

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 43250
Docket No. MW-44125
18-3-NRAB-00003-160415

The Third Division consisted of the regular members and in addition Referee Brian Clauss when award was rendered.

(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference

PARTIES TO DISPUTE: (

(BNSF Railway Company (Former ATSF Railway)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier recouped payment for overtime service from track supervisors working across Seniority District 600, Seniority District 700 and Seniority District 800 on February 14, March 1, 19 and April 2, 2015 (System File 130-SFA23-156/14-15-0222 ATS).
- (2) As a consequence of the violation referred to in Part (1) above, the Carrier must now pay Claimants F. Finch, P. Gomez, Jr. and A. Lojero for the overtime compensation it improperly recouped from the Claimants on February 14, March 1, 19 and April 2, 2015.”

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 claims a violation of the Agreement when the Carrier recouped and denied Claimants overtime compensation for non-track supervisor service rendered outside their normal work periods on various dates in November and December 2014. The Carrier issued a number of recoupment notices (“cut letters”) and the Organization claims that those cut letters and recouped payments were done in violation of the Agreement.

The Organization states the Claimants performed varying types and amounts of work outside of their normal work period. The Organization acknowledges that track inspection work performed after eight hours of work is not subject to overtime. However, the Organization argues that the instant work was not track inspection work and included non-inspection duties not in connection with routine track inspections. It was not related to their normal track supervisor duties and therefore under the historical application of Rule 1 and Appendix 23 of the Agreement Claimants are entitled to overtime.

The Organization argues that the Carrier has failed to recognize that a track supervisor is also entitled to compensated overtime for performing work outside of, but continuous with, their normal work period. They are entitled to the overtime payments when they are directed to perform work that is not part of or associated with regularly assigned track supervisor duties.

The Organization continues that the seven casualty codes do not limit the overtime-eligible work. As explained by the General Chairman in his lengthy discussion of past practice, there had previously been eight casualty codes. One of those codes was for assigned work and was for work outside of the seven identified casualty code. That eighth code was eliminated. The General Chairman offers an un-rebutted historical analysis of compensating track supervisors for non-track supervisor work.

The Organization continues by stating that allowing the Carrier to assign track supervisors to non-track supervisor duties as long as they are continuous with their normal work period hours could virtually create an unlimited number of hours worked without overtime pay. This would lead to an obviously absurd result.

In summary, the Organization acknowledges that Track Supervisors do not work a set eight hour day. Their job requires flexibility and means that an eight hour block can occur outside “normal” work hours. The Organization also

acknowledges that track inspection work continuous with the Track Supervisor's day is not compensated at the overtime rate. Call outs after a break in service are not disrupted. Continuous service performing work outside the normal duties for a track supervisor should be eligible for overtime after completion of the eight hour block. According to the Organization, the Carrier's argument leads to absurd results.

The Carrier responds that it properly determined that Claimants were not entitled to overtime and double time compensation on various dates in November and December 2014. In support, the Carrier cites the plain language of Appendix 23 and notes that there are no day or start time requirements for Track Supervisors. The Agreements clearly do not provide for the application of any basic day provisions. Track Supervisor is a position recognized as having irregular hours. Further, there are limited overtime provisions for Track Supervisors. Track Supervisors are eligible for overtime only when they perform services on a rest day or holiday or when they are called to perform services not continuous with their normal work period. It is undisputed that Track Supervisors can work in excess of eight hours if performing work continuous with their shift.

The Carrier continues that the 1998 Agreement increased a track supervisor's compensated hours to 240 hour per month due to the "unique nature" of the position. Article 1 Section 1 discusses the duties of a Track Supervisor. It is not just a single duty of track inspection. Rather, Track Supervisors have a variety of duties.

The Carrier claims that the BNSF's Timekeeping Department audited Track Supervisor payments for overtime and double time. The Carrier determined that the payments were made in error because time submitted was continuous with each Track Supervisor's normal work period and not on a rest day or holiday. Further, the Carrier determined that the overtime work also did not match any of the seven overtime codes identified in 2001 Engineering Track Supervisor policy. Those casualty codes were reduced from eight to seven due to abuse. Any issue regarding the change to those codes should have been resolved year ago and should not be part of the instant claim.

According to the Carrier, the Agreements do not provide for assigned hours to Track Supervisors. Because there are no set hour, it is not feasible to apply basic day or overtime rules. The Carrier argues that due to the plain language of the Agreement, the Track Supervisors were overpaid for the work they performed

continuous with their normal work periods. Therefore, the Carrier states it was proper for the Timekeeping Department to recoup the payments.

The Carrier continues by denying the Organization's claim that Article V applies to payments for "special projects." The Carrier claims that the plain language of the Agreement does not support this conclusion and the phrase "special projects" is not found in the Agreement.

In summary, the Carrier argues that plain language is clear regarding compensation when there is no break in service prior to additional work.

The Carrier argues that the BNSF Timekeeping Department did not violate Rule 45 in recollecting the Claimants' overpayments. According to the Carrier, the overpayments were for dates that fell within 60 days of the date that the Timekeeping Department notified the Claimants of the adjustments, therefore it was timely.

This Division has reviewed the record.

The Carrier denied the claim as follows:

"Per Appendix 23, monthly-rated Track Supervisors (including Claimant [name omitted]) are not paid overtime or double time for time worked continuous with their regular shift except for certain circumstances, of which these circumstances were not.

* * *

The Organization has failed to provide any evidence in support of its claimed damages. A claim by the Organization is not evidence, and it does not satisfy the Organization's burden of proving up every element of their claim. The Organization has provided no evidence to support their allegation. The Agreement has not been violated and the Organization has not proven otherwise. This claim is denied in its entirety. Your request that each Claimant be paid for the various overtime listed for each Claimant in claim letter is excessive and without merit."

The General Chairman appealed the Carrier's denial in a letter which provides in pertinent part:

“The Organization is in total disagreement with the Carrier's evaluation of our claim for Track Supervisors. This Agreement has been in place since January 1, 1974. Any time a New Carrier Manager comes into place, the first thing they do is challenge this Agreement because it effects their budget and their bonus they receive each and every year. Even though the Carrier is making Billions of dollars, managers attempt each and every time to nickel and dime employees who work for them and give them a honest days work for a honest days pay. That is not the case here.

The purpose of this letter is to advise you that the Organization vigorously disagrees with your interpretation and to provide you with documentation to show that there has been long-standing agreement between the Organization's Employees, known as Track Supervisors, and the Company to allow overtime pay to Track Supervisors in multiple situations and circumstances.

At the outset, I think it is important for the Carrier Labor Relations Department to understand that I personally worked as a Track Supervisor full time from 1976 to 1980 and intermittently from 1981 to 1996. Moreover after 1996, I had substantial interaction with Track Supervisors and BNSF Management over Track Supervisor issues in my capacity as a full time Union Officer. Consequently, I have detailed personal knowledge of the manner in which the January 1, 1974 Track Supervisor's Agreement has been interpreted and applied for nearly Four (4) decades. I understand and that Track Supervisors are not entitled to overtime payments if their “routine” daily track inspections requires more than Eight (8) hours to complete. But, you need to understand that if Track Supervisors are assigned to perform other than their basis track inspection work before or after their regular assignment, they are entitled to pay at the overtime rate for such work, as is the case here. As I shall demonstrate below, this interpretation and application of the Track Supervisor's and Inspectors Agreement has been repeatedly documented by the Company.

This is not the first time this issue has been addressed by the Carrier Management and the Carrier's Payroll Department and their confusion by the application of overtime rules to Track Supervisors as evidence by the fact that the Company has periodically found it necessary to issue clarifications on this point. For example, in a memo dated March 10, 1995 that was entitled "OVERTIME-TRACK SUPERVISORS" (Attachment "A"), Director of Labor Relations Lyle Pope issued these instructions.

The aforementioned letter was intended to cover what would be considered a 'normal' days work. If you are performing service beyond eight (8) hours and it entails work that can be identified with one of the casualty codes, you should claim overtime for the number of hours expended in the performance of such work using the appropriate casualty code to claim of overtime compensation.

I hope I have answered your question. If not, we will try again." (Emphasis in bold added.)"

Mr. Pope made it clear that Track Supervisors and Inspectors could not claim overtime for routine track inspection (i.e., the normal days work), but that they could claim overtime for work associated with casualty codes. Mr. Pope's instructions were subsequently clarified in a memo for Division Engineer D. L. Gabriel that was issued later that same day (see Attachment "A") and provided the following:

"THERE HAVE BEEN SEVERAL QUESTIONS ASKED SINCE MR. POPE'S E-MAIL, CONCERNING OVERTIME FOR TRACK SUPERVISORS, ATTACHED IS HIS REPLY REGARDING SPECIAL INSPECTIONS ALONG WITH MY CLARIFICATION OF THE ISSUE. TO REINFORCE OUR OVERTIME POLICY FOR TRACK SUPERVISORS: NO OVER TIME IS ALLOWED FOR NORMAL INSPECTIONS, INCLUDING ROUTINE O.T.M. ADJUSTMENT AND REPLACEMENT, SIGN MAINTENANCE, JOINT MAINTENANCE, LINING UP

**SECTION GANGS, AND MISCELLANEOUS MACHINES,
ETC.**

**OVERTIME MAY BE CHARGED AFTER YOUR
NORMAL QUITTING TIME IF YOU ARE NEEDED FOR
SPECIAL PROJECTS OR CASUALTY INSPECTIONS,
I.E.: HEAVY RAIN, TEMPERATURE, TIE GANG ETC.**

**AS HAS BEEN OUR POLICY, YOU HAVE MY
AUTHORITY TO CALL YOURSELF ‘OUT’ IF YOU
HAVE CONCERNS ABOUT TRACK SAFETY. YOU
SHOULD NOTIFY YOUR ROADMASTER OR MYSELF
OF THIS AS SOON AS TIME PERMITS, ALONG WITH
SUBMITTING THE OVERTIME REPORT TO THE M/W
DESK AT THE S.O.C., DAILY.” (Emphasis in bold added)”**

It is abundantly clear from Mr. Gabriel’s directive that overtime may be charged after normal quitting time for special projects such as a tie gang working on the territory or casualty inspections for conditions such as heavy rain, extreme temperatures, etc.

The instructions issued by Messrs. Pope and Gabriel are hardly anomalies. To the contrary, on January 9, 1998, Vice President of Engineering Mike Franke, issued a directive entitled “Track Supervisors Overtime” (Attachment “B”) in which he noted:

Additionally, it is BNSF Policy that Track Supervisors be allowed to charge overtime after eight hours regular service on assigned work days when there is not a break in service for the following work reasons only:

“PATS Overtime Code	Work Reason
1. 0700	Derailment
2. 0701	Earthquake
3. 0703	Heat

4. 0704 Heavy Rain/High Water
5. 0705 Road Crossing Accident
6. 0706 Snowstorm
7. 0707 Sandstorm
8. 0720 Other (with Roadmaster approval)”

Mr. Franke made it perfectly clear that Track Supervisors were entitled to claim overtime after Eight (8) hours of regular service on assigned work days even when there is not a break in service for casualty work (derailment, heat, heavy rain, snowstorm, etc.) and other special projects assigned by the Roadmaster. The written interpretations issued by Messrs. Pope, Gabriel and Franke comport precisely with my own experiences as a Track Supervisor date back to 1976. It was my experience as a Track Supervisor that I was not permitted to charge overtime for completing my routine daily track inspection work, even if that track inspection required more than Eight (8) hours. However, I was routinely allowed to charge overtime after Eight (8) hours of regular service on assigned work days even when there was no break in service for casualty work (derailment, heat cold, heavy rain, crossing accident, etc.) and for special projects assigned by the Roadmaster such as supporting production rail or tie gangs working on my territory. My experience as a Track Supervisor comports precisely with the instructions that the company has continued to issue to new Track Supervisors. As a Union Representative, I was invited to attend a rules training class at the Company Training facility in Overland Park, Kansas in June of 2001. The instructor was Mr. Dennis Vadnais and he clearly instructed the class that Track Supervisors were allowed to charge overtime after Eight (8) hours of regular work on assigned work days without a break in service for pay codes 0700-0716, Casualty and Maintenance Codes. Those codes included general casualty work such as derailments, earthquakes, heat heavy rain, snowstorms, cold weather, rail grinding, etc. and special projects assigned by the Roadmaster such as gang support for production gangs and other special project taken place while working on the territory. I am absolutely certain of these instructions because I still have the handwritten notes that I wrote on the pay code sheets that were presented during that class (see Attachment “C”).

In sum, the Organization recognizes that Track Supervisors are not permitted to claim overtime if their routine daily track inspection work requires more than Eight (8) hours on a regular assigned work day. However, it must be recognized that Track Supervisors are entitled to charge overtime after Eight (8) hours of regular service on assigned work days even if there is no break in service for casualty work (derailment, earthquake, heat, heavy rain, crossing accident, snowstorm, sandstorm, signal indication, etc.) and for special projects assigned by the Roadmaster such as gang support while working on their territory. And of course, you should recognize, Track Supervisors are entitled to charge overtime for work on rest days, call outs, and a return to work break in service. Thus, I trust The Carrier will be governed accordingly and allow this Claim.

Once again, we cannot agree that the Carrier complied with the Rule(s) Appendix 23, Article IV of our Agreement for the service performed and the lost overtime pay suffered due to this special project and special service requirements the Carrier required of the Claimant. Thus we ask for allowance of our claim, the Director of Maintenance Support disallowed our Claim. We cannot agree with the Director of Maintenance Support's reasons offered in disallowing our Claim.

We respectfully request that you authorize allowance of our Claim. In the event you disagree, we request our Claim be docketed for conference.

The Carrier responded to the appeal in a letter dated July 28, 2015, which provided, in pertinent part:

Ms. Tripp, in her declination of this claim, fully set out BNSF's position. BNSF hereby reaffirms Ms. Tripp's declination for the reasons stated therein. It should also be noted that the employees listed in Ms. Tripp's response are ineligible to claim overtime due to absences.

The Organization's claim filed on behalf of "all Track Supervisors" is overbroad and unreasonable. As detailed further below, it is the Organization's burden to prove violations of the Agreement. It is not

the duty of BNSF to search across the BNSF system for potential mistakes or violations and prove the Organization's claim.

Further, Rule 45 of the ATSF agreement was adhered to. Rule 45 states in part:

[omitted]

Thus, BNSF has 60 days from the date advice is given to the individual (the cut letter) to perform the cut. In all instances, the adjusted time was within 60 days of the notification.

Attached to the Organization's appeal is a memo, authored by then Director of Labor Relations Lyle Pope. The Organization states "Mr. Pope's instructions were subsequently clarified in a memo for Division Engineer D. L. Gabriel that was issued later that same day (see Attachment 'A')" [Emphasis added]. The Organization's statement alludes that a clarification email was written from Mr. Pope to Mr. Gabriel. However, that is not so. The email was not written for Mr. Gabriel but rather it was written by Mr. Gabriel. Meaning this email is merely Mr. Gabriel's "clarification of the issue." Mr. Pope could not respond if Mr. Gabriel's "clarification" was correct because he was not included on the email. Thus, the email from Mr. Gabriel provides little relevance because it is merely one employee's interpretation. Regardless, the email adds little merit to the Claim.

Further attached is a letter of instruction written by Vice President of Engineering Mike Franke, dated January 9, 1998. However, not attached is the revised letter of October 10, 2001, issued by Assistant Vice Presidents, M.N. Armstrong and S. A. Goodall. This letter states:

"Additionally, it is BNSF Policy that Track Supervisors be allowed to charge overtime after eight hours regular service on assigned, work days when there is not a break in service for the following work reasons:

PATS Overtime Code	Work Reason
1. 0700	Derailment

2. 0701 Earthquake
3. 0703 Heat
4. 0704 Heavy Rain/High Water
5. 0705 Road Crossing Accident
6. 0706 Snowstorm
7. 0707 Sandstorm

For the Claimants not claiming they were called into service, there are no overtime codes shown above that would qualify them to receive overtime. Thus, their claims are without merit.

The Organization also cites Appendix 23 as the basis of its claim. However, this rule does not support the Organization's position. There is no evidence, explanation, absolutely nothing to articulate how Appendix 23 was allegedly violated. According to Section IV - Compensation, Track Supervisors only receive overtime when 1) they perform work not continuous with the normal work period or 2) when called to work on holiday or rest days. Again, the Organization provides no evidence that Section IV was violated. The Organization cannot simply list several rules and assert they have been violated without stating how. This violates the intent of the Railway Labor Act.

For most all Claimants the Organization merely states Claimants were "called in" without providing a shred of supporting information or evidence. Timekeeping disallowed Claimants' claims per Appendix 23 because Track Supervisors are not allowed overtime if the work is continuous with their normal work period."

This Division finds that the cuts were made timely and that there was no violation of Rule 45. That finding does not end the analysis. This Board also finds that there was adequate support for the claims in the record because each cut letter contained a handwritten notation, or handwritten note for a group of cut letters, stating the work the respective Claimant had been doing for the overtime request.

There is no dispute between the parties that a call following a break in service entitles a Track Supervisor to overtime pay. There is also no dispute that a call on a rest day or holiday is also entitled to overtime. The issue in the instant matter involves whether a Track Supervisor is entitled to overtime when doing non-inspection work continuous a work period.

The parties agree that Track Supervisors are entitled to overtime for continuous work in certain situations. There are seven current overtime codes for those situations. The “casualty codes” are for: Derailment, Earthquake, Heat, Heavy Rain/High Water, Road Crossing Accident, Snowstorm, and Sandstorm. As noted by the Carrier and the Organization, these seven codes were reduced from eight casualty codes in 2001. Previously, there had been an eighth casualty code for “Other (with Roadmaster approval).” The Carrier states that the codes were changed due to abuse and categorizes them as a “revision” and not a change. However, completely eliminating an overtime code for a miscellaneous, Roadmaster-approved classification and not providing no other provision for Roadmaster assignments cannot be properly classified as a “revision.” The change completely eliminated a way to categorize Roadmaster assignments for overtime purposes – leading to the instant dispute.

The Organization counters the Carrier’s “revision” argument by asserting that the codes were used for situations like those present in the instant claims – where Track Supervisors continued past eight hours and assigned performing duties unrelated to track inspection.

The Organization presented a lengthy discussion of the duties of Track Supervisors and how they had historically been paid. The Carrier relies on a plain reading of the Rule and largely rejects the General Chairman’s statement. However, his statement contains a wealth of history and the Carrier has not successfully deconstructed his statement.

Appendix 23 recognizes that track supervisor duties are unique. However, the evidence and the record establish that the uniqueness of the position is not all-encompassing. The plain language of Appendix 23 cannot stand for the Carrier’s proposition which, in essence, is that all work done that does not fall within the seven casualty codes if it is performed continuous is not eligible for pay. Under the Carrier’s analysis, a Track Supervisor could be held for hours doing Track Supervisor duties without compensation. The prior, eliminated casualty code allowed for a Roadmaster to approve assignments that were not within the seven other casualty codes – thereby preserving the uniqueness of the Track Supervisor job while acknowledging that some work is beyond Track Supervisor duties. If there had been abuse, as the Carrier cites as the reason for eliminating the eighth casualty code, then there is recourse to discipline employees.

Here, the Organization established that the Claimants were assigned duties that went beyond track inspection duties. They are entitled to be compensated for those additional duties. The Organization's submission contains the cut letters that recouped payment to the Track Inspectors. The claims for the following cut letters are granted: 17, 18, 20, 21, 22, 25 and 29.

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 26th day of June 2018.