

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 40511
Docket No. MW-39407
10-3-NRAB-00003-060057
(06-3-57)

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 Employees 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 the paycheck, issued for May 30, 2004, of Mr. O. Morley in relation to his paid rest day overtime hours on March 22, 2004 [System File C-04-O020-27/10-04-0201(MW) BNR].
2. As a consequence of the violation referred to in Part (1) above, Claimant O. Morley shall now receive eighty dollars and six cents (\$80.06).”

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 and Welding Sub-department. At times relevant to the claim, he was regularly assigned as a Track Inspector with a Tuesday through Saturday workweek with Sunday and Monday rest days.

The Carrier assigned the Claimant to attend a welding training course consisting of two one-week sessions at its Overland Park, Kansas, training facility on ten week days beginning Monday, March 15 and ending Friday, March 26, 2004. To comply with the Carrier's instructions, the Claimant completed his regularly assigned shift on Saturday, March 13 and traveled to the training facility to be ready for work on Monday, March 15. After completing training on Friday, March 26, the Claimant submitted his usual end-of-the-work-period time sheet/expense report in which he included eight hours of training on Monday March 22 – a normal rest day for his assignment – for pay at time and one-half his normal rate.

In a letter dated April 28, 2004, the Carrier notified the Claimant of its denial of overtime and sought recoupment of \$80.06 from his next paycheck. The Timekeeper informed the Claimant:

“This Disallowance is for the following reason:

Your claim for eight hours of overtime attending school on March 22, 2004 is hereby declined and will be changed to straight time account no overtime is payable while attending school during the week, therefore, an adjustment in the amount of \$80.06 will be made. . . .”

The parties held a claims conference on September 20, 2004. In rejecting the time and one-half request, the Carrier stated that the Claimant was entitled only to straight time pay for training.

The involved Rules read, in relevant part, as follows:

“RULE 29A. OVERTIME

. . . time 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

. . . employees 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. . . .”

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 or any other provision of the Agreement.

In its Submission, the Carrier contends that “[U]nder Rule 29, training does not trigger overtime. The Carrier has consistently paid training at the straight time rate.” The Carrier argues that training is not work, so straight time pay should be substituted for overtime. 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 contends that no overtime is payable while attending school during the week even when directed to do so by the Carrier. It argues that because the Claimant was attending training for the benefit of both the Carrier and the Claimant, the Claimant was unable to and did not perform service or work and thus only straight time pay is permitted. The Carrier states that it only pays overtime to employees who are performing work or service for the Carrier as outlined in Rule 29.

The Carrier asserts that the schooling consisted of safety training and that safety is of the utmost concern for the Carrier and its employees. It contends that when the Claimant requested pay for training on his rest day, he falsely claimed the overtime rate.

The Carrier argues that no overtime is at issue here, and that under Rule 29, training does not trigger overtime. It rejects the Organization's reliance on Rule 32 and urges the claim be denied as without merit.

The Organization notes initially that it is not claiming pay for overtime hours worked, nor is its claim based on the appropriate rate of pay for attending training. It argues that it met its burden of proof to show that the Claimant was not free to observe the rest day that had been assigned to him by the Carrier and that, by requiring him to work on a rest day while denying the pay rate mandated by the explicit language of Rule 29A, the Carrier violated that Rule and the Agreement.

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 Monday rest day. In support of this position, the Organization calls attention to the Carrier's April 28, 2004 letter in the record reducing the Claimant's pay rate to straight time for the day at issue. The Organization argues that the fact of his being assigned to training on his rest day was never disputed by the Carrier and that it involves exactly the situation for which Rule 32A requires time and one-half pay.

The Organization acknowledges 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 argues that, in any event, the Carrier provided no Rules, documents or other relevant and probative evidence in support of its defenses and allegations, including its assertion that time and one-half

is not payable while attending school during the week. The Organization emphasizes that the Timekeeper's letter denying "Your claim for . . . overtime . . ." speaks to an issue – overtime – not in dispute and speaks to the issue raised by this claim – time and one-half for Carrier assignments on an employee's rest days.

The Board notes 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. The Board finds adequate evidence in the record to determine that in this instance the Organization met its burden of showing that the day for which overtime was claimed was a rest day for the Claimant and he was "held on duty" on that day. 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 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, in pay status. This claim seeks overtime pay only for time spent on the Claimant's non-rest days. It is limited to the Claimant's eight-hour assignment to the Overland Park facility on a single Monday – a normal rest day determined by the Carrier for his regular assignment.

The Carrier approaches the issue in this dispute as overtime pay for training. The Organization regards the issue as time and one-half pay for work on a Carrier-designated rest day. A careful reading of the parties' Submissions indicates that the claim does not seek overtime (although it does seek time and one-half pay) and Rule 32 does not contain the word or concern itself with "overtime." However, Rule 32A is clear that employees who are required to work or who are held on duty on rest days shall be paid at 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 who are 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 for overtime based on the Claimant's training status, the Board does not reach that issue. The claim will be sustained.

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 15th day of June 2010.