

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 37142
Docket No. MW-36129
04-3-00-3-310

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
(Duluth, Missabe and Iron Range Railway Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call Foreman M. R. Highland, Jr. to perform foreman's overtime service on January 25, 1999 and instead called and assigned Machine Operator S. Woods (Claim No. 10-99).
- (2) As a consequence of the violation referred to in Part (1) above, Foreman M. R. Highland, Jr. 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 Foreman work required by the Carrier on Monday, January 25, 1999 between 3:00 P.M. and 11:00 P.M. at Keenan, Minnesota. The Claimant regularly worked as a Section Foreman at Keenan. The Carrier assigned Machine Operator S. Woods, who regularly worked the 7:00 A.M. to 3:00 P.M. shift, to the overtime.

The correspondence on the property reveals that the Carrier did not dispute the Claimant's entitlement to be called for this overtime prior to its assignment to Woods, but its Track Engineer asserted that "Track Foreman Nosam or Supervisor Hunt" called the Claimant but there was no answer. The Organization took issue with this assertion noting that the Carrier was not sure who called the Claimant, who had an answering machine on which no message was left, and asserts that the Claimant says he was home and received no call from work. The Carrier's response indicates that it adopts the Track Engineer's contention that the Claimant was called, it need not leave a message on an answering machine and cannot verify that the Claimant was home. The Organization submitted a written statement from the Claimant affirming that he was home all day on January 25, 1999 and never was contacted about working the Foremen overtime. The Carrier's final denial indicates that the Claimant's statement is self-serving, dated five months after the incident, and that its records indicate that the Claimant was called and there is no reason to believe to the contrary.

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 the Carrier admitted that he was the first person who would have been contacted. It asserts that the Carrier's sole defense, that the Claimant was called, was not proven by any direct evidence, what was asserted as hearsay in the Track Engineer's initial denial did not even identify who allegedly called the Claimant, and that the Carrier failed to rebut the Claimant's direct statement that he was home on January 25, 1999 and received no call from work concerning overtime. The Organization argues that this state of the record does not create an irreconcilable dispute of fact, because only it presented direct evidence that was never rebutted, citing Third Division Awards 29854, 29763, and 26448. It also relies upon Third Division Awards 35577, 35420, and 27701 in arguing that the claim should be sustained.

The Carrier argues that, at best, this case presents an irreconcilable dispute of facts, because the Claimant's self-serving statement five months after the fact does not substitute for the evidence of its records that the Claimant was called. It notes that it could not verify the Claimant's statement that he was home on January 25, 1999, and asserts that when the Carrier is making calls for overtime and gets a busy signal, no answer or an answering machine it can legitimately assume that the Claimant is unavailable. 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.

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 "either Nosan or Herring." Nowhere in the record does the Carrier identify which of the two actually called the Claimant. The Board concludes that the Organization met its prima facie burden of proof by submitting the Claimant's statement that he was home all day on January 25, 1999 and received no call from work concerning this overtime. At that point, it became incumbent upon the Carrier to provide direct evidence as to who specifically placed the call, and when and how many times it was made. In the absence of such 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. In fact, it contains no specific evidence at all concerning the alleged call made to the Claimant. Thus, the Carrier's contention that it may assume that the Claimant is unavailable if he does not answer the phone need not be resolved in this case. Because the Carrier does not dispute that the Claimant was entitled to the overtime work under Rule 20(b) had he been available, 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.