Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 40469
Docket No. MW-39532
10-3-NRAB-00003-060302
(06-3-302)

The Third Division consisted of the regular members and in addition Referee M. David Vaughn when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes Division - IBT Rail Conference
(BNSF Railway Company (former Burlington Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1. The Agreement was violated when the Carrier deducted eighty dollars and six cents ($80.06) from Mr. R. Anfinsons' paycheck dated May 15, 2004 and again from his paycheck dated May 30, 2004, in relation to his paid rest day overtime hours for March 15 and 16, 2004 (System File T-D-2783-B/11-04-0230 BNR)

2. As a consequence of the violation referred to in Part (1) above, Claimant R. Anfinson shall now receive one hundred and sixty dollars and twelve cents ($160.12)."

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.

The Claimant established and held seniority in various classes within the Track Sub-department. At times relevant to the claim, he was regularly assigned as a Track Inspector headquartered in Sioux Falls, North Dakota, with a Wednesday through Sunday workweek.

The Carrier assigned the Claimant to attend a training course at the Carrier's Overland Park, Kansas, training facility on five week days beginning Monday, March 15 and ending Friday, March 19, 2004. To comply with the Carrier's instructions, on Sunday, March 14, the Claimant traveled from his headquarters to the training facility to be ready on Monday, March 15. After completing training on Friday, March 19, 2004, the Claimant returned to his headquarters. He submitted a time sheet/expense report in which he included 16 hours at the time and one-half rate for training on Monday, March 15 and Tuesday, March 16 – normal rest days for his assignment. The Claimant's rest days are Monday and Tuesday.

In two similar letters dated April 30 and May 14, 2004, the Carrier notified the Claimant of its denial of overtime for March 15 and 16 and sought (and subsequently received) recoupment of $80.06 from his second half of April paycheck and $80.06 from his first half of May paycheck. These amounts were the difference between eight hours of overtime pay and eight hours of straight time pay. In the notice dated April 30, 2004, the Timekeeper Supervisor informed the Claimant:

> "On work date 03-15-2004 you were disallowed the following:
> This declination was the result of:
> On 3-15 will change PC 12 Overtime to
> PC 06 school.
> Will reduce pay 80.06. . . .
> If you have any questions, please contact. . . ."

In the notice dated May 14, 2004, the Timekeeper Supervisor informed Claimant:

> "On work date 03-16-2004 you were disallowed the following:
> This declination was the result of:

Will change PC 12 Overtime to PC 06 school.
Will reduce pay 80.06. . . .
If you have any questions, please contact. . . ."

The Agreement provides in relevant parts:

"RULE 29A. OVERTIME

. . . [T]ime worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be . . . paid for at time and one-half rate . . . computed from starting time of employee's regular shift.

* * *

RULE 32A. REST DAY OR HOLIDAY PERIOD

. . . [E]mployees who are required to work or held on duty on rest days . . . shall be paid for at the rate of time and one-half for time worked or held on duty, with a minimum of two (2) hours and forty (40) minutes. . . .

* * *

RULE 50B. PAY

Employees required to make out time sheets and sign same for themselves or gang will be promptly notified in writing when said time is not allowed and the reason therefor given, and such timeroll maker will notify the employees affected."

The June 15, 2004 claim protesting the Carrier's action was timely filed and progressed on the property in the usual manner up to and including the Carrier's highest designated officer, but without resolution.

The Organization argues that it met its burden to prove that the Claimant was not free to observe the rest days assigned him by the Carrier and that by requiring him to work on his rest days while denying the pay rate mandated by the explicit language of Rule 29A, the Carrier violated the Agreement.

The Organization does not dispute the Carrier's defense that no overtime occurred here. The Claimant emphasizes that he is not claiming pay for overtime hours worked under Rule 29A, but instead is seeking time and one-half as specifically authorized by Rule 32.

In response to Third Division Award 32204 cited by the Carrier, the Organization distinguishes that case from the dispute at issue. In 32204, the Board denied overtime pay to Dispatchers who participated in one-hour computer training classes after completion of their regular eight-hour assignments. In the instant case, by contrast, the Claimant contends that he was held on duty at the Carrier's direction and was not free to go his own way on his rest days. In support of this position, the Organization calls attention to the Carrier's two letters in the record reducing the Claimant's pay rate to straight time for the days at issue. The Organization argues that the fact of his being assigned to training on his rest days was not disputed by the Carrier and that this claim involves exactly the situation for which Rule 29A requires time and one-half pay.

The Organization admits that the Claimant was attending a Carrier-mandated formal training school, but denies that this indicates he was not performing work for the Carrier.

The Organization cites Third Division Award 31949 which sustained a claim for time and one-half pay for employees who attended Carrier-mandated meetings on their rest days on the basis that attendance constituted "work" or "service."

The Organization asserts that the Carrier also violated the Agreement when it failed to inform the Claimant of its reasons for making the reductions. It directs the Board's attention to the Carrier's April 30 and May 14, 2004 letters which the Organization argues merely provide notification to the Claimant of the two pay reductions, but provide no reasons as required by Rule 50B.

The Organization argues that the monetary damages claimed are proved by the Carrier's declination notices in the record, that these damages of $80.06 and $80.06 are not excessive, that they do not constitute a windfall to the Claimant and that they are not punitive damages.

The Organization argues that the Agreement upon which the claim is based is definite and unambiguous and prior practices are therefore not controlling. It urges the claim be sustained as written.

The Carrier initially argues that the Organization failed to meet its burden of proving that by paying straight time for training, the Carrier violated Rule 29, Rule 32, Rule 50 or any other provision of the Agreement.

The Carrier reasserts its position that training programs are distinguished from "work" or "service" as intended in Rule 29. In its November 23, 2004 declination of the Organization's appeal of the claim, the Carrier contends that:

> "Rule 32A is not applicable to this dispute because it refers to 'time worked' or 'held on duty.' The claimant did not perform service for the Carrier – he was attending training – nor was he 'held on duty.' . . . [T]raining is not "work," and straight time is the proper payment. . . .
>
> * * *
>
> The damages claimed are excessive and an attempt to gain a windfall profit for the claimant. The Labor agreement does not provide for such punitive damages."

The Carrier denies that the Claimant performed overtime work for which Rule 29A requires pay at time and one-half. In support, it cites the following language in Third Division Award 20323:

> "In Award 10808 (Moore), it was noted that there are exceptions to time consumed by an employee when directed by the Carrier as being considered 'work' or 'service.' One of those exceptions was held to be where the circumstance contains a mutuality of interest.

> The Award concluded, 'Awards have held that classes on operating rules and safety rules are such exceptions.' See also, Award 11048 (Dolnick), 15630 (McGovern), Fourth Division Award 2385 and 2390 (Seidenberg), 7631 (Smith) 11567 (Sempliner) and Public Law Board 194, Awards 24 and 25."

The Carrier asserted that its past practice was to pay employees assigned to training on their rest days at their straight time rate.

The Carrier argues that no overtime occurred here and that under Rule 29 training does not trigger overtime. It rejects the Organization's reliance on Rule 32.

The Carrier further argues that the Organization offered no evidence in the record of the monetary damages claimed. The Carrier further argues that those damages are excessive, that they would constitute a windfall to the Claimant, and that the Agreement does not authorize punitive damages.

The Carrier rejects the Organization's argument that it violated the Agreement by failing to provide the Claimant with a reason for disallowing the money at issue in this claim. It asserts that the two notices to the Claimant quoted above provided adequate reasons. It also argues that the Organization admits that the Claimant received both notices and contacted the Carrier's Payroll Department regarding them. It urges the claim be denied as without merit.

In performing its analysis, the Board notes that Rule 32A has two elements that must be met for it to apply – "rest day" and "work or held on duty." As the moving party in this Rules case, the Organization bears the initial burden of establishing material facts necessary to make out a prima facie violation of the Agreement. After a thorough review of all record evidence, the Board finds adequate evidence to determine that the Organization met its burden of showing that with respect to the two days claimed, they were rest days for the Claimant and that he was "held on duty." The Carrier presented no probative evidence to prove an affirmative defense.

The Board takes notice that the Carrier pays straight time for regular work and that it does not pay employees who fail to or refuse to work. Because the Carrier pays straight time for training, that activity indicates an employee attending

training is at work or at the very least "on duty." This claim does not seek overtime pay either for the Claimant's rest days or for his non-rest days. It is limited to the Claimant's eight-hour assignments at the Carrier's Overland Park facility on only two days of training – normal rest days determined by the Carrier for the Claimant's regular assignment.

The Carrier approaches the issue in this dispute as overtime pay for training. The Organization, on the other hand, regards the issue as time and one-half pay for attending training on two Carrier-designated rest days. A careful reading of the Submissions indicates that the claim does not seek overtime (although it does seek time and one-half pay). The Board notes that Rule 32 does not contain the word "overtime" or concern itself with "overtime." Rule 32A is clear that employees who are required to work or who are held on duty on rest days will be paid at the time and one-half rate.

The Board takes further notice that the language in this Rule is not limited to "work." It also includes employees held on duty on their rest days. This dispute presents precisely that fact situation. The Board is not empowered to write new rules or to strike existing ones. Consequently, we find that the existing wording of Rule 32A applies to these parties and to this situation. Because there is no claim here for overtime training on non-rest days, we need not reach that issue.

Because this Rule applies both to employees at work and to employees being held on duty, and because the Claimant falls into at least one of those categories, we need not reach the issue of whether training is work. The Board's review of the record reveals no probative evidence from the Carrier to effectively dispute the Organization's assertions.

The record includes the April 30 and May 14, 2004 letters from the Carrier notifying the Claimant of its denial of $80.06 – the difference between two eight-hour days of time and one-half pay and two eight-hour days of the Claimant's straight time pay. The Board concludes that the monetary damage claimed is stated clearly and that this amount, which was recouped by the Carrier, is not excessive, is not a windfall to the Claimant and that it does not constitute punitive damages.

The Board further finds that while the Carrier provided notices of the payroll deductions, it violated Rule 50B of the Agreement by failing to also provide the

Claimant with a reason in either of the foregoing letters for disallowing the money at issue in this claim. Mere notification of a pay adjustment does not meet the Rule's requirement to provide a reason.

In view of the foregoing and based on the record as a whole, the Board finds the claim to be meritorious.

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 14th day of May 2010.