Form 1 **NATIONAL RAILROAD ADJUSTMENT BOARD**
THIRD DIVISION

Award No. 42183
Docket No. MW-41635
15-3-NRAB-00003-110312

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 Agreement was violated when the Carrier failed to call and assign REO Machine Operator R. Jensen to perform overtime REO machine operator duties in connection with rail unloading near Council Bluffs, Iowa on the Omaha Subdivision on February 28, 2010 and instead called and assigned Division Semi Truck Driver and junior employe D. Randolph (System File R-1035U-305/1533588).

(2) As a consequence of the violation referred to in Part (1) above, Claimant R. Jensen shall now '* be compensated for the seven (7) hours of overtime, for the lost opportunity to work, when the Carrier had a Division Semi Truck Driver perform the work of an REO operator, at the applicable 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.

At the time of the events giving rise to this claim, the Claimant was a Roadway Equipment Operator regularly assigned as an REO Machine Operator on Gang 5076, working under the supervision of Manager of Track Maintenance R. Read. The Claimant has an established seniority date of July 11, 1980. This claim was filed after the Carrier failed to assign REO overtime to the Claimant, and instead, assigned it to junior employee D. Randolph, whose seniority dates to June 20, 2006. Moreover, Randolph was regularly assigned as a Division Semi-Truck Driver on Gang 4755, within the Carrier's Maintenance of Way and Structures Department. Randolph holds no REO seniority.

During overtime hours on Sunday, February 28, 2010, continuous welded rail (CWR) was being unloaded from a rail train on the Omaha Subdivision near Council Bluffs, Iowa. The Carrier determined that it was necessary to utilize a Komatsu Loader, an REO machine, to assist in unloading the CWR. As an REO Operator, the Claimant was a "regularly assigned employee" entitled under Rule 26(h) to be offered the overtime before it was offered to an employee outside of the REO Department. According to the Claimant, no one contacted him about working the overtime, and his phone records do not show any incoming calls from the Carrier. According to the Carrier, Manager of Track Maintenance Read tried calling the Claimant, who did not answer the phone. Read then went down the call list of eligible employees and eventually the work was assigned to Randolph.

There is no dispute that the Claimant was the senior employee regularly assigned to operate REO equipment, and he was entitled to be offered the overtime before it was assigned to someone else. Regrettably, the Board is faced with an irreconcilable conflict in the evidence before it, specifically in relation to the material fact of whether the Carrier contacted the Claimant to offer him the overtime or not. The Claimant's written statement specifically addresses Manager Read's failure to call him:

> **"MTM Read, did in fact, fail to call me for the work. I was home, ready and willing to work. I have a cell phone and home phone both with caller ID. The fact is that Mgr Read did not even try & call. I am qualified and in possession**

of sufficient seniority and have operated that specific Komatsu loader many times in the past."

While Read's statement is considerably briefer, it nonetheless refutes the Claimant's statement:

"Ron did not answer the phone when called about unloading rail."

Neither party submitted additional evidence, such as telephone records that would corroborate the statements.

As noted in numerous prior Awards, the Board sits as an appellate body, with no way to measure the comparative validity of the statements in the record. This is especially true when there is no standardized protocol or record-keeping requirements associated with overtime callouts. As a result, when faced with such evidentiary conflicts and factual disputes, the Board must dismiss the claim before it.

AWARD

Claim dismissed.

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 28th day of October 2015.

LABOR MEMBER'S DISSENT
TO
AWARD 42183, DOCKET MW-41635
(Referee Andria S. Knapp)

In this instance, the Majority erred when it determined that an irreconcilable conflict existed in this case. Apparently, the Majority reached its erroneous determination by failing to properly consider and apply the concept of shifting burden of proof. In this instance, a claim was filed because a senior employe was not contacted to perform overtime work. The fact that the Claimant was entitled to be called for such overtime work was never the subject of dispute. As developed through the claim handling process on the property, the issue revolved around whether the Carrier proved that an attempt to contact the Claimant was made. As the Majority pointed out in its award, the evidence of record contained a written statement from the Claimant which specifically addressed the Manager's failure to call him, i.e., "MTM Read, did in fact, fail to call me for the work. I was home, ready and willing to work. I have a cell phone and home phone both with caller ID. The fact is that Mgr Read did not even to try & call. ***" (Emphasis in original). The record also contained an e-mail statement attributed to Manager Read which, while considerably briefer, the Majority held "... nonetheless refutes the Claimant's statement." The Majority's analysis to this point is logical and follows established principles regarding irreconcilable conflicts. However, within the on-property correspondence the General Chairman specifically challenged the Carrier to produce evidence in to the record to support its allegation that an attempt to call the Claimant was made. In his January 7, 2011 letter confirming a claims conference, the General Chairman stated, "The Carrier has failed to provide their phone records wherein it would show if they actually tried calling Claimant or not. Since they did not provide such records, it is assumed that no such call to Claimant was made. The Carrier has failed to produce evidence they called Claimant." Consequently, the Organization clearly challenged the veracity of the manager's statement and by specifically requesting that the Carrier provide phone records, effectively shifted the burden of proof back to the Carrier to prove its affirmative defense. The Carrier failed to provide such evidence. In such instances the overwhelming precedent, including precedent on this property, holds that a failure to provide such evidence must resolve against the Carrier. Typical of such award precedent are on-property Awards 36396, 40228, 40871 and 41106 which all held that this Carrier's failure to provide phone records, when challenged to do so on the property, was fatal to its affirmative defense. Awards 40228 and 41106 held:

AWARD 40228:

> "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 41106:

"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 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.'

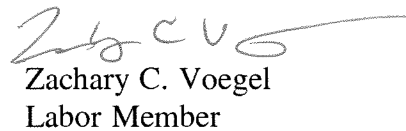
In the instant case, the Organization met its initial burden of proof by establishing that the Claimant was the employee to whom the overtime should have been assigned. That fact is undisputed. The Claimant states that he received no call. The Carrier counters with MTM Lander's statement that he made 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."

For the above reasons and in connection with the above-cited precedent, it is clear that the Majority in this instance erred when it determined that the claim should be dismissed on the basis of an irreconcilable conflict. Therefore, I respectfully dissent.

Respectfully submitted,



Zachary C. Voegel
Labor Member