only one attempted call) where it was held that no reasonable attempt to contact was made.

Because the Organization failed to sustain its burden of proving that the Carrier did not make a reasonable attempt to contact the Claimant for the disputed overtime - even if some of the cited Rules gave him preference to the assignment - the claim must fail.

AWARD

Claim denied.

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 1st day of March 2010.