

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 42856  
Docket No. SG-43239  
18-3-NRAB-00003-150311**

**The Third Division consisted of the regular members and in addition Referee Patricia Bittel when award was rendered.**

**(Brotherhood of Railroad Signalmen  
PARTIES TO DISPUTE: (  
(BNSF Railway Company**

**STATEMENT OF CLAIM:**

**“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the BNSF Railway Company:**

**Claim on behalf of J.L. Hughes, J.R. Loudermilk, R.B. Rector and S.D. Stafford, for ten (10) hours each at the time and one-half rate of pay and seventy nine (79) hours each at the double-time rate of pay, account Carrier violated the current Signalmen’s Agreement, particularly Rules 10, 11, and 45, when, on December 5–9, 2013, it held the Claimants on duty at the motel for anticipated storm coverage and then failed to compensate them. Carrier's File No. 35-14-0023. General Chairman's File No. 14-002-BNSF-121-T. BRS File Case No. 15175-BNSF.”**

**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 Hughes was a monthly-rated construction foreman at the time of the events of concern. Claimants Loudermilk, Rector and Stafford were hourly signalmen and assistant signalmen. A severe winter ice storm was projected to dump excessive amounts of ice in the Fort Worth, Texas area beginning the evening of Thursday, December 5, 2013. The Carrier advised area signal forces that they might be needed and asked them to remain available. The degree to which their movements were restricted is contested. It is clear, however, that the Claimants were provided rooms at a Fort Worth hotel.

The Organization filed a grievance alleging violation of Rule 10 (A) & (B); Rule 11(A) & (B), and Rule 45 of the BNSF/BRS Agreement in that the Claimants did not receive overtime and double time pay on December 6 through 9, 2013. The grievance was processed to arbitration. The parties to said dispute were given due notice of hearing. This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Applicable provisions of the parties' Collective Bargaining Agreement state as follows in pertinent part:

**“RULE 10. OVERTIME-HOURLY RATED EMPLOYEES:**

**A. Time worked preceding and continuous with a regularly assigned work period will be paid for on the actual minute basis at time and one-half rate, with a minimum of one hour at time and one-half rate and payment of double time rate after sixteen (16) hours of work in any twenty-four (24) hour period. An employee required to work eight (8) or more hours preceding and continuous with his regularly assigned work period will be paid at time and one-half rate for work performed during the regularly assigned work period.**

**B. Time worked following and continuous with a regularly assigned work period will be paid for on the actual minute basis at time and one-half rate, with payment at double time rate after sixteen (16) hours of work in any twenty-four (24) hour period.**

**RULE 11. Calls**

**A. An employee notified or called to perform work outside of and not continuous with his regular work period will be paid a minimum of two (2) hours and forty (40) minutes at time and one-half rate and if held on duty in excess of two (2) hours and forty (40) minutes, time and one-half will be allowed on the minute basis, with payment at double time rate for work in excess of sixteen (16) hours of continuous work.**

**B. The time of an employee who is notified prior to release from duty will begin at the time required to report at designated point at headquarters and end when released at such point. The time of an employee who is called after release from duty will begin at the time called and end at the time he returns to designated point at headquarters.**

**NOTE: In the application of paragraph A of this rule an employee will not be released from duty for the purpose of breaking the continuity of overtime work.**

**RULE 12. SUBJECT TO CALL**

**A. An employee assigned to regular maintenance duties will notify the person designated by the Carrier where he may be called by filing his home address and telephone number, if he has a telephone, with such person. An employee called to perform work outside of assigned working hours will respond promptly when called. The regular assigned employee, if available, will be called for such work on his assigned territory.**

**B. Should an hourly rated employee assigned to regular maintenance duties desire to temporarily absent himself from the designated place where he may be called and should such an employee desire to be called during such temporary absence, such an employee must keep the person designated by the Carrier notified at all times where he may be called.**

**C. An hourly rated employee assigned to regular maintenance duties desiring to leave the designated place where he may be called on his**

rest day will, if possible, notify the person designated by the Carrier when he expects to leave and return to such place.

**D. Monthly rated employees assigned to regular maintenance duties recognize the possibility of emergencies in the operation of the railroad, and will notify the person designated by the Carrier where they may be called. When such employees desire to leave their headquarters or section, they will notify the person designated by the Carrier that they will be absent, about when they will return, and when possible where they may be found.**

#### **RULE 45. RATES OF PAY**

**A. The monthly rates cover all services rendered except as otherwise provided herein. \* \* \***

**C. (Previous) When a monthly-rated employee is called out before or after his usual hours to perform signal work or is engaged in such signal work at the end of his usual working hours (except as otherwise provided in Rule 45), all time in excess of three (3) calls or ten (10) actual hours in any calendar month will be paid at the overtime rate of pay except that in the case of Signal Electronic Technicians, Signal Inspectors, Maintenance Foremen and Signal Construction Crew Foremen, all time in excess of four (4) calls or fifteen (15) actual hours in any calendar month will be paid at the overtime rate of pay. (Paid overtime does not count toward 3-10 or 4-15 non-comp time.) (Emphasis added)**

**C. (current) When a monthly-rated employee is called out before or after his usual hours to perform signal work or is engaged in such signal work at the end of his usual working hours (except as otherwise provided in Rule 45), all time will be paid at the overtime rate of pay.**

**D. Monthly-rated employees shall be assigned one regular rest day per calendar week (Sunday, if possible). Overtime rules applicable to other employees who are subject to the terms of the Signalmen's Agreement will apply to service which is performed by monthly-rated employees on such assigned rest day. \* \* \***

**I. The method of operation to be used for all monthly rated maintainers shall be on the following basis: The full workdays shall be Monday through Friday, with the "rest" and "subject to call" days alternated on adjacent districts.**

**EXAMPLE: District A works Monday through Friday. Subject to call day Saturday on Districts A and B. Rest Day Sunday. District B works Monday through Friday. Rest Day Saturday. Subject to call day Sunday on Districts A and B.**

**NOTE: In the application of this paragraph 1, Signal Maintainers may exchange weekend protection, and will be compensated as follows.**

**EXAMPLE: The normal protection day for District A is Saturday, with Sunday as his rest day. He agrees to protect both his own and another signal maintainer's district on Saturday and Sunday. If he is called for emergency signal service on the other signal maintainer's district on Saturday, he will be paid overtime, but not if he is called on his own district unless he has exceeded 3 calls or 10 actual hours in that month. If he is called on the other signal maintainer's district on Sunday, he will not be paid overtime unless he has exceeded 3 calls or 10 actual hours in that month but will be paid overtime if he is called on his own district. Every two (2) months the protection day and rest day for all districts is reversed, consequently the above example would be reversed.**

**During extreme adverse weather conditions, the Carrier may require signal maintainers to protect according to the regular schedule."**

**The Carrier paid Claimants as follows:**

- Friday December 6, 2013 (rest day) - sixteen (16) hours straight time and eight (8) hours double time);**
- Saturday December 7, 2013 (rest day) - Claimant signalmen and assistant signalmen were compensated sixteen (16) hours straight time**

**and eight (8) hours double time, (protect day) claimant signal foreman was compensated eight (8) hours available day pay;**

- Sunday December 8, 2013 (rest day) - Claimants were compensated sixteen (16) hours straight time and nine (9) hours double time);**
- Monday December 9, 2013 – (work day) Claimants were compensated ten (10) hours straight time.**

**The Carrier asserts this compensation was in accordance with Third Division Award 41683 and therefore proper. In that case, a foreman and crew were held at a hotel for a storm that did not materialize. The Carrier paid the affected employees for the date they were sent to the hotel, but did not pay them for the night or next day. The award described the Carrier’s position as “disingenuous” and granted maintenance crew members six hours straight time to make 16 within the 24 hour period, plus eight hours double time pay. The foreman was denied compensation unless he performed work off his assigned territory. Neutral Member Roger MacDougall stated: “It must be said that this Award is limited to the specific circumstances of this case. When a crew goes back to an away-from-home hotel in the middle of their weekly schedule to get rest to come out the next day, there should normally be no expectation of pay of the nature granted in this Award.” The Carrier focuses on this last sentence in justifying its calculations.**

**The Carrier adamantly asserts that nothing in the parties’ Agreement provides for overtime compensation when an employee is not performing duties for the Carrier. It notes the employees in question were allowed to do whatever they pleased and were not restricted to staying at the motel. Rather, they only needed to refrain from alcohol and be available by phone. Further, monthly-rated employees like the foreman are already compensated for being available to respond to calls every day except on their rest day.**

**The Organization maintains the Claimants were instructed to stand and wait by the phone at the motel and at no time were they free to come and go. In its view, the Carrier stands in violation of Rule 10 (A) & (B), Rule 11, and Rule 45 of the BNSF/BRS Agreement. It argues all the Claimants were held on continuous from 0700 hours on Thursday, December 05, 2013 until released from duty at 1800 hours on Monday, December 09, 2013. It insists they were not released from duty at any**

time during the period and were required to stand by the phone to immediately respond for call.

The Organization contends Third Division Award 41683 does not apply because it was limited to the circumstances of that case. It further asserts the neutral's basis for determining that the monthly-rated foreman was not due additional compensation was faulty. The Organization insists that the non-compensated pieces of the monthly-rate under Rule 45 have been eliminated. It claims a monthly rated foreman does not have a protect schedule and that such an interpretation of Rule 45 is absolutely wrong. A foreman does not have an assigned territory nor does he perform maintenance duties, it explains. Pursuant to Rules 12 and 45, only Signal Maintenance personnel with assigned territories have protect schedules, it argues. The Organization maintains that a signal foreman's sixth day pay, included in his salary, has always been compensation for non-compensated service time. However, in the Organization's view, the non-compensated service time a foreman was required to provide before he would be paid overtime was eliminated in a 2007 negotiated Agreement.

The Organization notes that the claim is for a construction crew foreman. It contends construction crew foremen are not assigned regular maintenance duties or protect schedules and are not required to be available. In its view, there is no longer any work or service performed outside of normal hours by Claimant Hughes that is not paid at the overtime or double-time rate of pay.

In Award 41683, Third Division 2013, a foreman and crew were instructed to leave work and go to a motel in preparation for an ice storm that never materialized. They were paid for the day they were sent home but nothing else. Neutral Member Roger MacDougall found the Carrier's argument "disingenuous" and granted the crew six hours of straight time and seven hours of double time but denied the foreman compensation. The Award states:

**"It must be said that this Award is limited to the specific circumstances of this case. When a crew goes back to an away-from-home hotel in the middle of their weekly schedule to get rest to come out the next day, there should normally be no expectation of pay of the nature granted in this Award."**

In the view of this Board, this statement makes it clear that Award 41683 was not intended to serve as precedent in interpreting the contractual provisions at issue. Instead it was expressly “limited to the specific circumstances of this case.” As a result, this Board must look elsewhere for guidance.

The history of contract interpretation on this issue is somewhat checkered. Second Division Award 3955, from 1959, held that forcing the claimant to be available for work or service, from 4:00 P.M. Saturday June 13, 1959, and all subsequent Saturdays, until 7:00 A.M. Sunday, was service or work and under the terms of the Agreement should be compensated at the applicable overtime rates. The Board opined: “There is nothing in the working agreement that requires any employee, regardless of how compensated, to render 24 hour service without proper compensation.” It reasoned that “Being available at the carriers' call is work and is service rendered under the terms of the agreement.”

Third Division Award 21295 was issued in 1976. In that case the Claimant maintained that since he took a call and advised the dispatcher about the trouble being in another territory, he had performed service and was due compensation. The Board found that the language of Rule 36 envisioned “the employee doing something beyond answering a telephone.” In Award 31150, Third Division 1995, employees were asked to regularly check the outdoor temperature and call in if it exceeded 90 degrees. This was not found to rise to the level of standby duty which imposes “severe or total restrictions on an employee’s movements.” In Award 32318, Third Division 1997, employees were on standby on a voluntary basis, and the Board agreed with the Carrier that they were not being required to stand waiting to serve; compensation was denied. In Award 40575, Third Division 2010, the claimant was sent home to rest to be available. The Board found a lack of evidence that the employee was required to perform services for the Carrier and denied compensation.

Rule 10 begs the question by providing overtime pay for “time worked” without defining the meaning of that term. Rule 11 sets forth pay for employees “notified or called to perform work.” This provision also provides no express explanation of whether a notification to perform work is restricted to the performance of maintenance tasks or is subject to a broader interpretation that would include other types of service. The ‘performance of work’ is without restrictions as to its inclusiveness.



With respect to the foreman, the prior version of Rule 45 required monthly rated employees to donate specified amounts of time, above and beyond their regular work week, without additional pay. This requirement was eliminated in 2007. Though the Organization maintains this change jettisoned the six-day week for Claimant Hughes, the Carrier flatly denies that this was ever agreed to between the parties.

Based on the foregoing, the Board finds the alteration of contractual language was intended to only eliminate the requirement of the specified, donated time. The negotiated change surgically excised references to the hours specified for donation. Nothing about this change evidences any intent to alter the six-day week or on-call requirements of covered monthly-rated employees. Also, nothing in the record reveals that the monthly-rated foreman was not already being compensated on his protect day for the time that the Organization claimed he was being held. This is consistent with the practice on the property. In the context of the particularized pay rates of the monthly-rated foreman, an intent to change this practice would have to be expressly articulated by the parties in the 2007 agreement and it is not.

However, an issue remains concerning compensation for the monthly-rated foreman outside of his on-call requirements on a rest day(s). The Board believes that the Claimant Hughes should have received compensation just as his hourly-rated counterparts did on their rest day. The foreman's protect "day" began at the start of his regular tour of duty on Saturday, December 7, and ended twenty-four hours later. The time the foreman was asked to be available on his rest day would warrant compensation.

Though the record in this case leaves much to be desired, the Board is persuaded that the Claimants in this case were indeed restricted to their motel and were not free to wander away to restaurants, pool halls or movie theaters. The rationale behind this conclusion is the fundamental reason they were being asked to stay in the first place: there was an impending storm and they needed to be able to respond on a dime. The Carrier's intent and purpose in keeping the employees available was not to allow them to wander about and answer a phone from wherever they were, as in Awards 31150 and 21295. The status was not voluntary. Rather, we find they were required to be instantly available by staying on site at the motel. This brings the case into alignment with the cases where overtime pay was granted because the employees were severely restricted in their movements.

In this case, the Carrier identified the location where the employees would stay. This distinguishes the case from Award 40575 where the employee was free to go home, Awards 21295 and 31150 where no hotel stay was involved, as well as Award 32318 where the call status was voluntary. The fact that the Carrier controlled the location where the employees had to stay is an important factor militating for the conclusion that the employees were providing a service to the Carrier by staying at that location and being immediately available. Unlike Award 31150, the employees were not free to go absolutely anywhere so long as they called in. They had to stay in the immediate vicinity so that their response upon call would be instantaneous. The hourly Claimants here concerned were indeed providing a service to the Carrier by staying in an employer-defined area, at the employer's convenience, waiting and ready at all times for immediate deploy.

The claim is sustained in part. The Carrier shall compensate the Claimants in accordance with the foregoing rulings. The Carrier shall be credited for any compensation already made.

**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 10th day of January 2018.