

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42857
Docket No. SG-43240
18-3-NRAB-00003-150312**

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 R. C. McAnally, J. C. Ortega, G. K. Rohrbacker, B. A. Smith and C. Sommerfeld, for ten (10) hours each at the time and one-half rate of pay and sixty eight (68) 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. 35-14-0024. General Chairman's File No. 14-001-BNSF-121-T. BRS File Case No. 15176-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.

A severe winter ice storm was projected to dump excessive amounts of ice in the Brownwood, Texas area beginning the evening of Thursday, December 5, 2013. Signal forces in the area were informed that they might be needed and asked to remain available. They were released early and were provided rooms at a Brownwood, Texas Hotel. The Organization states Claimants were compensated as follows:

“Friday December 6, 2013- ten (10) hours straight time and eight (8) hours double time;

Saturday December 7, 2013 (rest day) Claimant signalmen and assistant signalmen were compensated ten (10) hours straight time and eight (8) hours double time, claimant signal foreman was compensated eight (8) hours available day pay;

Sunday December 8, 2013 (rest day) - ten (10) hours straight time and nine (9) hours double time;

Monday December 9, 2013 (rest day) - Claimants were not compensated.”

The Organization filed a grievance alleging a violation of Rule 10 (A) & (B); Rule 11(A) & (B), and Rule 45 of the BNSF/BRS Agreement and demanding additional overtime and double time compensation for the Claimants. It claimed the following compensation is due:

“Friday December 6, 2013- Thirteen (13) hours double time for hours worked from midnight December 5th until 0700 hours and from 1800 hours until midnight December 6th. Ten (10) hours at time and one-half for their regular assigned work period from 0700 hours -1800 hours;

Saturday December 7, 2013 (rest day) -Twenty-four (24) hours double time for hours worked from midnight to midnight;

Sunday December 8, 2013 (rest day) - Twenty-four (24) hours double time for hours worked from midnight to midnight;

Monday December 9, 2013 (rest day)- Seven (7) hours at the double time rate for work from midnight December 8th until they were release at 0700 on December 9th.”

The parties to said dispute were given due notice of hearing and the matter was duly processed to arbitration. This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Pertinent provisions of the collective bargaining agreement provide as follows:

“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 16.

Hourly-rated Signalmen required to relieve on monthly-rated Signal Maintainer positions will be compensated at the monthly-rate of pay. Also, if they are called out before or after the usual hours of the monthly rated position to perform signal work or if engaged in such signal work at the end of the usual working hours for the position (except as otherwise provided in Rule 45), all time will be paid at the overtime rate of pay.

RULE 45. RATES OF PAY

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

C. (prior now eliminated) 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.)

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. * * *

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. 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 asserts the compensation given was in accordance with Third Division Award 41683 and therefore proper. In that case, a crew was returned to an away-from-home hotel in the middle of their schedule to rest for the next day's work. While the neutral did not provide a detailed explanation regarding the relevance of the foreman being off his assigned territory, the Carrier contends he

nonetheless correctly ruled that the monthly-rated employee was not due any additional compensation.

As the Carrier sees it, no work or service was performed by the Claimants after their release from duty at 3:30 pm on Thursday, December 5, 2013. It argues overtime and double time rates are only payable when an employee performs work for the Company. It maintains being available to answer the phone does not constitute "work" within the meaning of Rule 11. It explained that monthly-rated construction crew foremen are required to be available 24 hours a day, six days a week in the same manner as all other monthly-rated assignments.

The Organization maintains 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 0700 hours on Monday, December 9, 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.

It contends Third Division Award 41683 does not apply because the award was limited to the circumstances of that case. In its view, all non-compensated service under the monthly-rate was eliminated when Rule 45 was renegotiated in 2007. It perceives the Carrier's interpretation of Rule 45, that a foreman has a "*six-day protection schedule*," as absolutely wrong.

Claimants McAnally, Rohrbacker, Smith and Sommerfeld were hourly signalmen. Claimant Ortega was a monthly-rated foreman. Their situations will be separately reviewed.

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 additional pay but denied the foreman compensation. The Award states it "is limited to the specific circumstances of this case." 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. As a result, this Board must look elsewhere for guidance.

As explained more fully in Award 42856, the history of arbitral interpretation has recognized call status as “work” within the meaning of Rule 11 if the employee remains under the Carrier’s control and is severely restricted in terms of freedom of movement and activity. The Carrier cited exceptions to the requirement of recognizing call time as “work.” The Board has reviewed these cases and we find they recognize factual criteria indicating that the employees in question were not under the Carrier’s control. In such cases, the employees have been deemed not to have worked.

Though the record in this case leaves much to be desired, the Board is persuaded by the nature of the situation that in all likelihood the hourly Claimants here concerned were advised to stay at the hotel in order to maintain availability. An ice storm was impending and were the Carrier to allow the employees to wander about town, response time would likely be compromised. This circumstantial evidence persuades the Board that the Claimants were in fact restricted to the hotel and were required to be ready at all times for immediate deployment.

The situation of the foreman is different because he was a monthly-rated employee subject to an alternative pay schedule. The issue remains concerning compensation for Foreman Ortega outside of his on-call requirements on a rest day(s). The Board believes that Claimant Ortega should have received compensation just as his hourly-rated counterparts did on their rest day. The foreman’s protect “day” requires him to be available for 24 hours. We are not persuaded that he is due any additional compensation for the emergency call time in question on his protect day. However, the time the foreman was asked to be available on his rest day warrants compensation.

The claims are sustained in part. The Carrier will compensate 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.