

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 41106  
Docket No. MW-40949  
11-3-NRAB-00003-090241**

The Third Division consisted of the regular members and in addition Referee Sherwood Malamud when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(Union Pacific 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 Section 4728 Foreman T. Samuelson to overtime service (inspecting track within Section 4728 territory) on November 7, 2007 and instead called and assigned Surface and Lining Extra Gang Foreman B. Herman (System File D-0735U-213/1492838).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Samuelson shall now be compensated for two and one-half (2.5) hours at his respective overtime 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.

Claimant T. Samuelson asserts that on November 7, 2007 he was not called to inspect rough track at Mile Post 414.85 on the Sharon Subdivision on an overtime basis. There is no dispute that the Claimant is more senior than B. Herman the Foreman who was called and performed the work on overtime. There is no dispute that the Claimant was the regular employee, under Rule 26, who should have been called to work the 2.5 hours of overtime.

The Carrier submits Manager of Track Maintenance (MTM) Lander's statement in support of its position:

"I understand that Mr. Samuelson want(s) to get paid for the call Bob Herman answered. However, Mr. Samuelson needs to answer his phone and or call back to check what I needed. I simply can not wait on anyone including Mr. Samuelson especially if he does not call back. I never heard back from Mr. Samuelson after I left him a message so I called Mr. Herman for the duties. Mr. Herman is a Surface Gang Foreman and therefore he is also depended on for surface (Rough Track Reports) Claim is denied."

During the on property progression of this claim, the Claimant responded:

"Mr. Lander did not call on Nov. 7 and . . . Yes I have caller ID and voice mail."

The Carrier argues that the Board confronts an irreconcilable dispute in facts. The Board, sitting as an appellate body, has no method of resolving these conflicting accounts of material fact as to whether MTM Lander called the Claimant. The Carrier argues that under well established Board precedent (Third Division Awards 33487, 33895 and 37478) the Board should dismiss the claim. According to the Carrier, the Organization failed to meet its burden of proof. In Award 37478, the Board held:

"Given this state of the record, it is apparent that there is an irreconcilable dispute as to the facts. Because the burden rests with the Organization to provide sufficient proof to support its contentions, the conflict in the evidence requires a finding that the

**Organization's burden has not been met. Therefore, the claim must be denied."**

**In the case now before the Board, the Organization notes that during handling on the property it challenged the Carrier to provide evidence and phone records to substantiate its contention that Lander made the call as he claimed. In support of its position, it cited Third Division Award 36396 between the parties to this dispute. The dispute in that case turned on conflicting claims over whether UP management called an employee on furlough to a temporary assignment. In the face of a handwritten signed statement submitted by that Claimant, who asserted that he received no call, the Board in Award 36396 concluded:**

**"In resolving these disparate positions, we find upon close review of the record that the Carrier has not sufficiently rebutted the Organization's showing that the Claimant was not called. The Carrier's assertion is supported solely by an unsigned, undated typewritten memo purporting to be from Supervisor D. Peterson, submitted more than one year after the filing of this claim. No telephone records were produced. When weighed against the signed statement of the Claimant, we find that the Carrier comes up short in establishing its affirmative defense."**

**In the instant case, the Organization met its initial burden of proof by establishing that the Claimant was the employee to whom the overtime should have been assigned. That fact is undisputed. The Claimant states that he received no call. The Carrier counters with MTM Lander's statement that he made the call and left a message. If the matter ended there, the Board would be confronted with two irreconcilable statements. The claim would be dismissed for the reasons set forth in Award 37478. Here, the Organization asked for the phone records. Through this demand, the burden shifted back to the Carrier to establish its affirmative defense. The Carrier did not state that such phone records were unavailable. As a consequence, the Organization argues that the Board should draw a negative inference from the Carrier's failure to present the phone records.**

**The Board concludes from the Carrier's failure to provide the phone records that it did not meet its burden to prove that it called the Claimant to offer him the overtime in question. Because the Carrier did not establish its affirmative defense,**

the Board concludes that the claim must be sustained in accordance with the on-property precedent established by Award 36396.

**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 18th day of October 2011.

## **CARRIER MEMBERS' DISSENT**

**to**

### **THIRD DIVISION AWARD 41106 – DOCKET MW-40949**

**(Referee Sherwood Malamud)**

The Majority 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 Board precedent such as Third Division Award 33895 (Referee Dana E. Eischen) the Majority should have dismissed the claim ". . . on grounds that the moving party has failed to establish a prima facie case." Unfortunately, the Majority imposed the burden of proof in this case on the wrong party, stating that the Carrier failed to meet its burden of proof to support its position. The claim, however, was the Organization's - not the Carrier's - and the Majority's conclusion that the Carrier failed to ". . . meet its burden to prove that it called the Claimant to offer him the overtime in question. . ." 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 based its deviation from the principle set forth above on the implied notion that the Carrier had a superior obligation to provide documentary evidence in support of its position than the Organization had to support its basic claim. Not only is that deviation in conflict with Award 33895, with the many Awards cited therein, and with the many Awards which have applied that principle since then, it improperly shifts the initial 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 accepted 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 justified 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 overlooked the fact, however, that the Organization likewise presented no telephone records to support the Claimant's bare assertions. Moreover, it overlooked 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 Awards cited and/or referenced above, none of which required a carrier to support its statements with additional records.

The sole Award relied on by the Majority for its conclusion, which employed likewise questionable logic, involved other circumstances not present here, including questions of whether the carrier there had even called the correct telephone number. 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 palpably erroneous. For all of these reasons, the Carrier Members respectfully dissent.

*Brant Hanquist*  
Brant Hanquist

*Michael C. Lesnik*  
Michael C. Lesnik

October 18, 2011