

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40502
Docket No. MW-39947
10-3-NRAB-00003-070102
(07-3-102)**

The Third Division consisted of the regular members and in addition Referee Michael D. Gordon when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference**
PARTIES TO DISPUTE: (
(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 assigned Track Sub-department Assistant Foreman B. Pederson and D. Luben to perform Roadway Equipment Sub-department work (maintain the continuous running of all Group 3 machines assigned to Gangs TP-06 and SC-06) on planned overtime on November 29, 2004 and continuing through December 3, 2004, instead of Group 3 Machine Operators S. Monk and A. Castner [System File C-05-J010-9/10-05-0069(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants S. Monk and A. Castner shall now each be compensated for thirty-four (34) hours at their respective time and one-half rates of pay and for thirty (30) hours at their respective double time rate of pay.”**

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 Claimants are Group 3 Machine Operators in the Roadway Equipment Subdepartment. Between late November and early December 2004, they regularly worked from 8:30 A.M. to 5:00 P.M. as Ballast Regulator Operators on Gangs TP-06 and SC-06. Extreme cold, snow and ice existed in their area from November 29 through December 3, 2004.

The Roadmaster ordered that all Group 3 machines run all night to avoid weather related problems in the morning. The machines ran, but did not move or repair track. Two Repair Track Subdepartment Assistant Foremen who regularly work from 8:30 A.M. to 5:00 P.M. were assigned to watch them. Their responsibilities were to monitor fuel levels and to check for breakdowns (water, air, oil leaks, broken belts, low fuel, warning lights, etc.). Each received 34 hours' pay at the time and one-half rate and 30 hours' pay at the double time rate.

The Organization, citing Rules 1, 2, 5, 29, 55C and 55N, claims Group 3 Roadway Equipment Subdepartment Operators should have tended the machines rather than Assistant Foremen. It seeks overtime pay for the Claimants. It reasons (1) the Rules' unambiguous language and customary practice reserve the disputed work to senior Machine Operators in the Roadway Equipment Subdepartment (2) because Machine Operators perform the daily tasks involved during regular work hours, they are entitled to perform them during overtime (3) assignment of Assistant Foremen was improper because they did not assist any Foreman in directing work (4) the remedy appropriately seeks what the Claimants would have earned if correctly assigned and (5) arbitral precedent supports the Organization.

The Carrier states (1) the evidence and Agreement language do not support the claim (2) this is an intra-craft dispute requiring proof of exclusivity (3) because the machines were not operating there can be no exclusivity and, also, Assistant Foremen could be assigned incidental work per Rule 78 (4) Rule 55N contemplates operation of machines (5) an emergency existed because the Carrier cannot control extreme cold which allows the disputed assignment (6) assigning the Claimants to do the night work would have shut down their production during their regular shifts (7) the remedy is excessive and punitive because Claimants did none of the disputed work and overtime is claimed for their regular, already paid, work hours; and (8) Board precedent supports the Carrier.

This is an intra-craft dispute over the right to particular overtime work. The work is not part of regular, routine operation or maintenance. Nor was it an extension of any actual work performed by Roadway Equipment Subdepartment during regular hours and extended into overtime. Rather, it was an infrequent proactive reaction to severe weather intended to assure work-ready equipment when the next regular shift began. No pure language in the Agreement clearly promises this specific work exclusively to any classification or forbids any classification from performing it.

Importantly, these overtime claims assume the disputed work exclusively belongs to Roadway Equipment Subdepartment employees during regular work hours so that their right to perform it extends into overtime work hours. The assumption is incorrect.

In intra-craft disputes, the Third Division repeatedly has held that proof of exclusive, system-wide jurisdiction is necessary to reserve work to one Organization class rather than another class represented by the Organization. The principle appears so well established that the Organization uses it to differentiate intra-craft assignments from subcontracting situations where vigorously disputed obligations are far less settled. Indeed, in several subcontracting disputes presently under consideration, the Organization makes the specific distinction. As two examples, in its Submission for Dockets MW-39948 and MW-39980, the Organization states:

“ . . . the Third Division has repeatedly considered the question of whether it was necessary for the Organization to prove exclusive reservation of scope covered work when the dispute involved the assignment of work to outsiders and has held that the proper application of the exclusivity doctrine was to disputes over the proper assignment of work between different classes and crafts of the Carrier's own employees – not to disputes involving outside contractors. . . .”

Because no good reason is shown to deviate from established, recognized Third Division precedent and there is no proof of exclusive system-wide assignments of this work to Machine Operators in the Roadway Equipment Subdepartment, the Organization failed to prove its claim.

Accordingly, the claim is denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 15th day of June 2010.