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**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40386
Docket No. MW-39890
09-3-NRAB-00003-070060
(07-3-60)**

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 Atchison, Topeka
(and Santa Fe 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 Bayou Bouff Bridge Tender M. Frazier to relieve and perform the duties of Swing Shift Operator D. Hymel during his absence on January 7, 8, 13, 14, 15, 20, 21 and 22, 2006 [System File JFSF-06-01/15-06-0001(MW) ATS].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant M. Frazier shall now be compensated ‘ . . . for a total sixty-four (64) hours at the Claimant’s respective overtime rate of pay, eight (8) hours each day, to begin on January 7, 2006, January 8, 2006, January 13, 2006, through and including January 15, 2006, and again on January 20, 2006 through and including January 22, 2006, account Carrier afforded the opportunity for overtime on for the before mentioned dates, to Vacation Relief Bridge tender, B. P. Andras, who had already acquired his forty (40) and should have been relieving vacation for assigned Baldwin bridge Tender, M. J. Lacoste, or assigned Mermentau Bridge Tender, Batiste, who took a floating vacation day on January 9, 2006, or Assigned Des Almandes,**

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Bridge Tender, Robert Matherne who was on scheduled vacation January 16, 2006, through and including January 20, 2006, instead of the Claimant who shows to be the senior Bridge Tender on the Bayou Bouff Railroad Bridge, and should have been afforded the opportunity to relieve and work the overtime, to relieve David Hymel, the Swing Shift Operator. . . .”

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 M. Frazier was regularly and permanently assigned as Bridge Tender at Bayou Bouff with a normal Monday - Friday, 8:00 A.M. - 4:00 P.M. work schedule. He was the most senior assigned to the location.

Anders was not headquartered at Bayou Boeuf. At relevant times, he was classified as vacation relief Bridge Tender. On January 7, 8, 13, 14, 15, 20, 21 and 22, 2006, he worked as swing shift Bridge Tender at Bayou Bouff to temporarily substitute for the incumbent who was off work due to an injury. The work lasted 40 hours.

The Organization claims that (1) the Carrier violated Rule 33 because the Claimant was the most senior Bridge Tender at the location (2) overtime assignments must be based on seniority, even in emergencies and (3) no attempt or

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inquiry was made to assign the Claimant to work overtime and no inquiry was made about the relevant dates.

The Carrier asserts that (1) no overtime was worked (2) nothing requires regular assignment vacancies be filled at overtime rates (3) nothing prevents the regular assignment of vacation relief employees from working non-vacation assignments and (4) because the Claimant was not the senior relief employee, he is not entitled to overtime under any circumstances.

The Carrier's position that no overtime was worked begs the question whether overtime should have been assigned under the Agreement. The answer to this dispute is found elsewhere.

Both parties cite separate prior on-property Third Division Awards as controlling precedent. The Organization relies on Award 25601 while the Carrier presents Award 38043.

Award 25601 is inapposite because the "Carrier's by-pass of [the claimant] is not disputed, only the remedy." Thus, it does not answer the preliminary question of whether the assignment was proper.

Award 38043 is strikingly similar to the current facts. It also is substantially more recent. Most important, it directly resolves the issue of whether the language of Rule 33 requires regular assignment vacancies to be filled at the overtime rate rather than the use of a vacation relief employee on straight time. After examining the Agreement's language and binding practice, the Board decided the question in the negative.

The Organization advances no new evidence or theory in the present dispute. Nor is there any contention that Award 38043 was wrongly decided. Our review of the relevant cited prior decisions compels no such conclusion. Accordingly, in the interest of stability and predictability, the same analysis and result apply now. Accordingly, the instant claim is denied.

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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 March 2010.