

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42966
Docket No. MW-42612
18-3-NRAB-00003-140302**

The Third Division consisted of the regular members and in addition Referee Michael G. Whelan 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 M. Smith to perform overtime service with a rail grinding train at various locations on the Bellingham Subdivision on December 14 and 15, 2012 instead of calling and assigning senior Machine Operator J. Latray thereto (System File S-P-1695-G/11-13-0162 BNR).**
- (2) The claim* as appealed by General Chairman Glover on May 28, 2013 to General Director Labor Relations W. Osborn shall be allowed as presented because said appeal was not disallowed by Director Labor Relations W. Osborn in accordance with Rule 42.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant J. Latray shall be allowed ‘... 8 hours overtime, 7.5 hours double time and all benefits that the Claimant did not receive because of these violations.’**

***The initial letter of claim will be reproduced within our submission.”**

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 J. Latray holds seniority as a machine operator with the Roadway Equipment Sub-department, and at the time of the instant dispute was assigned within Seniority District No. 100, and headquartered at Bellingham, Washington. On December 14 and 15, 2012, the Carrier assigned machine operator M. Smith, who has less seniority than the Claimant on the same seniority roster, to perform overtime work on a rail grinding train on the Bellingham section.

The Organization argues that it was a violation of the Agreement to allow M. Smith to perform this work. Specifically, the Organization alleges that the Carrier violated Rule 2 Seniority Rights and Sub-Department Limits, Rule 6 Basic Seniority Districts, Rule 29 Overtime, and Rule 30 Calls. As a remedy, the Organization claims that Claimant should be compensated for 8 hours of overtime at the rate of time and one-half and 7.5 hours of double time.

The Carrier submits that this case is not about the assignment of incidental overtime, but rather centers on whether an employee can insist on assignment of duties of his choice, solely based on seniority without consideration for the bulletin and assignment provisions of the Agreement.

In addition to the substantive issues presented, the Organization also raises a procedural issue. Specifically, the Organization argues that the Carrier did not notify the Organization within sixty (60) days from the date of the letter of appeal that the appeal was disallowed. The record establishes that the Carrier received the Organization's appeal on May 29, 2013. The Carrier's declination of appeal, dated

July 25, 2013, was sent on July 25, 2013, and received by the Organization on July 29, 2013, sixty-one (61) days after the Carrier received the Organization's appeal.

The Organization informed the Carrier in a letter dated August 8, 2013, that the Organization was not notified that this claim had been disallowed within the time limits of Rule 42. The Carrier did not respond to this letter. The Organization submits that the failure to comply with Rule 42 and the Carrier's failure to challenge this issue on the property require that the Claim must be sustained. Rule 42 states, in relevant part:

RULE 42. TIME LIMIT ON CLAIMS

"A. All claims or grievances must be presented in writing by or on behalf of the employee involved, to the officer of the Company authorized to receive same, within sixty (60) days from the date of the occurrence on which the claim or grievance is based. Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reasons for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances."

The procedural issue raised here has been addressed recently in prior Awards between the parties. See Public Law Board 7738, Cases 30, 31, and 32, and Third Division Award 42698. In Public Law Board 7738, Case 30, the Carrier argued that the "mailbox rule" should apply such that its response would be timely if mailed within the sixty (60) day period. The Board addressed that issue and the same contract language presented in this case and found the following:

"The Board recognizes that the "mail box rule" is often applied in contract disputes regarding time frames, especially where there is ambiguity in the language of the contract. But here the language in Rule 42 is not ambiguous. It clearly states "notify." How can the Organization be officially notified within the time frames if they don't get notification of the response until after sixty (60) days? There is a clear violation of Rule 42."

Similarly, in Third Division Award 42698, the Board reviewed several awards considering whether denials of claims must be mailed or received with the sixty (60) day time frame. In that case, the denial of an unjust dismissal claim was delivered to the Organization sixty-one (61) days after the claim was filed. The Board held that:

“Third Division Award 32889 explained that “We follow this [Marx Award] precedent because to do so provides the parties with a greater degree of certainty and predictability in their claims handling process.” This Board, subscribing to the reasoning expressed in the Third Division Award, follows the precedent set in the latest, definitive on-property award, and thus finds a violation of Rule 42.A.”

The Board concurs with the reasoning of these prior awards. Pursuant to the last sentence of Rule 42A, the claim shall be allowed as presented. Because this conclusion is dispositive of the case, it is unnecessary to consider the merits of the case or the Organization’s other argument that it should prevail because of the Carrier’s failure to challenge the procedural issue on the property.

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 14th day of February 2018.