

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37975
Docket No. SG-38088
06-3-03-3-523**

The Third Division consisted of the regular members and in addition Referee James E. Conway when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(BNSF Railway Company

STATEMENT OF CLAIM:

“Claim on behalf of the General committee of the Brotherhood of Railroad Signalmen on the Burlington Northern Santa Fe:

Claim on behalf of J. L. Pankey, R. L. Franks, R. J. McNeely, J. D. Huckabee and B. Simpson, for 33 hours at the overtime rate of pay for J. D. Huckabee and B. Simpson; 30 hours at the overtime rate of pay for J. L. Pankey and R. L. Franks; and 27 hours at the overtime rate of pay for R. J. McNeely, account Carrier violated the current Signalmen's Agreement, particularly Rule 8, when it temporarily changed their starting time from 6:30 a.m. to 8:00 a.m. to follow a tie gang working on the Thayer North Subdivision for the purpose of avoiding overtime. The Claimants were also instructed to come to work at 10:00 a.m. so as not to run out of hours. The change began September 16, 2002, and ended October 22, 2002. Carrier's File No. 35 03 0005. General Chairman's File No. 02-102-BNSF-129-S. BRS File Case No 12726-BNSF.”

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 record discloses that Signal Foreman J. L. Pankey and Signalmen R. L. Franks, R. J. McNeely, J. D. Huckabee and B. Simpson were assigned to Mobile Construction Crew No. 22 in early September 2002. By majority vote, the gang had opted to work four ten-hour days weekly pursuant to Rule 46 (B). It is undisputed that Rule 8 of the governing Agreement prohibited their starting time from being set earlier than 5:00 A.M. or later than 8:00 A.M.

On Monday, September 9, 2002, Signal Construction Supervisor G. Snyder notified the crew that their starting time would be temporarily changed from 6:30 A.M. to 8:00 A.M. from September 16 through October 22, 2002 to permit the crew to follow a tie gang scheduled to work in the area. The crew was further instructed to delay their reporting time to 10:00 A.M. each day while the changed hours of service were in effect.

On November 1, 2002 the Organization submitted this claim on behalf of the members of Mobile Construction Crew No. 22 asserting that the Carrier's decision to change their starting time was for the purpose of avoiding overtime in violation of Rule 8 of the Agreement.

The Carrier takes the position that all Claimants received a seven-day notice of change in starting time, substantially greater advance alert than is required by the Agreement, and that their new hours were within the allowable time frame set forth in Rule 8 (D). Because the purpose of the schedule change was to align the crew's work hours with those of the Maintenance of Way tie gang, and not avoid overtime, it argues that it did not violate Rule 8.

The relevant sections of the Rule at issue are as follows:

"RULE 8 - BASIC DAY AND STARTING TIME

- A. Where one (1) shift is worked, eight (8) hours exclusive of the meal period shall constitute a day's work. The starting time shall not be earlier than 5:00 A.M. nor later than 8 A.M.

* * *

- D. The starting time of employees shall not be changed without first giving the employees affected thirty-six (36) hours' notice. The starting time shall not be temporarily changed for the purpose of avoiding overtime."

The claim presents no issue regarding adequacy of advance notice of the schedule changes nor of whether the new, temporary work hours were within the permissible range of starting times under Rule 9. The sole question for Board consideration is whether the Carrier made those changes "for the purpose of avoiding overtime." If so, it violated Rule 8.

A similar situation was addressed by the Board in Third Division Award 31632 involving the same Organization, substantially the same Rule, and another Carrier. There, as here, the carrier changed the starting hours for a Signal crew to permit it to work the same hours as a Maintenance of Way crew. The controlling terms of the Rule provided that, "[s]tarting time shall not be temporarily changed for the purpose of avoiding overtime." The Board found based upon the facts of that case as follows:

"The Board sees no intent to 'avoid overtime' since the stated purpose of the hours change was simply to conform with the Maintenance of Way crew's schedule."

Proper enforcement of Rules whose application turns on intent makes for difficult problems of proof. The Claimants who assert deliberate wrongdoing under the provisions negotiated in Rule 8 must show that any change in hours was induced by an intention to avoid overtime costs. The fact-finder's evaluation is necessarily somewhat subjective, taking into account, for example, evidence of the Carrier's words, the victim's perceptions, and any misrepresented facts. Other indicia of motivation might also be compelling - a recent ban on overtime; a passing remark by a Carrier official. The credibility of both parties is always an issue.

In sum, to convincingly establish subjective intent by the Carrier to avoid overtime, the petitioner must satisfy the decision maker that there is a link between the Carrier's wrongful motives and its actions. In adopting Rule 8, the parties chose to make state of mind an essential component of a Rule violation. Often, however, as the parties know, overtime considerations may play a role in the employer's decision but

may be merely one of several legitimate objectives to be factored into its decision making. Rule 8 does not by any means preclude such an approach.

The difficult evidentiary problems presented by the bargain the parties struck on Rule 8, requiring proof of wrongful intent to establish a violation, are exemplified by this case. Impure motives can be hard to nail down because frequently the other party is operating with superior information and need not alert others to all the facts that motivated it to act. The Organization asserts wrongful intent, but in support offers no evidence except to note that Signal crews had always started at 6:30 A.M., implying that such past practice was unalterable. None of that establishes a violation of Rule 8.

On the record before us, in the absence of any showing of intent to avoid overtime, the claim must be 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 25th day of October 2006.