

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42831  
Docket No. MW-43378  
17-3-NRAB-00003-160057**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -  
( IBT Rail Conference  
PARTIES TO DISPUTE: (  
(Springfield Terminal 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 and assign I&R West Crew Bucket Loader Equipment Operator W. Charles to perform rest day overtime work on “September 14, 2014 and instead assigned B&B Mechanic R. Witham thereto (Carrier’s File MW-15-01 STR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Charles shall be compensated ‘. . . for eight (8.0) hours at time and one half rate of \$25.67 (@ \$38.51 per hour) totaling \$308.08 \*\*\*’ (Emphasis in original).”**

**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.

The Claimant has seniority as an Equipment Operator in the Track Sub-Department while Mr. R. Witham has seniority in the Bridge & Building (B&B) Sub-Department. When overtime track repair work was needed on September 13, 2014 in Liverpool, ME, the Carrier allegedly called Mr. Witham rather than the Claimant, who customarily performed track repair work in that area. The Claimant lost eight hours of overtime as a result. A timely claim was filed.

The Organization insists that the Carrier violated the contract when the Claimant was not offered preference for the overtime work. The Carrier has not proven the affirmative defense that an emergency existed, as a derailment per se does not create an emergency. There is no proof that Supervisor Lawrence contacted the Claimant to offer the overtime. Even assuming a call was made, there is support for the proposition that a single call does not constitute a reasonable attempt to contact an employee. Because the Claimant was fully qualified, available, and willing to work and because his seniority rights were violated, he should receive eight hours of pay at the overtime rate.

The Carrier contends that the Organization has not proven the claim with substantial evidence. At approximately 9:30 pm on a Saturday 12 cars derailed on a single track mainline. It took several hours to get sufficient response despite the many calls that were made. Article 10.4(e) supports that Carrier's handling of this emergency. Ultimately the Organization did not respond to the Carrier's written clarification of the pertinent facts and handling of the incident.

For reasons set forth below, the Board sustains this claim. The parties do not disagree that B&B Mechanic Witham performed the overtime work in dispute and that the Claimant, who customarily performed track repair work in the area, did not perform the overtime. The Organization, therefore, provided a prima facie case that the Claimant was deprived of his seniority right to work the overtime. The Carrier has advanced two affirmative defenses, for which it bears the burden of proof: 1) that the callout was in response to an emergency and 2) that the Claimant, in fact, was called but was not available.

The Carrier has asserted that the 12-car derailment on a single mainline track was an emergency and that a derailment, per se, "constitutes an emergency, as established by prior disputes on this property" (Carrier Submission). The Organization has provided several Third Division Awards establishing the Carrier's burden to prove the affirmative defense of emergency. See, for example, Awards 40078, 36954, 32862 and 32414. The Carrier has provided no prior awards and no

evidence of prior disputes that were resolved in a manner establishing a derailment as a per se emergency. Moreover, other than the uncontested information that the derailment involved 12 cars on a single mainline track, there is nothing in evidence to support the emergency contention.

But, even assuming that the derailment constituted an emergency, the Carrier cannot prove the affirmative defense that the Claimant was called. He says that he was not called; the Carrier avers that he was. The derailment occurred about 9:30 PM on Saturday, September 13, 2014. The Claimant's phone records show calls at 7:58 A.M. and 10:59 A.M. on September 13, well before the derailment, and one call at 11:26 AM on September 14. The Carrier does not dispute the Claimant's statement that none of these calls were from his employer. The Carrier alleges that the Claimant's Supervisor, Lawrence, called "everyone who worked for him" that Saturday night. This information is contained in a written statement from Ken Pelletier, thus it is second hand information that does not specifically identify the Claimant as one who received a call and does not indicate that more than one call, if any, was made to the Claimant. The Carrier has provided no phone records to confirm that a call to the Claimant was made. Moreover, Third Division Awards 28796, 29527, and 31704 establish the principle that one call is insufficient (in case of a misdial) and that a reasonable effort to reach the affected employee must be made.

The Carrier has provided an on-property award, Third Division Award 42575, involving a claim submitted when the Claimant was not called for overtime. The Board, honoring an earlier on-property award (41810) that it found "not palpably erroneous," denied the claim. The earlier award had stated that a supervisor's statement that a called employee did not answer was sufficient evidence without further proof. The Labor Member's dissent from Award 42575 distinguished Award 42575 from Award 41810, stating that Award 42575 involved the Organization's challenge to the Carrier's assertion that overtime was offered but that Award 41810 involved the Organization's failure to rebut the Carrier's evidence. While the Carrier member's concurring opinion stated that the "dispute involved in Award 42575 is directly analogous in all material ways to the dispute involved in Third Division Award 41810 . . ." this Board is not persuaded that the Carrier's award is controlling. In the case before us, the proof that the Carrier has advanced in the form of Mr. Pelletier's statement has been rebutted by the absence of Carrier phone records and the existence of the Claimant's phone records. The case at bar is easily distinguished from the earlier awards.

The Carrier has not met the burden of proving either element of its affirmative defense. The Organization's prima facie stands un rebutted and is grounded on substantial evidence.

**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 12th day of December 2017.

**CARRIER MEMBERS' DISSENT**  
**to**  
**THIRD DIVISION AWARD 42831 - DOCKET NO. MW-43378**

**(Referee I.B. Helburn)**

The dispute involved in this case is directly analogous in all relevant material ways to the dispute involved in Third Division Award 42575 and the dispute involved in Third Division Award 41810, (which was cited by the Majority in Third Division Award 42575). In both Third Division Award 42575 and Third Division Award 41810, the Carrier established with evidence of a supervisor's statement, that the Claimants had been called for the overtime assignments at issue in each dispute. In both Third Division Award 42575 and Third Division Award 41810, the Organization sought further proof from the Carrier, specifically in the form of telephone records. In both Third Division Award 42575 and Third Division Award 41810, the Board correctly concluded that the Carrier had already provided sufficient proof to refute the Claimants' initial assertions and no further proof of the kind that the Organization was specifically demanding was necessary. The same relevant material facts existed in the instant dispute.

Despite the foregoing, the Organization progressed this dispute to the Third Division of the NRAB in a third (3<sup>rd</sup>) attempt at obtaining a different outcome than it had achieved in the two (2) previous disputes (Third Division Award 42575 and Third Division Award 41810). Unfortunately, this Board allowed the Organization to achieve that different result. Clearly, the analysis and holding of prior Third Division Award 42575 and Third Division Award 41810 should stand as uniform precedent on this property to be followed in all future similar disputes for the sake of consistency.

*Anthony Lomanto*  
Carrier Member

*Matthew R. Holt*  
Carrier Member

**December 12, 2017**