Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
FOURTH DIVISION

Award Number 4064
Docket Number 3999

Referee Herbert L. Marx, Jr.

PARTIES TO DISPUTE: Railroad Yardmasters of America

The Baltimore and Ohio Railroad Company.

STATEMENT OF CLAIM: Claim and request of Railroad Yardmasters of America that:

Yardmaster Leon Bargo, ID 1071068, be allowed 8 hours at time and one-half for November 2, 1980 account being run-around in seniority order when Carrier called and used Yardmaster M. L. Barker to double over. Leon Bargo being senior should have been called and used for the vacancy.

OPINION OF BOARD: This dispute involves the claim of a Yardmaster for pay because of the Carrier's alleged failure to notify him of a yardmaster vacancy under the terms of Article 3(b), which reads as follows:

> "Where extra yardmaster service is required and there are no unassigned or substitute yardmasters in the terminal who could perform the work at pro rata rate of pay, the senior qualified regularly assigned yardmaster or yardmasters in the terminal who have signified in writing of their desire to protect extra yardmaster service will be called. However, regular assigned yardmasters will not be used for more than one extra shift on a calendar day if another regularly assigned yardmaster is available and signed up for extra work. If such regularly assigned yardmaster or yardmasters are not available then the senior qualified available unassigned or substitute yardmaster in the terminal will be called."

In defending its position that the Claimant was properly "called", the Carrier relies on the written statement of its Acting Assistant Terminal Trainmaster as follows:

> "Mr. Bargo was called for the job but did not answer phone about 1:30 p 11-2-80. No report that phone #574-4535 was not working."

No evidence is shown or statement made that any call beyond this initial one was attempted.

In its argument, the Organization offers statements that the Claimant, his wife, and two guests in his home were present at the time the telephone call was supposed to have been made, and that no call was received.

The two positions appear to be in direct conflict. However, such is not in actuality the only explanation. The Board need not doubt the Carrier's representative statement that an attempt to reach the Claimant was made once with no answer received, and that the Claimant and others were available to receive the call. What is at issue is whether or not the Carrier was obliged, on getting a single "no answer", to try the number at least once more to check if the correct number had been dialed or if the call had been properly completed.

The Carrier is quite correct that the rule does not mandate any particular number of calls to be made, nor does it specify the degree of effort required. The Board accepts that the attempt to reach the Claimant was made. If the Claimant presented no substantive defense that he was available to receive the call, the claim would be without merit. Here, however, the Claimant offers a defense that he was present to receive the call and that others were also available for this purpose at the time specified. This leaves the clear possibility that any further effort (even rechecking to be certain the number had been correctly dialed) would have been successful.

The issue of failure to reach an employe for an assignment has been the subject of a great many previous awards, as cited by both the Organization and the Carrier. Many of these awards uphold the Carrier's position where the Claimant either indicated he was not present at the specific time the call was made or failed to offer any convincing proof that he was present at the specific time the call was allegedly made. Other claims have been denied where the Carrier has indicated several attempts to reach the Claimant. None of these instances is applicable here. A single attempt was made, and the Claimant avers that the telephone would have been answered at the time specified if it had rung.

Two awards cited by the Organization seem more directly in point. Third Division Award No. 23561 (Dennis) states in relevant part:

> "There is no dispute that Claimant has the right to work the third trick on December 25. It was her regularly assigned shift. The only real issue before this Board is whether one call, a single attempt to contact an employe who should have been called, represented a sufficient effort on the part of Carrier.
>
> "Based on the record before us, it is the opinion of this Board that Carrier could have and should have made more of an effort to contact Claimant to inform her that she should report for work. One call in such a situation falls short of any reasonable definition of sufficient effort. Accordingly, the claim must be sustained."

Fourth Division Award No. 2929 (O'Brien), in denying a claim, nevertheless offers reasoning applicable here, as follows:

> "When Petitioner's General Chairman was informed of this attempt to call Claimant the burden shifted to Petitioner to show that such attempt was not reasonable. However, the record is devoid of evidence which would indicate that claimant or other members of his household were at home on the date of the call. <u>If Claimant had shown this, the burden would rest upon Carrier to prove that it had made more than a minimal effort to contact the claimant</u>. . . ." (emphasis added)

Most of the awards cited by both parties have, in common, the basis that specific circumstances determine whether the Carrier has or has not met its requirement to call an employe and whether the employe has met his obligation to be available when called. In this instance, the circumstances -- similar to the two cited above -- lead to sustaining the claim.

The parties are in further dispute as to the appropriateness of the claim here for pay at time and one-half rather than at straight time. The Carrier cites Fourth Division Award Nos. 1099 (Livingston) and 1632 (Sheridan) in support of its position that the pro rata rate is the correct remedy, and the claim for the punitive rate is excessive.

The Board, however, must be guided in this matter not by individual awards as cited by the Carrier but by the overwhelmingly consistent line of reasoning in the Fourth Division as to the appropriateness of a claim for time and one-half pay for work not performed. In its rebuttal submission, the Organization offers evidence of a recent line of awards in favor of the claim as here presented. Award No.

2533 (Seidenberg), adopted in 1970 (and more recent than Awards Nos. 1099 and 1632 cited by the Carrier) states as follows:

> "The Board must take cognizance that the more recent awards, appear in substantial number, to have adopted the Organization's rationale, namely that the affected employe is contractually entitled to be paid that amount which he would have earned if he had been called to service, but for which service he was not called, only because of the Carrier's inadvertence or error. In the interests of uniformity, the Board concludes that this rationale should now be accepted, and thus sustains the claim."

In line with a myriad of awards since then, the Board will sustain this claim as presented.

FINDINGS:

The Fourth Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The Carrier and the Employes involved in this dispute are respectively Carrier and Employe 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.

The parties to said dispute were given due notice of hearing thereon.

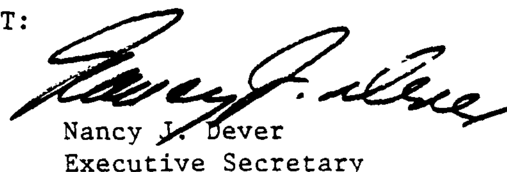
The parties to said dispute waived right of appearance at hearing thereon.

A W A R D

Claim Sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Fourth Division

ATTEST:



Nancy J. Dever
Executive Secretary

Dated at Chicago, Illinois, this 20th day of October 1983.