

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44695
Docket No. MW-46161
22-3-NRAB-00003-200217**

**The Third Division consisted of the regular members and in addition Referee
Pilar Vaile when award was rendered.**

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**

PARTIES TO DISPUTE: (
(Keolis Commuter Services, LLC

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier assigned Mr. J. Lentz to perform overtime service at Lynn Station on November 25, 2018 instead of assigning employee G. Haberland thereto (Carrier's File BMW 14/2019 KLS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant G. Haberland shall now ‘... be compensated five (5) hours of B&B Foreman time and one-half rate of pay, as well as all credits for vacation and all other benefits for the date claimed for the missed work opportunity. Please advise the pay period in which the Claimant will be paid.’”**

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.

Claimant G. Haberland has established and maintains seniority in the Bridge and Building (B&B) Sub-department of the Carrier's Maintenance of Way Department. At the time of this dispute, the Claimant was assigned to the position of B&B foreman headquartered at Lynn. The headquartered position at Lynn is ordinarily/customarily responsible for maintenance work at the Lynn Station.

Employee J. Lentz has also established and maintains seniority in the B&B Sub-department of the Carrier's Maintenance of Way Department. At the time of this dispute Lentz was assigned to the BET Facility.

On Sunday, November 25, 2018, the Carrier – through one or more “Radio Room” employees – called down the seniority roster(s) seeking a crew to perform work on a portion of the Lynn Station where there was falling debris. To track the responses to their calls, the Radio Room used the “Straight Seniority Callout Foreman” roster and also handwritten lists to track who was called, and the results thereof, which the Carrier represented was its regular and established process.

The “Straight Seniority Callout Foreman” roster is a printed spreadsheet that has the Claimant's name struck out, along with that of four (4) other listed employees, only two of which – not including the Claimant – had an explanation provided (“Out”). This roster has the following annotations next to Lentz' name: “8:28a – LM”; and then to the right of that the word “YES” without any time annotation. (The Board notes that in the digital copy provided by the Carrier, it appears that Lentz's “YES” was written over something that had been erased or whited out; the digital copy from the Organization does not give this same appearance, however.)

The handwritten list reflects that the Claimant was called at 8:20 a.m., but the annotations by his name are unusual compared to those of the other listed employees. The handwritten notes reflect an initial annotation of “LM” for the Claimant, which was also listed next to five (5) other of the seven (7) listed names. At some point later, the “LM” at the Claimant's name was scratched out and “No

Answer” was written above it. Lentz’s name, in contrast, not appear among the initial handwritten listing, but was instead written in underneath along with the annotation to “See Straight Roster”.

In his initial claim, and by subsequent signed statement submitted by the General Chairman at the final stage of the on-property claim process, the Claimant denied receiving a call from the Carrier on November 25, 2019 regarding overtime.

The Organization timely filed a claim under the Railway Labor Act, 45 USC §§ 151, *et seq.*, which was denied on the property and timely referred with or without an agreed upon extension to the National Railroad Adjustment Board for final adjudication.

The Organization argues the Carrier violated Rules 1 and 11 (and violated the Claimant’s valuable property rights of seniority) by assigning the overtime service to Lentz in lieu of the Claimant because it is undisputed that the work was contractually reserved to the Lynn Section at Lynn Station; and that the Claimant (as the Lynn Station B&B Foreman) ordinarily and customarily performs the work involved here, as contemplated by Rule 11.4(b). As such, the Organization asserts, the Carrier denied the Claimant an overtime opportunity and also denied him the benefit of his valuable property right of seniority.

The Carrier maintains that the record is clear that it first offered the shift to the Claimant by telephone and that the Claimant did not answer the telephone. It argues that the Organization has failed to carry its burden of proof because it has submitted no evidence in support of its position. The Carrier does not recognize the signed statement the Organization submitted at the post-denial conference, saying the evidence was late raised. The Carrier further asserts that it, in contrast,

has provided explicit evidence illustrating that Claimant was called to perform the overtime assignment before Mr. Lentz, but he failed to answer the call. Accordingly, when Mr. Lentz answered the call and accepted, the opportunity went to Mr. Lentz.

(Carrier Ex Parte Subm. at 4.)

However, the Organization disputed the quality and veracity of the Carrier’s evidence at the second step of the on-property claims process, asserting that the

Carrier's proffered "call log with notes"...is nothing more than scribbles on paper with no proof that a call was even made." The Organization also argued

Further, it appears that the date and time was whited out and altered... and the alleged phone calls are not supplemented with any official phone records. There is evidence of a message left and the Claimant had not received any calls nor messages for the date and time being claimed.

The Carrier has not supplied sufficient information to undoubtedly show that the Claimant was called. Even if they had, it is well established that a single call with no message is not a sufficient effort on the Carrier's behalf to contact and employee for overtime...

(Org. Subm. 26-27, letter dated March 20, 2019.)

Upon review of the whole record the Board agrees that the evidence relied on by the Carrier to establish its affirmative defense is ambiguous and not up to that task of rebutting the Claimant's assertion that he never received a call from the Carrier that day.

As an initial matter, the Board rejects the Carrier's argument that the Claimant's signed statement is not admissible because it was provided after the claim had been denied. The post-denial conferral is a standard part of the established and regular processing leading up to the filing of an appeal before the NRAB, and materials are often added at that point. Moreover, the NRAB has held that such materials are not "outside the handling of the claims in the usual manner", and it routinely considers such matters provided that the issues are not enlarged upon significantly, no one is misled, the Carrier is able to prepare an adequate defense, and there is no prejudice,. See Third Div. Award No. 24757, *Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes and Chicago and Illinois Midland Railway Co.* (Sirefam 1984); Third Div. Award No. 36517, *Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes and Chicago and Illinois Midland Railway Co.* (Sirefam 1984); and Third Div. Award No. 37576, *Bhd. of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes and Chicago and Illinois Midland Railway Co.* (Sirefam 1984).

Here, the Carrier cannot credibly assert surprise since the Claimant denied receiving a call in his initial claim. Moreover, the Local Chairman challenged the quality of the Carrier's proffered evidence before the final on-property decision was rendered. Despite advance notice of the Organization's defenses, however, the Carrier countered with no evidence aside from the disputed and facially questionable "Straight Seniority Callout Foreman" list with odd and/or inconsistent marginalia.

The Board has consistently held that when a party fails to produce records upon request that contain material and relevant evidence, it does so at its own peril. See Third Division Awards 14224, 15444, 18447, 20892, 24621, 28724, 29823 and 36932. The Board has also consistently held that merely contending a phone call was made does not substantiate that position. See Third Division Awards 36396 (UPS), 39320 (CNW), 39670 (UPS), 40871 (UPS) and 42948 (DME).

Despite its advance notice of the issues in dispute and past Board rulings, the Carrier declined to produce any telephone or other corroborating evidence, not even any first-person witness testimony to explain the anomalous aspects of the seniority lists and notes. Ultimately the Carrier's only response was to say that the Radio Room employee who made the calls and notes was also an Organization member. However, that is a fact having no relevance or bearing on the subject of the Claimant's overtime, or whether the employee's notes were accurate.

As such, the Carrier failed to adequately rebut the Organization's prima facie case, which therefore constitutes substantial evidence of its claim. In so determining, the Board finds Third Div. Award No. 38212, *BMWE and Amtrak* (Benn 2007) to be particularly instructive. There, the Board sustained a similar claim of seniority violation, where the Claimant specifically denied that he was offered an overtime opportunity and the Carrier responded only with "general statements in letters". The Board there specifically noted that "[h]ad the Carrier provided a similar statement from an individual making the overtime offers, the Board would have found that there was a dispute of a material fact necessary for the Organization to meet its burden and [it] would have dismissed the claim on that basis". However, because the record included only "general statements in letters from the Carrier", "[o]n that basis the Board ha[d] no choice but to find, as a matter of fact, that...the Claimant was not offered that overtime" in violation of the

contract. See Third Div. Award No. 38192, *BMWE and National Railroad Passenger Corp.- (Amtrak)* (Benn 2007).

The Carrier does not dispute the number of overtime hours claimed or the rate and, therefore, the Board sustains the remedy request as presented. *See* Third Div. Award No. 39670, *BMEWD - IBT Rail Conference and Union Pacific Railroad Co.* (Zimmerman 2009) (“[b]ecause the Carrier does not dispute that the Claimant would have been entitled to work the days in question absent his supposed request to leave his assignment early, the 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 28th day of January 2022.