Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40228
Docket No. MW-40484
09-3-NRAB-00003-080308

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

(Brotherhood of Maintenance of Way Employes 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 Carrier violated the Agreement when it failed to call and assign Truck Driver C. Westeng for overtime service (deliver a frog to Green River, Wyoming) on December 16, 2006 and instead called and assigned junior employe D. Nath (System File R-0735U-301/1468863).

(2) As a consequence of the violation referred to in Part (1) above, Claimant C. Westeng shall now be compensated for twelve (12) 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 concerns rest day overtime callout. The Organization based the claim on the Claimant's statement that the Carrier did not call to offer the overtime opportunity. The Carrier submitted, on the property, the statement from Supervisor Erickson that:

> "Mr. Westeng was offered the overtime and did not respond to a message left for him, and the load was time sensitive due to a slow order that was on the track in Green River. I denied this claim."

On the property, the Organization responded by demanding that the Carrier produce the phone record documenting the assertion that the Carrier contacted the Claimant. The Carrier made no such submission.

The Carrier argues that the state of the record is such that the Board is confronted with irreconcilable conflicting claims which, as an appellate body, it is unable to resolve. The principle that governs is well stated in Public Law Board No. 2960, Award 154 as follows:

> "Obviously, at this level, the Board has no way of resolving evidentiary conflicts. We have neither the authority nor the competence to resolve such conflicts in the evidence of record. On the state of this record, the Board has no alternative but to dismiss the claim."

Also see Third Division Awards 37204, 36406 and 33895.

In its argument before the Board, the Organization submitted recent Third Division Award 39320 involving the call out claim of a furloughed Claimant. Therein, the Board held:

> "Although the Carrier is shown to have taken exception to the above assertions of the Organization, the Board finds it significant that the Carrier did not present any documentary evidence to support it having provided any of the requested information to the Organization."

In Award 39320, the Board concluded that the Carrier failed to provide competent evidence in support of its defense. The Board determined that the

Carrier failed to meet its burden of proof, a finding that the Board is competent to decide.

Once the Organization demanded on the property that the Carrier provide the phone record support for its assertion that it contacted the Claimant, the burden shifted to the Carrier to do so. By failing to produce the requested record on the property, the Carrier failed to meet its burden of proof to support its assertion.

Here, had the Carrier presented evidence of the call to the Claimant, then the Board would be confronted with an irreconcilable dispute in facts that it could not resolve and would be required to dismiss the claim. Because the Carrier did not meet its burden of proof, in accordance with the Board's decision in Award 39320, the Board concludes that this claim should be allowed.

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 21st day of December 2009.

CARRIER MEMBERS' DISSENT

to

THIRD DIVISION AWARD 40228 – DOCKET MW-40484

(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 NRAB 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 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 contention. The claim, however, was the Organization's - not the Carrier's, and 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 principle set forth above on the implied notion that the Carrier has a superior obligation to provide documentary evidence in support of its position than the Organization has 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 cases which have applied that principle since then, but 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 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.

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 in error. In light of this plainly erroneous finding, the Carrier Members respectfully dissent.

Michael D. Phillips
Michael D. Phillips

Michael C. Lesnik
Michael C. Lesnik

December 21, 2009

LABOR MEMBER'S RESPONSE
TO CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 40228, DOCKET MW-40484
(Referee Sherwood Malamud)

The Carrier Member's Dissent requires response because the Neutral Member did the correct thing in this case and I must respond to set the record straight.

The Carrier Member simply does not understand the concept of shifting burden of proof. To be sure the Organization bares the initial burden of proof when, as here, we claim that an employes seniority was violated when he contended that he was not called for an overtime assignment. That portion of the burden test was fulfilled when the Carrier acknowledged that he was the proper employe to be called and that it had in fact attempted to contact him. At this point is where the Carrier's reasoning suffers from cognitive dissonance.

On the one hand the Carrier asserts that it attempted to contact the Claimant but got no response. The Claimant stated that he received no phone call from the Carrier on that date and provided a written statement to support his position. The Carrier countered with an e-mail message alleging that it attempted to contact the Claimant for the overtime at issue here. Apparently, the Carrier believes that the record should be closed at that point and the Claimant should just go away. If the state of the record remained unchanged at this point, the Carrier would be correct that there was a conflict in fact. The problem here is that we requested proof from the Carrier that it had in fact called the Claimant by producing the telephone records it had on file to prove its affirmative defense. The Carrier Member seemed to think that Award 33895 somehow was supportive of its position. In part it is correct, it would have ended the discussion if the Organization had done nothing else in an attempt to perfect the record. Unfortunately for the Carrier that was not the end of the matter. When the burden shifted back to the Carrier to prove its affirmative defense, it failed to do so. This issue was before the Board recently wherein the Carrier made the same argument as it did here, that competing written statements cancelled each other out and the Organization did not meets its burden of proof. As in this case, the Board held in **Award 39320**, an award from the CNW side of this Carrier, that:

> "While the Carrier asserts it complied with a request from the Organization for a list of the phone numbers and seniority ranking said by Wilson to have been provided him by the General Manager's Clerk for calling furloughed employees, the Organization maintains that when it asked for such documentation the Carrier could not produce it. The Organization also contends that its request of the Carrier for phone bills or records showing the date and time the Claimant was alleged to have been contacted likewise went unfulfilled.
>
> Although the Carrier is shown to have taken exception to the above assertions of the Organization, the Board finds it significant that the Carrier did not

"present any documentary evidence to support it having provided any of the requested information to the Organization.

Except for the above-referenced unsigned electronic statement from Wilson, the Carrier provided no verification to prove that the Claimant was indeed called for the work opportunity.

Notwithstanding its failure to have produced any documentary evidence in support of its defense that a phone listing as used to call the furloughed employees did exist, the Carrier takes the further position that if the contact information provided by the General Manager's Clerk to Wilson was incorrect or did not reflect an up-to-date telephone number for the Claimant, that it was the latter's responsibility to update that information pursuant to Rule 14(A) of the Agreement. This Rule provides: 'Employees shall provide the Carrier and General Chairman in writing of any change in mailing address and telephone number.'

The Board is not persuaded by this Carrier argument. As stated hereinabove, nothing of record shows the phone number that Wilson purportedly used to contact the Claimant. Nor does the record show that the Claimant had at the time, much less meantime, apprised the Carrier and General Chairman of a change in his telephone number. Moreover, even assuming, arguendo, as the Organization says, the Claimant's personal information on the listing as provided by the General Manager's Clerk was found to have been incorrect, it would conflict with the statement of Wilson that he had called the Claimant and left a message on the Claimant's answering machine.

The Carrier having failed to provide competent support for its defense against the claim, the Board finds that the claim should be allowed." (Emphasis in original)

Second, the Carrier seems genuinely surprised by the fact that the Board has held in this manner before. The concept of the shifting burden is nothing new in conflict resolution, especially between these parties. We cited to the Neutral Member of the Board three (3) on-property awards concerning the Carrier proving its affirmative defense and the production of telephone records. As can be seen from the award quoted above, the Carrier has been down this road before, so it should not be surprised by the outcome.

Finally, the Carrier goes out to left field when it made the following 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. ***"

The above-cited excerpt from the Carrier's Dissent is right out of bizarro world. Proving something did not happen is an impossible task and the Carrier should know this, rather than attacking the Neutral Member because it did not like a decision. The Majority was correct in its analysis of the case and the findings are in keeping with established Board precedent.

Respectfully submitted,

Roy C. Robinson
Labor Member