

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40560
Docket No. MW-40102
10-3-NRAB-00003-070288
(07-3-288)**

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 Burlington
(Northern Railroad Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call regularly assigned Hickman, Nebraska, Section Laborer K. Esser to perform overtime service with the Hickman section crew when said crew was called to perform overtime on February 19 and 20, 2005 and instead called and assigned Mr. N. Shallenberger [System File C-05-O020-13/10-05-0141(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant K. Esser shall now be compensated for twenty-two (22) hours at his respective time and one-half rate 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.

At material times, the Claimant was a Trackman/Laborer on the Hickman, Nebraska, section crew. His normal work days ended at 4:00 P.M., Monday through Friday.

On February 8, 2005, the Claimant received a five-day suspension. The suspension notice provided that it “. . . will began start of shift [Monday] February 14, 2005, through end of shift [Friday] February 18, 2005. . .” Section Laborer N. Shallenberger was assigned, and did work, temporarily to fill the vacancy created by the Claimant's suspension.

The Claimant's crew worked 12 hours overtime on Saturday, February 19 and ten hours of overtime on Sunday, February 20. No attempt was made to contact the Claimant for either overtime assignment. Shallenberger, who had less seniority than the Claimant, worked the February 19 overtime. The record is silent regarding who, if anyone, junior to the Claimant worked overtime on February 20.

Citing Rules 1, 2, 29A and 29C, the Organization grieved the overtime assignment. (A claim for holiday pay was subsequently withdrawn). The Organization asserts (1) the Claimant's suspension, and Shallenberger's temporary assignment, ended at 4:00 P.M. on February 18 (2) the Claimant was entitled to the weekend overtime as the senior regularly assigned crew employee (3) the Claimant was qualified and available and would have worked if asked (4) the Claimant is entitled to overtime for February 20 because the Carrier did not identify the crew members who worked the assignment and (5) arbitral decisions support the Organization.

The Carrier states (1) the Claimant is not entitled to the disputed overtime because he did not perform any services during the prior regular workweek (2) the Organization has shown no Rule violation (3) Rule 24J unambiguously governs how employees are called for overtime and, given the Claimant's suspension, he was not the “regular assigned employee” the preceding workweek (4) the Organization's position is inconsistent with its positions in prior matters (5) at most, the Claimant is

entitled only to straight time pay (6) a material factual dispute exists that deprives the Board of jurisdiction (7) Rule 2 is inapplicable and (8) arbitral precedent supports the Carrier.

Contrary to the Carrier, no material facts are disputed. Indeed, relevant events are simple and straight-forward. Also, it is long established that the Carrier, at least, is obliged to assign overtime on non-regular workdays by seniority among “regular employees” unless an express exception exists in Rule 24J or the Carrier proves a compelling reason the practice need not be followed in a particular case. Also, see Rule 2 and Third Division Award 19758. Rule 24J's express exceptions are inapposite here.

On these facts, the dispute turns on the meaning of “regular employee” in Rule 24J. Shallenberger was a temporary, substitute replacement during the Claimant's suspension. The Claimant was the employee who normally and routinely held the crew position consistent with his seniority. When his suspension ended sometime before the start of the February 19 overtime assignment, he had returned to his previous bid place and Shallenberger's status became subordinate.¹ Any other reading is irreconcilable with the common meaning of “regular,” extends Claimant's 5-day unpaid suspension into a seven days' inability to earn wages and creates overtime limitations found nowhere in the Rules or established practice.

No evidence indicates an employee junior to the Claimant worked on February 20 or that he otherwise was entitled to overtime assignment as the senior regular employee. Therefore, he shall be paid 12 hours at his time and one-half rate for missed overtime on February 19, but nothing for February 20. The premium rate is appropriate because it was the rate he would have earned if properly assigned.

Accordingly, the claim is partially sustained.

¹This Award does not answer the unasked question of who would have been entitled to overtime immediately following 4:00 P.M. on February 18.

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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 29th day of June 2010.