

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40864
Docket No. MW-40483
11-3-NRAB-00003-080329**

The Third Division consisted of the regular members and in addition Referee Andria S. Knapp 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 assigned junior Machine Operator R. Smith to overtime service (nighttime machine watcher) on November 27, 28, and 29, 2006, instead of Machine Operator W. Espinoza [System File C-07-O020-3/10-07-0084(MW) BNR].**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant W. Espinoza shall now be compensated for a total of twenty-eight and one-half (28.5) 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.

The Organization filed a claim with the Carrier by letter dated December 9 alleging an improper overtime assignment on November 27, 2006, involving Crew CG-01 at Moorcroft, Wyoming. Specifically, the Carrier assigned a Group 3 Machine Operator to work overtime as a "night-time machine watcher," instead of the Claimant, who is the Group 2 Machine Operator normally assigned to operate one of the two machines at issue, and who has seniority over the Group 3 Machine Operator who was assigned. (The Carrier also assigned a Truck Driver to the night watch work, but the Organization did not challenge his assignment, as a Truck Driver has to be available for refueling if necessary.)

Diesel machines cannot be properly started in very cold weather, so the Carrier's cold-weather policy is to run the machines all night long so that they can be used the next day. The machines are not operated, in the sense of being used for their mechanical purpose; they are merely kept running all night, and the position that is filled is "night-time machine watcher." The weather forecast at the time was for very cold weather, so management decided to run the machines continuously.

According to the Carrier, management indicated at the morning briefing on the days in question that the machines would need to be run all night, and asked for volunteers to be the "night-time machine watchers." The record includes an e-mail from the Roadmaster that states: "On the days mentioned we let it be known, that we needed people to watch machines due to cold weather, which was addressed at the morning job briefing." The Claimant was present at the meetings and (again, according to the Carrier) did not volunteer. The Carrier then assigned other employees to perform the work.

A statement submitted by the Claimant contradicts the Carrier's version of events:

“On November 27, 28, 29 of 2007 [sic - it was actually 2006]

Truck Driver Ray Smith and Grp3/4 Operator Rich Smith were asked to stay overnight and watch two Group 2 machines. Ray Smith was the fuel truck driver he had to stay to keep the machines full. But Rich Smith has less time than me and one of the machines was mine. I was High Grp 2 operator. This was not brought up at the job briefing. Asst Roadmaster Bridgewater and Foreman Daniels told Rich and Ray since they were brothers to stay and watch the machines. The next day when I asked the roadmaster about it he said that Ray was the truck driver so he had to stay and asked Rich since they were brothers. In the process of our talk Tom Smith came in and asked what the problem was and I told him and he said put in a claim. This went on for three days even after I brought it up they still had them two stay. My claim is for Rich Smith’s overtime, the overtime that I should have got. We were all on CG-01.”

It is important to protect the seniority rights that the parties have negotiated in their Agreement, particularly between junior and senior employees in the same job classification.

However, the Board is limited to making decisions where the facts are not in dispute: in the absence of an opportunity to evaluate witness credibility, the Board is not in a position realistically to be able to make informed decisions about which of two competing versions of the facts is the more credible. In this case, the Carrier contends that employees were told about the overtime opportunity during the morning briefings on the days in question and that the Claimant did not indicate any interest in working it. According to the Carrier, it is too difficult to ask employees individually about such work, and it is accepted practice to raise the opportunity during group meetings and ask if anyone is interested. But the Claimant’s statement indicates that the opportunity was never offered during the morning briefings and that, in fact, even after he raised questions about a junior Machine Operator’s having been assigned to perform the work and expressed his interest in the overtime opportunity, management continued the assignment, telling him to file a claim. These two versions of what happened cannot both be true, and the factual dispute makes it impossible for the Board to make a reasoned decision: if the Claimant knew about the opportunity and

did not indicate any interest in the overtime (the Carrier's version of events) he cannot complain after the fact about how the overtime was assigned. His statement offers an entirely different version of what happened. Regrettably, the Board has no way of determining whom to believe.

Whether the overtime opportunity was discussed and offered at the morning job briefings is an essential fact of this case, and the record developed on the property establishes that there is a dispute between the parties over this essential fact. In such cases, the Board is compelled to dismiss the claim. Under the circumstances, the Board has no alternative here but to dismiss the case.

AWARD

Claim dismissed.

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 7th day of February 2011.