Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40891
Docket No. MW-40991
11-3-NRAB-00003-090291

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 Employes Division - IBT Rail Conference
(
(Union Pacific Railroad Company (former Chicago & North Western Transportation Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it failed to call and assign Track Inspector B. Warnke to perform overtime track inspection service between Carroll and Ames, Iowa on December 15, 2007 and instead called and assigned employe W. Stevens, Jr. (System File R-0823C-302/1496701 CNW).

(2) As a consequence of the violation referred to in Part (1) above, Claimant B. Warnke shall now be compensated for seven (7) 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 is a rest day overtime dispute involving the Carrier's use of a junior employee to inspect track on the Claimant's regularly assigned territory on Saturday, December 15, 2007. It raises the issue of whether the Claimant was available and called, and relies upon the preferences established in Rule 23(L) and 31(A) which provide, in pertinent part:

"RULE 23 - WORK WEEK

L. Work on unassigned days - Where work is required by the Carrier to be performed on a day which is not part of any assignment, it may be performed by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee.

RULE 31 - CALLS

A. Employees called to perform work not continuous with regular work period shall be allowed a minimum of two hours and forty minutes at rate and one-half, and if held on duty in excess of two hours and forty minutes shall be compensated on a minute basis for all time worked. When necessary to call employees under this rule, the senior available employees in the gang shall be called."

The Claimant is assigned a Sunday through Thursday workweek. He took a vacation day on Wednesday, December 12 and a personal leave day on Thursday, December 13. He was scheduled for his rest days on December 14 and 15, and was to return to work on December 16, 2007. There is no dispute that the contested overtime assignment was on the Claimant's regularly assigned territory, and that the employee who was called to perform the work was junior to the Claimant and was not regularly assigned to track inspection on this territory. In its denial, the Carrier attached an unsigned email dated February 4, 2008, from Manager of Track Maintenance J. Biggerstaff which states: "Mr. Warnke was not available when called." The Carrier denied the claim on the basis that it is not obligated to call the Claimant for overtime when he is on vacation, but that it did so and he was

unavailable. In response, the Organization provided a signed statement from the Claimant indicating that before going off duty on December 12 he told Biggerstaff that he was available for December 15 overtime, was told he would be called if needed, and that he never received a call on either his land line (which has voice mail and caller ID) or his cell phone, which he carries with him 24/7. The Organization challenged the Carrier to present a phone log reflecting that a call was made. No phone records or additional statements were submitted.

The Organization argues that the Claimant's preference to the overtime under Rules 23(L) and 31(A) is not disputed, and the record confirms that he was available to work and was never contacted for the assignment. It notes that Manager Biggerstaff's vague, unsigned statement is insufficient to rebut the Claimants' signed statement that he was not called, was available, and made that fact known before he went on vacation and personal leave, and no phone log was produced, as requested. The Organization asserts that there is no irreconcilable dispute in facts, and because the Carrier failed to meet its burden of establishing its affirmative defense, the claim should be sustained, citing Third Division Awards 36396, 39670, 40228 and 40406.

The Carrier first contends that it was under no obligation to call the Claimant for this rest day overtime because a person on vacation or personal leave is unavailable to perform overtime until he returns to his regular schedule, which for the Claimant was December 16, 2007, citing Third Division Awards 23198, 27616, 29092, 29621, 31790 and 39146. In any event, the Carrier argues that because the Manager did attempt to call the Claimant, who was unavailable, it did not violate the Agreement by using a junior qualified employee for the assignment. It notes that, at best, this case presents an irreconcilable dispute of fact that requires the claim to be dismissed for failure of the Organization to meet its burden of establishing a violation of the Agreement, relying on Third Division Awards 29533, 29566, 30591, 30689, 30798 and 37857.

There is no dispute that, ordinarily, the Claimant would have an Agreement preference for this rest day overtime assignment as the regular employee assigned to this work on this territory under Rule 23(L). However, the Carrier's primary defense is based upon prior Board precedent holding that a person on vacation or personal leave is considered not to be available to work until he returns to his regularly scheduled assignment, and that the Carrier does not have to call to offer him overtime assignments during the vacation period, which includes contiguous

rest days. See Third Division Awards 23198, 27616 and 29092. This finding has been applied to an employee taking two days of vacation prior to his rest days, Third Division Award 29092, as well as an employee taking one personal day immediately preceding his rest days. See Third Division Award 39146. In Award 39146, the Board applied this rationale for denying the claim for rest day overtime despite the fact that the Manager had the practice of calling employees who previously indicated their availability. In that case the employee did not indicate ahead of time that he would be available.

After careful review of the record, we believe the facts of this case are distinguishable from this precedent which establishes a presumption of unavailability on rest days contiguous with vacation or personal leave days. The uncontested evidence reveals that before the Claimant went off duty on December 12, he informed Manager Biggerstaff that he was available for overtime on Saturday, December 15 and was told that he would be called if overtime was needed. Thus, the Claimant had a legitimate expectation that he would be offered any overtime that arose on his territory on that day. Additionally, the Manager asserted that he did call the Claimant for that assignment, corroborating his understanding that the Claimant was to be offered the rest day overtime first because he had made himself available. These circumstances are sufficient to rebut the presumption of unavailability, and distinguish this case from Third Division Award 39146, and others relied upon by the Carrier.

Therefore, this case must be analyzed in the same manner as others where a prima facie case of a violation is presented by proving an Agreement preference to the overtime and the Claimant's availability. See Third Division Award 40871. The Carrier raised the argument that it attempted to reach the Claimant for this assignment, but he was unavailable. The only proof submitted in support of this defense was the email from Manager Biggerstaff set forth above, which states that the Claimant was not available when called. Even when challenged to provide some direct evidence that a call was actually made to the Claimant, especially in light of his signed statement that he was available and reachable through two different phone numbers that the Carrier had and was not called, the Carrier provided no additional information. This situation does not raise an irreconcilable dispute of fact, because we are unable to conclude that the Carrier sufficiently established its secondary affirmative defense that it met its obligation to offer the Claimant the overtime assignment and that the Claimant was unavailable. See Third Division Awards 36396 and 40406. Because there is insufficient direct evidence to overcome

the Organization's prima facie case, the claim will be sustained. See Third Division Award 39670.

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 10th day of March 2011.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 40891 – DOCKET MW-40991

(Referee Margo R. Newman)

The Majority in this case was presented with directly conflicting statements from the two primary witnesses regarding the Claimant's availability for the overtime work in question. Therefore, pursuant to well-established precedent such as Third Division Award 33895, the Majority should have dismissed the case "... on grounds that the moving party has failed to establish a prima facie case." Unfortunately, the Majority transferred the burden of proof in this case to the wrong party, stating that the Carrier failed to meet its burden of proof to support its secondary affirmative defense to the claim. The Majority's conclusion that the Carrier failed to meet its burden of proof obviously cannot form the basis for a sustaining award. Thus, this dissent is required so that future arbitral panels will understand that this Award cannot be considered as precedent in similar cases.

The Majority bases its deviation from the well-established burden of proof principle on the implied notion that the Carrier has a superior obligation to provide documentary evidence in support of its position than does the Organization to support its basic claim. Not only is that deviation in conflict with Award 33895, with the many cases cited therein, and with the many Awards which have applied that principle since then, but it improperly shifts the burden of proof. While Award 33895 recognized that conflicting statements such as were presented here result in the Organization's failure to establish a prima facie case, the Majority here accepts the Organization's unsupported statement as sufficient evidence to establish a prima facie case, even though the Carrier supplied directly contradictory evidence in response. The circumstances presented here are exactly the same as those presented in Award 33895, and as in that case, there was no basis here to elevate the Organization's statement over that supplied by the Carrier.

The Majority apparently justifies its preference for the Organization's statement on the grounds that the Carrier did not provide telephone records to bolster the assertions set forth in the written statement. The Majority overlooks the fact, however, that the Organization likewise presented no telephone records to support the Claimant's bare assertion that he would have heard his phone if it had

rung. Moreover, it overlooks the fact that it was the Organization's burden to establish in the first place that the Claimant was available for the overtime and that the Claimant's bare assertion was insufficient to establish a prima facie case when confronted with the diametrically opposing statement provided by the Carrier. The fact remains that the statements in this case were of exactly the same nature as in the cases cited above, none of which required a carrier to support its statements with additional records.

Third Division Award 39670, which was relied on by the Majority for its conclusion, employed likewise questionable logic and involved other circumstances not present here. In any event, neither that Award nor the Majority's holding here should be considered as relieving the Organization from establishing a prima facie case in any claim, nor should they be considered as establishing a principle that the Carrier has a more onerous burden of production than that required of the Organization. Both parties supplied evidence of equal weight here, and the Majority should not have imposed a heavier burden on the Carrier. The Majority's finding is in direct conflict with the principle so clearly established in the plethora of Awards which employ the analysis described in Award 33895, and it is in error. In light of this plainly erroneous finding, the undersigned Carrier Members respectfully dissent.

Brant Hanquist *Michael C. Lesnik*

March 10, 2011