

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40513
Docket No. MW-39474
10-3-NRAB-00003-060256
(06-3-256)**

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

PARTIES TO DISPUTE: (
(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
(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 deducted eighty dollars and six cents (\$80.06) from the last half of March 2004 paycheck of Mr. K. Fitterer in relation to his paid rest day overtime hours for January 30, 2004 [System File B-M-1221-H/11-04-0172(MW) BNR].**
- 2. As a consequence of the violation referred to in Part (1) above, Claimant K. Fitterer shall now receive eighty dollars and six cents (\$80.06).”**

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 Claimant established and held seniority in various classes within the Track Sub-department. At all times relevant to the claim, he was regularly assigned as a Track Inspector headquartered in Glen Ullin, North Dakota, with a Sunday through Thursday workweek. The Carrier designated Friday and Saturday as the Claimant's rest days.

The Carrier assigned the Claimant to attend a training course at its Overland Park, Kansas, training facility on five week days beginning Monday, January 26 and ending Friday, January 30, 2004. To comply with the Carrier's instructions, the Claimant completed his regularly assigned shift on Thursday, January 22, 2004 and traveled to the training facility to be ready for work on Monday, January 26. After completing training on Friday, January 26, 2004, the Claimant submitted his end-of-the-work-period time sheet/expense report in which he included the eight hours of training on Friday, January 30 – a normal rest day for his assignment – for pay at time and one-half his normal rate.

In a letter dated March 15, 2004, the Carrier notified the Claimant of its denial of overtime and recouped \$80.06 from his next paycheck. The Timekeeper Supervisor informed the Claimant:

“This Disallowance is for the following reason . . . will reduce pay 80.06. . . .”

The involved Rules read, in relevant part, as follows:

“RULE 29A. OVERTIME

. . . time worked preceding or following and continuous with a regularly assigned eight (8) hour work period shall be . . . paid for at time and one-half rate, . . . computed from starting time of employe's regular shift.

* * *

RULE 32A. REST DAY OR HOLIDAY PERIOD

... employees who are required to work or held on duty on rest days
... shall be paid for at the rate of time and one-half for time worked
or held on duty, with a minimum of two (2) hours and forty (40)
minutes. . . .”

The Carrier initially argues that the Organization failed to meet its burden of proving that by paying straight time for training, it violated Rule 29, Rule 32 or any other provision of the Agreement.

In its September 3, 2004 denial of the claim, the Carrier contends that:

“ . . . past practice is that training is paid at straight time rate,
because the Claimant is not performing work.

Overtime pay is earned pursuant to Rule 29 or Rule 32 when an
employee performs work or service for the Carrier. An employee
who is training or attending classes does not perform work or
service as specified in either Rule 29 or Rule 32. . . .”

The Carrier denies the Claimant performed overtime work for which Rule 29A requires pay at time and one-half. In support, it cites the following language in Third Division Award 20323:

“In Award 10808 (Moore), it was noted that there are exceptions to time consumed by an employee when directed by the Carrier as being considered ‘work’ or ‘service.’ One of those exceptions was held to be where the circumstance contains a mutuality of interest. The Award concluded, ‘Awards have held that classes on operating rules and safety rules are such exceptions.’ See also, Award 11048 (Dolnick), 15630 (McGovern), Fourth Division Award 2385 and 2390 (Seidenberg), 7631 (Smith) 11567 (Sempliner) and Public Law Board 194, Awards 24 and 25.”

The Carrier argues that no overtime occurred here and that under Rule 29, training does not trigger overtime. It rejects the Organization’s reliance on Rule 32

and urges the claim be denied as without merit. The Carrier asserted that its past practice was to pay employees assigned to training on their rest days at their straight time rate.

The Carrier denies the Organization's claim that it violated the Agreement by failing to provide the Claimant with a reason for disallowing the money at issue in this claim. It asserts that the notice to the Claimant quoted above provided adequate reasons.

The Organization argues that it met its burden of proof to show that the Claimant was not free to observe the rest day assigned him by the Carrier and that by requiring him to work on a rest day while denying the pay rate mandated by the explicit language of Rule 29A, the Carrier violated that Rule and the Agreement.

The Organization emphasizes that it is not claiming pay for overtime hours worked. In response to Third Division Award 32204 cited by the Carrier, the Organization distinguishes that case from the instant facts. Therein, the Board denied overtime pay to Train Dispatchers who participated in one-hour computer training classes after completion of their regular eight-hour assignments.

In the instant case, by contrast, the Claimant contends he was held on duty at the Carrier's direction and was not free to go his own way on his Friday rest day. In support of this position, the Organization calls attention to the Carrier's March 15, 2004 letter in the record reducing the Claimant's pay rate to straight time for the day at issue. It argues that the fact of his being assigned to training on his rest day was not disputed by the Carrier and that it involves exactly the situation for which Rule 32A requires time and one-half pay.

The Organization admits that the Claimant was attending a Carrier-mandated formal training school, but denies that this indicates he was not performing work for the Carrier. It cites Third Division Award 31949 which sustained a claim for time and one-half pay for employees who attended mandated meetings on their rest days on the basis that attendance constituted "work" or "service."

As to the Carrier's allegation of a past practice of paying straight time to employees assigned to training on their rest days, the Organization argues that the

Agreement upon which this claim is based is definite and unambiguous and prior practices are therefore not controlling. It asserts that the burden to prove this affirmative defense rests on the Carrier and that it produced no evidence that such a practice exists or existed. It suggests that mere allegations are not proof or evidence of such a past practice. The Organization argues further that even if such a practice did exist, it would not supercede what it referred to as “the clear and specific language of Rule 32.” In support, it cited Third Division Aware 5306 which states in part:

“The Agreement upon which this claim is based is definite and unambiguous; and prior practices therefore are not controlling.”

In performing its analysis, the Board notes Rule 32A has two elements that must be met for it to apply – “rest day” and “work or held on duty.” As the moving party in this rules case, the Organization bears the initial burden of establishing material facts necessary to make out a prima facie violation of the Agreement. After a thorough review of all evidence including party Submissions, the Board finds adequate evidence in the record to determine that in this instance the Organization met its burden of showing that the day for which pay is claimed was a rest day for the Claimant and that he was “held on duty.” The Carrier presented no probative evidence to prove an affirmative defense.

The Board notes that the Carrier pays straight time for regular work and that it does not pay employees who fail to or refuse to work. Because the Carrier pays employees for time spent on training, that indicates an employee attending training is performing work, or at the very least, is “on duty.” This claim does not seek overtime pay for the Claimant’s non-rest days. It is a claim for pay for the Claimant’s eight-hour assignment at the Carrier’s Overland Park facility on a single Friday – a normal rest day for the Claimant on his regular assignment.

The Carrier approaches the issue in this dispute as overtime pay for training. The Organization, on the other hand, regards the issue as time and one-half pay for attending training on a Carrier-designated rest day. A careful reading of the Submissions indicates that the claim does not seek overtime (although it does seek time and one-half pay). Indeed, the Board notes that Rule 32 does not contain the word “overtime” or concern itself with “overtime.” Rule 32A is clear that

employees who are required to work or who are held on duty on rest days will be paid at time and one-half.

The Board takes further notice that the language in Rule 32A is not limited to “work.” It also includes employees “held on duty” on their rest days. This dispute presents precisely that fact situation. The Board is not empowered to write new Rules or to strike existing ones. Consequently, the Board finds that the existing wording of Rule 32A applies to these parties and to this situation. Because there is no claim here for overtime for training performed on non-rest days, the Board need not reach that issue.

Because this Rule applies both to employees at work and to employees being held on duty, and because the Claimant falls into at least one of those categories, the Board need not reach the issue of whether training is work.

In view of the foregoing and based on the record as a whole, the Board finds that the record shows the claim to be meritorious and that accordingly, a sustaining award is in order. The Board need not reach the issue as to whether the Carrier violated the Agreement by failing to provide the Claimant with a reason for disallowing the money at issue in this claim. The claim will be sustained.

AWARD

Claim sustained.

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 15th day of June 2010.