

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40577
Docket No. MW-40103
10-3-NRAB-00003-070296
(07-3-296)**

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 Carrier violated the Agreement when it assigned Gang RP-05 junior employe L. Jensen, instead of Mr. H. Schillereff, to perform derailment repair work near Mile Post 76.5 on May 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 25, 2005 [System File C-05-O020-24/10-05-0240(MW) BNR].

(2) As a consequence of the violation referred to in Part (1) above, Claimant H. Schillereff shall now ‘. . . be paid the difference in what he was paid for overtime worked during the claim dates and what Mr. Jensen was paid for overtime worked during the same claim dates. *’”**

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.

On May 14, 2005, a derailment occurred near MP 76.5 on the Orin Subdivision. Another derailment involving Union Pacific occurred on May 15 in the same area. Roadmaster G. Schultz assigned resulting Sectionmen work at the site. The work occurred each day from May 14 through 25 and involved overtime.

The Claimant was a Group 3 Machine Operator regularly assigned to Steel Gang RP-05. No effort was made to assign him to derailment work on May 14 or 15. No employee with less seniority than the Claimant worked overtime on May 14.

The assignment, including the overtime it involved, was given to Group 5 Machine Operator L. L. Jensen, also a member of Steel Gang RP-05. Jensen is junior in seniority to the Claimant. Jensen worked overtime every day from May 15 to 25.

The Organization contended that the Claimant was entitled to the overtime as the senior employee. In an August 15 statement, Schultz states he did not attempt to contact the Claimant on May 14 and 15. He further stated that he asked all RP-05 crew members, including the Claimant, to volunteer for the assignment during morning briefings. He asserts that the Claimant declined. The Organization produced statements by the Claimant and eight others in Gang RP-05 that Schultz never asked for volunteers for the work during morning briefings.

The Organization seeks overtime for the Claimant at the overtime rate from May 14 through 25, 2005. It asserts (1) under Rule 2A, the Claimant had a seniority right to the contested overtime trumping junior employee Jensen (2) there is no merit to the Carrier's assertion that the Claimant did not want to do the regular work that resulted in overtime (3) Schultz admits he did not call the Claimant on May 14 and 15 (4) the Claimant's statement together with eight other RP-05 employees disprove Schultz's contention that he asked for volunteers for the overtime derailment assignment and (5) employee witnesses must be credited because they have no interest in the outcome, whereas the Carrier's self-serving version saves it money and protects supervision's face.

The Carrier defends (1) Rule 2 is a general Rule inapplicable to this specific overtime situation (2) given Rule 24(J) nothing dictates how much overtime must be assigned employees who, like the Claimant, are not “regular” employees at a derailment (3) the Claimant declined assignment to the overtime work after Schultz offered relevant work opportunities during morning briefings (4) the Carrier has greater discretion in overtime assignments in emergency/derailment situations (5) statements by the Claimant and other Organization witnesses are self-serving (6) factual disputes require dismissal under long-standing Board principles and (7) even if a violation occurred, the Claimant is entitled only to straight time pay.

Seniority governs overtime assignments provided there is convincing proof a junior employee worked the disputed assignment and the general Rule is not trumped by a well-established exception.

On this record, the Claimant's seniority right to the May 15 overtime is proven. It is undisputed no attempt was made to assign him that work. The possible “emergency” exception is unsupported by fact. Schultz did not claim his failure to contact the Claimant was caused by an emergency, but because he did not have easy access to the Claimant's telephone number. Indeed, Schultz appears almost apologetic regarding May 15.

No violation is proven for May 14 because there is no evidence any employee junior to the Claimant worked overtime on the derailment. No violation can be found for May 16 through 25 because the evidence turns on credibility determinations. Material facts related by Schultz and the Organization's affiants are irreconcilable regarding the core question of whether a violation occurred. The number and interests of witnesses are premature considerations until disputed statements have been subjected to cross-examination or other safeguards mutually acceptable to the parties. Truth does not always turn on a Supervisor's title or the number of contested affidavits. Consequently, these conflicting, unsworn and conclusory written statements cannot resolve credibility issues under prevailing Board policy.

The Organization's reliance on the credibility holding in Third Division Award 20706 is misplaced. The Board rejected the Carrier's position, not because it believed percipient employee witnesses over a supervisor, but because, even under the Supervisor's version, the Carrier's facts were unproven, inconsistent and/or, otherwise, insufficient to establish adequate reason for an employee's termination.

Accordingly, the Claimant shall receive May 15 overtime pay at the then overtime rate (less the amount of May 15 overtime pay he already received, if any.) The overtime rate is appropriate because that is the rate that he would have been paid had he worked the assignment.

The Claimant shall receive overtime for May 15, but no overtime for May 14 or May 16 through 25, 2005.

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 Third Division

Dated at Chicago, Illinois, this 27th day of August 2010.