

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37675
Docket No. MW-36589
06-3-01-3-44**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(BNSF Railway Company (former St. Louis –
(San Francisco Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to assign or allow overtime flag protection service (flagging for Chem Trol contractor clearing right of way on the Arvard Sub) to regularly assigned Flagman Foreman J. M. Newman beginning August 28, 1998 and continuing through October 29, 1998 (System File B-2370-5/MWC 98-12-16AA SLF).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant J. M. Newman shall now be compensated for one hundred twelve hours and thirty minutes' (112.5) pay at his respective time and one-half 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.

Claimant J. M. Newman has established and holds seniority in various classes within the Track Subdepartment. During the time period in question, he was regularly assigned to Foreman/Flagman position on the Aarvard Subdivision in Seniority District No. 5. The Foreman/Flagman position was directly responsible for performing flagging work (supervising and providing flagging protection) for a gang comprised of contractor forces of Chem Trol, Inc.

Beginning August 28, 1998 and continuing through October 29, 1998, the contracting gang performed right-of-way clearing work during regularly assigned hours, daily overtime and various rest days. The Claimant performed his assigned duties during the regularly scheduled work hours; however, the Carrier did not allow the Claimant to perform the overtime work on his assigned position as Flagman, either as a continuation of the regular workday or on rest days. The Carrier chose to not utilize a Flagman during these overtime periods, which, according to the Organization, created an unsafe working environment.

According to the Organization, the Claimant suffered a loss of 112.5 hours of overtime work at the time and one-half rate of pay. The Claimant was fully qualified and available to perform all of the overtime work involved in this matter that was directly related to his regular position.

The Organization claims that this is a very straightforward case. According to the Organization, the Carrier has refused to recognize the Claimant's seniority when it failed to allow him to perform overtime flag protection service (flagging for Chem Trol Contractor clearing right-of-way on the Aarvard Sub) after normal working hours and on rest days. According to the Organization, this case should be sustained because the Claimant was entitled to perform all regular and overtime work of his position by virtue of his seniority and assignment as the flagman on this gang.

Conversely, the Carrier takes the position that the Organization cannot meet its burden of proof in this matter. The Carrier contends that a Flagman is only required when work is completed within 25 feet of the property. In this case, the evidence presented shows that the work performed on rest days and on overtime was outside the 25-foot limit and therefore did not require a Flagman. Further, even if the work was within 25 feet of the property, the Carrier takes the position that no protection was

required because the work was being performed by a contractor and therefore, no BMW flagman was required.

Thus, we reach the substance of whether the Carrier was required to post a Flagman for work performed by Chem Trol during rest days and overtime hours. We remind the parties that the burden of proof in this matter is on the Organization to prove that the Carrier was required to provide a Flagman, specifically the Claimant, for the work that was performed by the contractor on rest days and during overtime hours.

We have carefully reviewed all evidence regarding whether the Organization has proven that the Carrier was required to provide a Flagman under the circumstances of this case. After a review of all the evidence, we cannot find that sufficient evidence has been presented to prove that the Carrier was required to provide a Flagman for Chem Trol during the relevant time period.

Thus, having determined that the Organization failed to prove that a Flagman was required for Chem Trol, we find that the Organization has not met its burden of proof and the claim is, therefore, 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 30th day of January 2006.