Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 37149
Docket No. MW-37307
04-3-02-3-324

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
(National Railroad Passenger Corporation (Amtrak)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it called junior employe J. Merola for overtime snow duty on December 30, 2000 instead of Mr. D. Wallace (System File NEC-BMWE-SD-4108 AMT).

(2) As a consequence of the violation referred to in Part (1) above, Claimant D. Wallace shall now be compensated for ten (10) 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 claim raises the issue of whether the Carrier complied with Rule 55 when calling out Mechanics to perform overtime snow duty on December 30, 2000. On the property the Carrier contended that it called employees in order of seniority on December 29, 2000 to obtain sufficient forces for snow removal on two 12 hours shifts beginning at 3:00 A.M. and 3:00 P.M. in compliance with its Rule 55 obligations. It submitted its call-out sheet indicating the times and outcomes of its phone calls. This sheet reveals that the Claimant was called at 1:20 P.M. and there was no answer. It also reveals that the process followed by the Carrier when it received either no answer or an answering machine was to continue down the list making calls to find available workers. There is one notation of "call back" at 1:21 P.M. for an employee who was called after the Claimant with no answer. The call-out sheet reveals a gap between 1:40 P.M. and 4:13 P.M. for calls made to Mechanics, and that junior Mechanic Merola accepted the assignment at 4:15 P.M. The last call-out was at 4:25 P.M. The Organization submitted a signed statement from the Claimant and his wife indicating that he was available for the overtime, was home during the evening of December 29 and the day on December 30, 2000 and received no call from the Carrier, and that he had an answering machine and there was no message from the Carrier.

On the property the Organization argued that the Claimant was senior and available to perform the work and that he did not receive a call from the Carrier. It denied the call was made and requested a copy of the phone bill as proof of such. In its Submission to the Board, the Organization posits that the call-out sheet was insufficient proof that a call was made, that the Carrier cannot meet its burden of compliance with Rule 55 by making a single call, and that more than that is required to show that a reasonable effort was made to contact the Claimant, citing Third Division Awards 17182, 18870, 19658, 20119, 20466, 20534, 21222, 22422, 23401, 23561, 26448, 26562, 27701, 28796, 35577 and 35642.

The Carrier initially contends that the Organization's arguments presented to the Board for the first time cannot be considered as they were not addressed by the parties on the property. It asserts that the Claimant's statement does not rebut the proof that he was called at 1:20 P.M. by the Carrier prior to calling junior employees, and was not available. The Carrier points out that the Claimant only asserted that he was home during the evening of December 29, 2000 and not during the afternoon when the calls were made and a sufficient work force was obtained.

At best, the Carrier posits that there is an irreconcilable dispute of facts requiring dismissal of the claim. See Third Division Award 28435. The Carrier concludes that the Claimant has not shown his availability, citing Public Law Board No. 1844, Award 10, and argues that the Organization's claim for the overtime rate is excessive and should be the basis for dismissing the claim, relying upon Public Law Board No. 4549, Award 1; Third Division Award 35863.

A careful review of the record convinces the Board that the Organization has not met its burden of proving that the Carrier violated the Agreement in this case. In order to prevail on a defense of unavailability, the Carrier must show that it made reasonable efforts to contact the senior employee before calling junior men to perform the overtime work. See, e.g. Public Law Board No. 1844, Award 10. The question in this case is whether the Carrier submitted sufficient evidence to carry its burden and shift to the Claimant the burden of persuasion concerning his availability.

The only evidence submitted by the Carrier on the property, aside from its written denials saying that calls were made to the Claimant, was the call-out list which shows the efforts made on December 29, 2000 to obtain employees for snow duty on December 30, 2000. There is an entry next to the Claimant's name indicating that he was called in order of seniority at 1:20 P.M. and there was no answer. The call-out list also reveals a practice of continuing down the list when there is no answer or an answering machine response. The Carrier obtained a sufficient workforce for the overtime by 4:25 P.M., when the last call was made. The Board concludes that this evidence is sufficient to meet the Carrier's initial burden of showing that the Claimant was called in order of his seniority and was not available at the time of the call. Because the Organization did not raise the number of calls made to the Claimant on the property, but only denied that any call was ever made, the Board will not address in this case the issue of whether a single call is sufficient to meet the Carrier's burden of proof.

The Claimant's statement that he was home all evening on December 29, 2000 and had an answering machine and received no call or message from the Carrier does not rebut the Carrier's statement that he was unavailable during the period it was filling the vacancies for snow removal overtime work. If the Claimant had shown or asserted that he was home at 1:20 P.M., or at least prior to 4:15 P.M. when

the junior employee accepted the overtime call, and received no call from the Carrier, such evidence may have been sufficient to rebut the call-out list in the absence of any other direct proof that such call was made and by whom, and may have called into question whether the Carrier's attempt constituted a reasonable effort on its part. However, in this case, because the Claimant did not show that he was home to either receive the call or to timely respond to a message left on his answering machine, the Board must conclude that he has not rebutted the Carrier's proof that it complied with Rule 55 in assigning overtime snow removal work on December 30, 2000.

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 25th day of August 2004.