

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40388
Docket No. MW-40104
10-3-NRAB-00003-070297
(07-3-297)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(BNSF Railway Company**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier did not call B&B employe T. Nicholson for overtime service on January 17, 2004 and instead called and assigned junior B&B employe W. Brhel [System File C-04-0020-15/10-04-168(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant T. Nicholson shall now be compensated for nine and one-half (9.5) 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.

A mainline derailment at MP 8.7 on January 16, 2004, derailed 28 rail cars and damaged a nearby home. Although the Organization stops short of acknowledging the fact, the derailment presented an emergency. The Claimant, then a First Class Mechanic/Carpenter in the B&B Sub-department, was on his rest day.

Supervisor Structures C. Krause telephoned potentially available non-scheduled employees to work the emergency until he acquired the number that he believed needed.

In two signed statements, Krause contends that he called the Claimant at his home at about 6:00 A.M. on January 17, but received no answer. He states that he left no message and continued calling others. Brhel, an employee on the same gang but junior to the Claimant, was contacted and worked nine and one-half overtime hours.

In an April 13, 2003, written statement, the Claimant states that he was home at the time Krause contends that he called but, in fact, he received no call from him. He contends that he has an answering machine and caller ID which showed no evidence of Krause's call. He further asserts that he had a cell phone and his Foreman knew its number. The Claimant was fully qualified and willing to perform the overtime assignment.

The Organization relies on Rules 1, 2, 5 and 24. It seeks nine and one-half hours' pay at the Claimant's time and one-half rate.

Seniority is the soul of collective bargaining agreements. Nonetheless, the Carrier has much greater, but not unlimited, latitude to assign emergency work. However, even under its expanded discretion, an honest, reasonable effort must be made to honor seniority within the perimeters of the emergency. Indeed, the Carrier's original core defense is that it attempted to contact the Claimant in seniority order, but was unable to reach him and had to find less senior employees to work the emergency.

This is not a case like Third Division Award 36524 where the nature and extent of the emergency justified no effort to assign work in seniority order. Because Krause contends that he called the Claimant, there is no question that time permitted calls to attempt assignments by seniority. Moreover, it is undisputed that an employee junior to the Claimant worked. Therefore, the threshold determinative issue is whether Krause called the Claimant at all. If there is insufficient proof that he did, the Claimant is entitled to a remedy for violation of his seniority rights at the rate he would have earned had he worked the assignment.

Given the seniority deviation, the Carrier shoulders the burden of proving an acceptable excuse. The Carrier notes that Krause said that he called the Claimant. The Claimant denies a call under circumstances he was available to answer it. The Carrier offers no corroborating or contemporaneous evidence to prove that a call was made. Instead, it reasons that the Claimant is obliged to prove that Krause did not make the call and/or that the two irreconcilable statements create a credibility conflict. The first contention creates the impossible task of proving a negative with no access to relevant information. The second forgets that the Carrier must provide an acceptable exception for the admitted seniority deviation.

Methods are available to contemporaneously verify attempted telephone calls. They are used in many industries where dispatches and assignments are important. They can involve minor expense or be virtually cost free. The precise method does not matter as long as it reliably corroborates supervision's otherwise naked claims.

In a dispute involving the Union Pacific Railroad Company (UP) the Board very recently rejected the BNSF's current defense. See Third Division Award 40228. The UP submitted a vigorous dissent. However, in addition to reasons explained above relating to burden of proof, Award 40228 is not a singular or recent exception to prior Third Division decisions. For example, see Awards 21222, 21224, 36396 and 39935. Moreover, it avoids the undesirable consequence of dismissing every emergency call-out dispute, no matter the circumstances, based on supervision's uncorroborated assertion of what it did even when corroboration of attempted calls could be achieved so easily. In view of all of the foregoing, the instant claim will 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 March 2010.