Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28799
THIRD DIVISION Docket No. MW-27491
91-3-86-3-749

The Third Division consisted of the regular members and in addition Referee Lamont E. Stallworth when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when Group 7, Class 2 Machine Operator R. E. Fredman was not called to perform overtime service on his assigned position (spike reclaimer operator) on and subsequent to July 15, 1985 (System File 20-33-8545/11-1580-220-470).

(2) Because of the aforesaid violation, Machine Operator R. E. Fredman shall be allowed thirteen (13) hours of pay (thirty minutes per day) at his time and one-half rate for the period July 15, 1985 through August 23, 1985 and thirty (30) minutes of pay at his time and one-half rate for each day thereafter on which another machine operator performs overtime service starting and warming his assigned machine thirty minutes prior to his regular starting time."

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

As of July 15, 1985, Claimant was a Machine Operator on the Carrier's Illinois Division. He was regularly assigned to operate a spike reclaimer, which is a Group 7, Class 2 machine, on the Carrier's Tie Gang 31. His was one of fourteen machines used on that Gang.

At that time, Tie Gang 31 was assigned to work four days per week, ten hours per day. The work days were Mondays through Thursdays. Claimant's assigned hours were 6:00 A.M. to 4:30 P.M., Monday through Thursday.

Beginning July 15, 1985, the Carrier instructed two senior Machine Operators, who were assigned to Group 7, Class 3 machines on Tie Gang 31, to report 30 minutes early each work day on an overtime basis. During that 30 minute period, the two Operators turned on all the machines used by Tie Gang 31, including Claimant's machine, so that the machines would be warmed up and

ready to operate when the rest of the crew arrived. As of August 12, 1985, the Gang returned to 5-day-a-week operation, but the 30-minute overtime warm-up practice continued.

This claim asserts that since "Claimant is assigned to his machine and is responsible for its care and maintenance [he] is entitled to the work opportunity" of reporting early to warm up the machine. The claim cited Rule 33(i) of the Agreement, entitled "Preference to Overtime Work", which provides in pertinent part:

> "Except when employes are utilized as provided in Rule 33(f), employes assigned to sections, work districts, specific areas and/or locations shall be given preference in relative seniority order among employes of the gang, work district or location to overtime work to be performed within such section, district, area or location.
>
> Employes assigned to road gangs, such as Track Extra Gangs and B&B Gangs, Machine Operators, etc., shall have preference to overtime work in relative seniority order in connection with work projects to which they are assigned."

Before the Board, the Organization relies on the interplay among various rules of the Agreement. The Organization argues as follows:

> "Rule 2 specifically stipulates that, with certain exceptions which have no application here, seniority shall be established in one of the Groups listed therein, including Group 7, Classes 1, 2 and 3. The parties then agreed, within Rules 8 and 9, that promotions and assignments shall be based upon seniority and that new positions, both permanent and temporary positions of more than thirty (30) days duration, that are to be filled, in the classes listed in Rule 2(a) will be promptly bulletined to the employes in the class in which they occur. The parties further agreed, within Rule 11, that new positions that are to be filled in Group 7 will be filled first by bulletining to the employes holding seniority in the class, or working in a lower class of Group 7, second, by advancing the senior qualified off-in-force-reduction employe subject to recall in the class, third, by either advancing the junior employe of the class who is not working in the class but is working in a lower class of Group 7 or on a lower rated position of another seniority group; or when the contingencies of the service permit, from employes who have written applications for promotion or assignment to the class. An objective review and analysis of the afore-quoted rules will firmly establish that the parties contemplated that positions under the

Agreement would be assigned in accordance with seniority and that work flowing from said positions would be reserved to employes assigned thereto."

The Carrier denied the claim on November 20, 1985, explaining:

"Starting machines and/or equipment is not work exclusively reserved to machine operators or any other group or class employe covered by the Agreement. In fact, this is not work to which any craft or class of employe could claim exclusive rights. Calling out certain member(s) of a particular gang earlier (prior to the start of the shift) to start and warm-up machines is not uncommon. This has been done many times in the past without exception taken with respect thereto."

In support of this proposition, the Carrier referred to a previous claim between the Parties which involved the use of a Track Foreman and others to warm up machines before hours. The Carrier pointed out that no claim or contention was made in that case that it was improper to use an employee other than the individual operator of each machine to work overtime warming up the machines. In addition, the Carrier argues that nothing in Rule 33(i), the initial basis for this claim, prohibits the practice at issue, and that the Organization has not specified what portion of that Rule it contends was violated.

It almost goes without saying that, in a claim like this, the Organization bears the burden of proving that overtime work properly belonging to the Claimant was given to others in violation of the Agreement. The Organization may show that the work belongs to the Claimant either by citing an explicit rule or provision of the Agreement, or by citing the established practice on the property. In this case, however, the correspondence exchanged between the Parties on the property fails to identify either a rule or a practice which reserves the starting of a machine, merely for purposes of warming it up, to the employee who is assigned to operate the machine after it is warmed up. Nothing in the Scope Rule so provides.

In common parlance, simply turning on a machine does not constitute "operating" it. Neither is the assignment of a member of a gang to report early to turn on equipment used by the gang necessarily creating a new "position." The only evidence of past practice discussed on the property, which can shed light on how such situations have been handled in the past, indicates that the Carrier has previously called out employees early to start and warm up machines before the operators arrive, without objection by the Organization.

Consequently, there is no basis for a finding that Rule 33(i), or any other cited rule of the Agreement, was violated in this case. Rule 33(i) requires that overtime be assigned within road gangs "in relative seniority order among employees of the gang." The Carrier did not violate that requirement in this case. To the contrary, the two employees assigned to perform the overtime "warm-up" work were senior to Claimant. Accordingly, the claim must be denied.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 15th day of May 1991.