

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 39863
Docket No. MW-38894
09-3-NRAB-00003-050332
(05-3-332)**

The Third Division consisted of the regular members and in addition Referee Brian Clauss 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 failed to call and assign Mt. Pleasant, Iowa Section Foreman V. Roberts and Truck Driver S. Feehan to perform overtime service on the Mt. Pleasant section territory on January 11, 2003 and instead called and assigned Mt. Pleasant Section Laborer C. Amos, Monmouth, Illinois Section Laborer R. Morrow and Fairfield, Iowa Truck Driver M. Paris. [System File C-03-0020-28/10-03-0182(MW) BNR]**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants V. Roberts and Truck Driver S. Feehan shall now each be compensated for sixteen and one-half hours (16.50) at their respective time and one-half rates 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 Organization claims that the Carrier violated the Agreement when it did not call out the Mt. Pleasant, Iowa, Section Foreman and Truck Driver to repair a broken rail near New London, Iowa. The broken rail was in their section, but the Carrier only called out one employee from the Mt. Pleasant section and went to other sections to find employees. The Carrier counters that the Roadmaster did call out the Claimants, but they did not respond. Because there is a dispute of facts, the claim must be dismissed or denied. Further, it was an emergency and the Carrier could call employees for that emergency without necessarily going down the section list. Moreover, the Claimant's statement does not contain a signature and is therefore less credible.

The Carrier contends that the inquiry here is simple because there is a dispute of facts that cannot be resolved. The statement of Roadmaster Rotness details how the call list procedures were followed. The on-duty Roadmaster must have called the list because it would not have made sense for him to call from another section further away from the work.

The Organization contends that the statement of Claimant Roberts is dispositive because he stated that both he and Claimant Feehan were home and available at 8:00 A.M. and were never called by the Carrier. The statement of Roadmaster Rotness does not create a dispute of fact because Roadmaster Rotness was not involved in the call-out, the weekend Roadmaster made the calls. There is no statement from the weekend Roadmaster and, therefore, no factual dispute.

The Board carefully reviewed the evidence, which reveals the following: Claimant Robert's statement indicates that he was home, available and was not called. He indicates that Claimant Feehan was available as well. During the handling of the claim, the Carrier asserted that Roadmaster Turnbull called out to

the Mt. Pleasant Section Foreman, but got no answer. The Carrier further contends that, according to Appendix N, the failure of the Section Foreman to answer allowed the Carrier to consider the section employees on that section as also unavailable and call another section.

The typewritten statement of the Claimant is dated January 13, 2003, and provides, in pertinent part:

“On January 11, 2003, Roadmaster Casey Turnbull failed to call section foreman Vince Roberts and truck driver Steve Feehan of the Mount Pleasant section for overtime that they were entitled to. At around 8 o’clock on Saturday, January 11 Roadmaster Turnbull called section laborers . . . along with truck driver . . . to report to Mount Pleasant Iowa to help repair a broken rail at MP 223.4 near New London, IA. . . .

These men worked 16.5 hours of overtime beginning at around 8 a.m. and finishing after midnight that night.

Since the section foreman and truck driver from Mount Pleasant’s section were not called as they should have been on this date I believe that they should be paid for the time that they lost since they were not called as they should have been.

It should also be noted that [Claimant Roberts] and [Claimant Feehan] were at home and available at 8 a.m. on Saturday the 11th of January.

Thank you.

Vincent L. Roberts”

The statement of Roadmaster Rotness, which was contained in an e-mail dated February 25, 2003, states, in pertinent part:

“On Saturday, January 11, 2003, Roadmaster Casey Turnbull was on weekend coverage on the Ottumwa sub. Mr. Turnbull received a

call of a broken rail on the Mt. Pleasant section territory at mile post 223.4. Using the call out list that I provided for Mr. Turnbull he called the appropriate people first, if they were unavailable he then moved on to the next person. On my territory, only three people answered the phone. The first three people that were called out were from three different sections and were 80 miles apart from one to the other. These three were truck driver . . . from Fairfield, IA section, . . . the sectionman from Mt. Pleasant, IA section, and sectionman R.V. Morrow from Monmouth, IL section. Due to the extreme cold that day other broken rails kept them out for most of the day. Mr. Turnbull had a current call out list and the claimants did not answer the phone, either they were unavailable or they were unwilling to go to work on this cold weekend.

Thank you,
John Rotness
Rdm. Burlington, IA''

The Board carefully reviewed the presented claim and the evidence. Neither party disputes that the Claimant's section should have been first called – the issue involves whether calls were made. Claimant Roberts' statement indicates that the repair work was in his section, he was home, available from 8:00 A.M., was not called, and people on other sections were called and worked.

The Board notes that the Carrier's contention of an emergency was not raised during the handling of the claim. It appears for the first time in its Submission and is, therefore, not considered. Indeed, there is nothing in the record that suggests an emergency, other than that it was cold in January in Iowa. Cold, absent more, does not mean an emergency exists.

The Carrier argues that the Claimant's statement was not signed. The Board notes that the statements of both Claimant Roberts and Roadmaster Rotness were not signed - rather, they contained their names typewritten. The typewritten names of both men on their statements were sufficient authentication in this matter.

The Carrier has not established a dispute of fact. Upon examination, the statement of Roadmaster Rotness clearly shows that he did not work on Saturday,

January 11, 2003. He did not make any calls himself, did not speak to any employees on the phone and did not talk to any employees in person. He was not there and had no basis of knowledge. Moreover, there is no basis in the contents of the statement for Rotness' conclusion that somebody else made the calls to the Mt. Pleasant section employees. Baseless statements do not create a dispute of fact. Roadmaster Turnbull was working as weekend Roadmaster coverage. Roadmaster Turnbull did not submit a statement. There is no contradiction to the Claimant's statement that he was available and was not called.

Claimant Roberts established that he was available and was not called. However, that does not end the inquiry. Claimant Roberts stated: "It should also be noted that [Claimant Roberts] and [Claimant Feehan] were at home and available at 8 a.m. on Saturday the 11th of January." Just as Roadmaster Rotness' statement contained no basis of knowledge for his assertions about another Roadmaster's specific actions, Claimant Roberts' statement contains no basis of knowledge about Claimant Feehan. There is no evidence in the file to suggest that the Claimants reside together, share a household or share a phone line. Save for Claimant Roberts' statement, there is nothing in the record that establishes that Claimant Feehan was available to work and was not called.

The Carrier contends that Claimant Roberts was fully employed and not entitled to pay for the overtime worked here. The Board disagrees and finds that Claimant Roberts was denied the overtime opportunity. The Carrier cites to Public Law Board No. 4768, Award 41, finding that a claim for lost overtime should be paid at straight time rates. That Board's analysis is instructive where it provides:

"As to remedy, the parties disagree as to whether the Claimants should be paid at the punitive rate, as urged by the Organization, or at the straight-time rate, as suggested by the Carrier. The Board is fully aware that this issue is raised frequently and that there is no undisputed 'right' answer.

The Board notes that the NRAB Second Division regularly, but not always, favors payment of straight time in instances where an employee is improperly deprived of work, while under the same circumstances the NRAB Third Division regularly, but not always, grants pay at the rate the claimant(s) would have worked."

Under the above analysis, the claim should be granted at the rate Claimant Roberts would have earned had he worked. The evidence offered by the Organization is sufficient to establish a violation of the Agreement in regards to Claimant Roberts and insufficient to establish a violation of the Agreement in regards to Claimant Feehan.

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 31st day of July 2009.