NATIONAL MEDIATION BOARD

PUBLIC LAW BOARD NO. 5564

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES	)
	) Case No. 18
and	)
	) Award No. 12
NORTHEAST ILLINOIS REGIONAL COMMUTER RAILROAD CORPORATION	)
	)

Martin H. Malin, Chairman & Neutral Member
R. C. Robinson, Employee Member
J. P. Finn, Carrier Member

Hearing Date: January 7, 2009

STATEMENT OF CLAIM:

(1) The Carrier violated the Agreement when it called and assigned junior Trackman L. R. Boneta to perform services from December 16, 2000 through December 31, 2000, rather than calling and assigning senior Trackman A. A. Buchko who was senior, qualified and available to perform such service (Carrier's File

(2) As a consequence of the aforesaid violation, Claimant A. A. Buchko shall be allowed forty-eight (48) hours' pay at his respective straight time rate, one hundred fourteen and one-half (114.5) hours at his respective time and one-half rate and (24) twenty-four hours at his respective holiday rate of pay.

FINDINGS:

Public Law Board No. 5565 upon the whole record and all of the evidence, finds and holds that Employee and Carrier are employee and carrier within the meaning of the Railway Labor Act, as amended; and, that the Board has jurisdiction over the dispute herein; and, that the parties to the dispute were given due notice of the hearing thereon and did participate therein.

The facts in this case are not in dispute. Carrier was in need of three Trackmen to fill temporary vacancies from December 16 - 31, 2000 created by vacations of the regularly assigned employees. Claimant was on furlough at the time. On Friday, December 15, Carrier called the furloughed employees in order of seniority. When Carrier called Claimant, the caller reached his answering machine and left a message. Claimant did not return the call until at least Monday, December 18, 2000. By that time, the vacancies had been filled with employees junior to

Claimant.

Applicable here are Rules 6(d) and 9(f). Rule 6(d) provides:

> Positions or vacancies of thirty (30) or less calendar days will be considered temporary and may be filled without bulletining, with preference given to the senior employees in the rank and group in which the position or vacancy occurs who may be out of work or working in a lower rank due to force reductions. If no such employee is available, the position or vacancy will be filled through the general promotion rules.

Rule 9(f) provides:

> Employees temporarily out of the service or serving in lower ranks will be given the opportunity to return to the service or to such higher rank in the service in which they have established seniority, in the order of their seniority, to fill temporary vacancies or positions.

Carrier relies on NRAB Third Division Award No. 35959 which it maintains is on point with the instant case. The facts that gave rise to the claim in Award No. 35959 are almost identical to the facts of the instant case. In Award No. 35959, the carrier needed to fill a temporary vacancy and contacted the claimant but reached his answering machine on a Friday, The message instructed Claimant to call for a work opportunity. Claimant returned home after hours, retrieved the message but was unable to contact the carrier because the office was closed. He called again the first thing on Monday morning, but by that time the vacancy had been filled with a junior employee.

However, at issue in Award No. 35959 was the applicability of Rule 9 of the Agreement between the Brotherhood of Maintenance of Way Employees and Burlington Northern Santa Fe (former Burlington Northern Railroad Company). Rule 9 only applied to vacancies lasting more than 30 days and the Board determined that the Organization in that case failed to prove that the vacancy at issue lasted more than 30 days. Thus, although the facts of Award No. 35959 are almost identical to the facts of the instant case, its issue and holding are irrelevant to the instant case.

We turn to the language of the Rules applicable to the instant dispute. We find it significant that the requirement of Rule 9(f) is that Carrier give the employees in order of seniority "the opportunity to return to the service . . . to fill temporary vacancies." Carrier clearly gave Claimant the opportunity before it gave the same opportunity to more junior employees as Carrier called Claimant prior to calling the more junior employees.

The Organization, relying on several Awards, argues that a single call is insufficient to fulfill Carrier's obligation under the Agreement and that, at the least, a second call was

necessary.[1] We are not persuaded. In NRAB Third Division Award No. 26562, the carrier called the claimant to offer him overtime, received no answer and called the next most senior employee. The Board held that the single call was not sufficient to meet the carrier's obligation under the applicable agreement. Quoting Third Division Award No. 4189, the Board reasoned, "Telephone connections are not infallible, and additional effort might well have been made." Essentially, the Board held that Carrier could not rely on the absence of an answer to its single phone call because of the possibility that the claimant was available and that the phone call did not reach him because of an error in transmission over the phone lines or a mistake in dialing. The same concern was expressed in Third Division Award No. 27973, where the Board held that a single phone call which received no answer was insufficient, opining, "A phone call could have gone wrong for a number of reasons." Finally, in Third Division Award No. 27701, the Board held that a single phone call to offer overtime was insufficient because Carrier received a busy signal. Award No. 27701 is in line with the other two Awards. The call could have been misdirected, resulting in the busy signal or the call could have reached the correct phone number with the busy signal indicating that someone was at home and there was no burden on the carrier to wait a few minutes to see if the phone became clear.

In contrast to the three cases relied on by the Organization, there is no question in this case that when Carrier called Claimant it reached the correct number because it reached his answering machine. Carrier left a message for Claimant advising of the work opportunity and instructing him to call back if he was interested. At that point, it certainly was reasonable for Carrier to assume that if Claimant was interested and available, he would return the call. Indeed, imposing on Carrier a requirement that it make a second call would be meaningless as, one might infer from a failure by Claimant to return the call, that he still was not home and Carrier would just reach his answering machine again. By contrast, in the three Awards relied on by the Organization, a second call would have ensured that the first call was not misdirected or would have determined whether the phone was freed up and would possibly reach the claimant.

We conclude that by calling Claimant ahead of the junior employees and leaving a message on his answering machine, Carrier fulfilled its obligation under the Agreement. Carrier was not obligated to wait until the following Monday to fill the vacancy on the chance that Claimant might call back and claim the position, especially since the vacancy began on Saturday. Accordingly, the claim must be denied.

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[1]Carrier objects that this argument was not raised on the property. Because we reject the argument on the merits, we need not address Carrier's objection.

AWARD

Claim denied.

Martin H. Malin, Chairman

J. P. Finn
Carrier Member

R. C. Robinson, Employee Member
Employee Member

Dated at Chicago, Illinois, March 31, 2009