

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40214
Docket No. MW-38165
09-3-NRAB-00003-040066
(04-3-66)**

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

**(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(BNSF Railway Company (former Atchison, Topeka
(and Santa Fe Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to assign Messrs. P. D. Barros, C. F. Sciacca, F. Aranda, J. E. Gauna and J. D. Tortorelli to perform overtime service (working with the rail grinder) on the Powder River Division South of Texlin, Texas to Walsenberg, Colorado from December 4 through 11, 2002 and instead assigned junior employees C. R. Velasquez, C. A. Velasquez, D. D. Martinez, P. O. Gribble and P. A. Duran [System File C-02-32/13-03-0002 (MW) ATS].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants P. D. Barros, C. F. Sciacca, F. Aranda, J. E. Gauna and J. D. Tortorelli shall now each be compensated for sixty-two (62) hours' pay 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 maintains that the Carrier violated the Agreement when it failed to properly assign the Claimants to work overtime in support of the rail grinder that was operating in the area. The Carrier counters that the overtime was properly assigned to the employees assigned to work in support of the rail grinder.

On December 19, 2002, the Organization filed a claim for the overtime worked by five junior Welders while they were assigned overtime on the rail grinder working on the Powder River Division from December 4 to December 11, 2002. The five Claimants are all senior to the five employees who did the work.

The Carrier's February 19, 2003 response, reads, in relevant part, as follows:

"First, Carrier must take exception to this claim filing for Claimants: Barros for date of December 4, 2002, Arand for date of December 4, 2002. Claimants were not available for service for these time periods and therefore are invalid Claimants for these dates. See attached computer screen printout of Personnel Activity Tracking System Time Histories.

With this, the Organization must give adequate evidence/proof in their claim filings, along with the necessary documentation to support what is being claimed including dates and hours. This has not been done and therefore claim is invalid.

Without waiving any of the above objections, the Carrier will proceed with further arguments as to the validity of this claim.

Contrary to your contentions, the employees given the overtime were assigned to work with the rail grinder for the dates claimed. Claimants were working in conjunction with rail detector and service failure activities and working overtime associated with those

assignments. See Time Histories printout for their overtime service.”

The Organization replied on March 14, 2003, in pertinent part:

“[T]he Organization rejects the Carrier’s decision . . . and takes exception . . . as follows.

Carrier states: ‘First, Carrier must take exception to this claim filing for Claimants: Barros for date of December 4, 2002, Arand for date of December 4, 2002. Claimants were not available for service for these time periods and therefore are invalid Claimants for these dates. See attached computer screen printout of Personnel Activity Tracking System Time Histories.’

Contrary to this statement by the Carrier, both Barros and Aranda (correct spelling) volunteered and offered to work this overtime on these dates in question and were denied. All other remaining Claimants also volunteered and offered to work this overtime and were willing to make themselves available for service to the Carrier as needed.

The Carrier further states: ‘With this, the Organization must give adequate evidence/proof in their claim filings, along with the necessary documentation to support what is being claimed including dates and hours. This has not been done and therefore claim is invalid.’

The Organization strongly objects to this statement. As presented in our initial claim, we have documented that this claim is for overtime service performed by junior employees in violation of Rule 33(i) Preference to Overtime Work and we have clearly documented the dates and hours involved herein.

The Carrier also states: ‘Contrary to your contentions, the employees given the overtime were assigned to work with the rail grinder for the dates claimed. Claimants were working in

conjunction with rail detector and service failure activities and working overtime associated with those assignments. See Time Histories printout for their overtime service.'

Again, the Organization objects to the Carrier's statement. The only employee working with the rail detector was Foreman Barros and we documented that in our initial claim. We have reviewed the time sheets and see no excessive overtime for other Claimants on these dates that would have precluded their ability to perform this claimed overtime. The majority of this overtime was worked by junior employees on rest days of December 5 and 6, 2002 and after regularly assigned hours on the other claimed dates. Rule 33(i) of the ATSF agreement is clear and unambiguous as to the assigning of overtime service. Rule 33(i) states in part: 'Except when employees are utilized as provided in Rule 33(f), employees assigned to sections, work districts, specific areas and/or locations shall be given preference in relative seniority order among employees of the gang, work district or location to overtime work to be performed within such section, district, area or location.' All Claimants volunteered, offered and were willing to perform this claimed overtime work and were denied.

Claimants are skilled, qualified and hold seniority in the classes claimed, were willing, able and available to perform this overtime service. They have performed this same type of service to the Carrier in the past and no doubt will do so in the future when so assigned."

In its May 8, 2003 response, the Carrier stated, in part:

"[The] declination of this claim, fully set out the Carrier's position. [The] declination and the reason stated therein are reaffirmed.

This claim should be withdrawn. The claim contains vague and very little information. It merely states the Claimants are short on overtime pay and not called properly. The Carrier needs to know what days the overtime was worked, who worked the alleged

overtime, where and what was the overtime allegedly worked . . . Claimants were not called for the overtime. The Supervisor states that the Claimants were called and used for overtime with this project. This claim is provided with no evidence, other than the accusation, and the Organization has the burden to prove every aspect of the claim.

[Regarding] December 2, 2003. [Claimant] Barros had an unapproved absence and certainly would not be available for any overtime. [Claimant] Aranda had an approved absence from work . . . thus was not available for work on the date, on account the Claimant requested to be off work. These claims are invalid for this date.

Also, no dates provided of the alleged overtime worked, the Carrier cannot address the dates of the claim. Ms. Johnson furnished the Organization pay records for all the Claimants for the alleged claim days. The Organization should note that all the Claimants worked overtime periodically. Again this claim has no merit and should be withdrawn. Certainly, there is a dispute in facts in this case.

This claim revolved around whether [Claimants were] paid properly for overtime. However, there is no evidence that the Claimants actually performed overtime service that they should be paid for, as it appears the Claimants did claim and were paid for overtime.”

The issue before the Board is whether overtime in support of the rail grinder was properly assigned. Rule 33(i) Preference to Overtime Work provides:

“Except when employees are utilized as provided in Rule 33(f), employees assigned to sections, work districts, specific areas and/or locations shall be given preference in relative seniority order among employees of the gang, work district or location of overtime work to be performed within such section, district, area or location.

Employees assigned to road gangs, such as Track Extra Gangs and B&B Gangs, Machine Operators, etc, shall have preference to

overtime work in relative seniority order in connection with work projects to which they are assigned.

When overtime is anticipated and the employee is so informed, the employee will, if he expects to be away from his usual calling place, notify his supervisor that he will be away and the approximate length of time, and, if possible, where he may be reached.

When gangs are divided (working at different location) and supervision becomes aware that one part of the divided gang will be required to render overtime service, it will not be necessary to utilize the senior member of the other part of the gang, unless all members of the gang are returned to the designated assembly point or assembled at another location before the overtime service commences."

The Board carefully reviewed the evidence. The Carrier argues that the five Welders were properly assigned to assist rail grinder operations and that any overtime was in conjunction with their eight hour day. The Organization maintains that the applicable Rule is clear – the Claimants were senior and should have been offered the overtime pursuant to Rule 33(i).

The Claimants' statements offered by the Organization indicate that the Claimants approached the Roadmaster as a group when they learned from Roadmaster Myers that the rail grinder would be working on the territory in the future. They requested to be placed on the project because of the opportunity for overtime. According to the Claimants, Roadmaster Myers informed them that they would not be assigned to the rail grinder and that he could assign whoever he wanted to, including junior employees. Corroboration for the Claimants' statements comes from the January 29, 2003 e-mail of Roadmaster Myers in which he stated that the work has been assigned to Welder A employees for the past few years. The record evidence also shows that employees with considerably less seniority than the Claimants were selected to work in support of the rail grinder.

Clearly, the Claimants wanted the overtime opportunity because they sought it from the Roadmaster upon learning that the rail grinder would be coming to the territory. It is important for the Board to note what the instant claim is not – it is

not a claim about whether the senior employees should have been assigned to the rail grinder project. The Board does note, however, that there is nothing in the record that indicates that an employee need be a Welder A to work in support of the rail grinder project.

Third Division Award 35962 is instructive in the instant matter where it states: "When such an employee makes out a prima facie case that he was not offered the overtime opportunity in seniority order, as the Claimant has shown in this record, the Carrier must shoulder the burden of proving its affirmative defense that it offered the overtime to the senior bypassed employee and that he refused." A review of the record evidence indicates that when the Carrier handled the matter on the property, it asserted that there was insufficient information to state a proper claim and that the Claimants were not assigned to the rail grinder. However, there was a prima facie case made by the Claimants as the claim was made with sufficient specificity that the Carrier could investigate and formulate a response. The Carrier's response did not rebut that prima facie case. The Board also notes that Claimant Barros had an unapproved absence on December 4, 2002. Accordingly, he is not entitled to overtime pay for that day.

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 21st day of December 2009.