Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13954
Docket No. 13837
08-2-NRAB-00002-070014
07-2-14

The Second Division consisted of the regular members and in addition Referee William R. Miller when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railway Carmen Division of TCIU
(BNSF Railway

STATEMENT OF CLAIM:

"A. Burlington Northern Santa Fe, hereinafter to be referred to as Carrier, violated the Burlington Northern Scheduled Agreement at Galesburg, Illinois, January 17, 2005 when it failed to allow Carmen apprentices to work overtime. Instead the Carrier force assigns journeymen to work an extra shift on the repair track after the overtime list has been exhausted.

B. Carrier shall now be required to compensate carman apprentices J. R. Churchill, R. L. Lambert, D. B. Honeyman, E. W. Forrester, J. E. Crowl, J. R. Cudd and E. W. Liepitz, hereinafter to be referred to as Claimants, for the lost overtime wages that they would have earned had they been properly offered to work as per Rule 38 of the BN Agreement, as amended."

FINDINGS:

The Second 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.

In January of 2005, the Carrier had a large amount of bad ordered rail cars at its Galesburg, Illinois, facility. In order to repair those cars, the Carrier required that additional Carmen be called for overtime service on the first and second shifts on January 17, 2005, so that the bad order cars could be repaired and returned to revenue service in an expeditious manner. Calls were placed to available Journeymen Carmen; however, none were willing to volunteer to fill the 14 available shifts. The Carrier then instructed the available Journeymen to work the additional shifts with six Carmen working overtime on the first shift and seven Carmen working overtime on the second shift.

It is the Organization's position that the Carrier was required to call available Apprentices to perform the overtime work instead of forcing the Journeyman Carman to fill the overtime shifts. It argues that the Carrier violated Rule 38 when it failed to allow Carmen Apprentices to work overtime after the overtime list had been exhausted as Rule 38 explains that Apprentices should be called as follows: "...and they will be used for overtime work only when all available mechanics on the overtime call list have been called." It further argues that the Carrier never disputed the fact that the overtime list was exhausted or the fact that the Claimants in this instance were not being called to fill a Journeyman vacancy or open position, but merely to assist the RIP track work force on duty. It also states that Claimants had completed their RIP track training.

Additionally, the Organization argued that at all other locations on the Carrier's system where Apprentices were employed they are used to work similar overtime when the overtime list has been exhausted. Furthermore, it states that the Carrier was aware that Galesburg was the only location during the limited claim period that this case covers that did not allow Apprentices to work overtime which was subsequently corrected when there was a change in management.

It is the Carrier's position that the Claimants level of training and expertise was not adequate to have them perform the RIP track repair work on overtime as they were still in their probationary period. It argues that the Carrier is the sole

judge of the ability of an employee to perform a certain job and the Organization bears the burden of proving that the Carrier was unreasonable in its assessment of an individual's qualifications. And, in this case the Organization has failed to prove that the Claimants were qualified to do the work and because of that the claim should be denied.

Finally, the Carrier argues that even if there were any validity to this claim, which there is not, the Board should follow property precedent involving the same parties (See Second Division Award No. 11352) allowing the Claimants the straight time rate of pay rather than the time and one-half rate claimed.

The Board has thoroughly reviewed the record and determined that the overtime to be filled did not include Journeymen vacancies or open positions, but instead involved the assisting of the RIP track work force on duty. On the property the Organization argued that the work at dispute is the same work the Apprentices were regularly doing and that throughout the Carrier's system when like overtime arises Apprentices are used to assist when that overtime is declined by Journeymen. Neither of those arguments was rebutted by the Carrier on the property. Instead it argued, for example, in its letter of February 25, 2005 that the Claimants were not fully qualified "...as Carmen to work individually..." and would not be so until the Fall of 2005 after they had completed computer training and other technical training courses. In its letter of March 11, 2005, the Organization wrote the following:

> "The fact is on January 17, 2005 every apprentice named to this claim had worked on the repair track for over fourteen weeks since hiring out on August 23, 2004. Even using your own wording in a denial, copy attached you state: "They did not complete their training at the repair track until December 31, 2004." If there training is over in the repair track; why can't they work overtime there after the overtime list has been exhausted?"

The Carrier never answered the aforementioned question nor did it deny that Field Superintendent Martin had written that Claimants had completed their repair track training prior to the instant claim date.

Therefore, the Board has determined that because the overtime in question did not require the Claimants to work individually, but instead consisted of assisting Journeymen Carmen on duty, doing RIP track repair work for which each had completed their training, they was eligible for the overtime after that overtime had been declined by regular Carmen. A review of the record further indicates that Carrier's practice at Galesburg was not consistent with that administered at other locations throughout its system. The Carrier violated the Agreement. The Board finds and holds that in accordance with property precedent, involving the same parties, the Claimants shall be compensated at the straight time rate the number of hours each would have worked if they had been called.

AWARD

Claim sustained in accordance with the Findings.

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 Second Division

Dated at Chicago, Illinois, this 23rd day of October 2008.

CARRIER MEMBERS'
DISSENT TO
SECOND DIVISION AWARD 13954 , DOCKET 13837
(REFEREE MILLER)

The issue in this case was whether the Carrier violated the Agreement when it called journeymen to work overtime rather than apprentices.

The Organization relied upon Rule 38 of the Agreement, which deals with overtime and Apprentices. Of interest is Rule 38 (c) which shows that insofar as apprentices are concerned, as were all named Claimants, all could have been dismissed by the Carrier with impunity. They were not even in the "Regular" apprentice category at the time of the incident.

Insofar as Rule 38(d) is concerned, the paragraph relied upon by the Organization reads:

> "However, Regular Apprentices shall not be placed on the overtime call list; and they will be used for overtime work only when all available mechanics on the overtime call list have been called."

The Organization read this paragraph as requiring the Carrier to call Regular Apprentices when there are no available mechanics on the overtime call list. The Organization was totally in error. The thrust of the paragraph is to restrict the Carrier's right to call Regular Apprentices. Thus, if there are journeymen on the Call List, the Carrier cannot call Regular Apprentices until the journeyman list is exhausted. Once exhausted, the Carrier can call Regular Apprentices if the Carrier so desires. There is no obligation on the Carrier to do so, nor any right of the Apprentices to insist.

Indeed, the next paragraph removes any doubt on the subject when it provides that,

> "Regular Apprentices will not be used . . . to augment forces until all available Journeymen at the location are utilized. . .."

Here again, the purpose of the provision is to restrict the Carrier's right to use Regular Apprentices. It does not give any rights to Regular Apprentices.

The Majority Award is in error and we must Dissent.

Martin W. Fingerhut – Carrier Member

John P. Lange – Carrier Member

Michael C. Lesnik-Carrier Member