

**NATIONAL RAILROAD ADJUSTMENT BOARD  
THIRD DIVISION**

**Award No. 44497  
Docket No. MW-45925  
21-3-NRAB-00003-200534**

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

**(Brotherhood of Maintenance of Way Employees Division -  
(IBT Rail Conference**

**PARTIES TO DISPUTE: (  
(BNSF Railway Company**

**STATEMENT OF CLAIM:**

**“Claim of the System Committee of the Brotherhood that:**

- (1) The Agreement was violated when the Carrier assigned employees M. Dunlavey and J. Devries to perform overtime service repairing a broken rail at Mile Post 481.2 Main One (MI) on November 6, 2018 instead of calling and assigning employees J. Dollarhide and M. Lucero thereto (System File 2417-SL33-18123/14-19-0129 BNS).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimants J. Dollarhide and M. Lucero shall now be compensated for four and three-quarters (4.75) hours at their overtime rates 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.

*Factual Background*

On November 6, 2018, the Carrier assigned employees M. Dunlavey and J. Devries to perform overtime service repairing a broken rail at Mile Post 481.2 Main One (M1) instead of calling and assigning the Claimants, who were the senior employees assigned at the territory involved.

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

**RULE 1 – SCOPE**

This Agreement governs the hours of service, wages and working conditions of employees of the following classes in the Maintenance of Way and Structures Department: Track Supervisors and Motor Track Inspectors, to the extent set forth in Appendix No. 23; Bridge and Building Foremen; Paint Foremen; Bridge Inspectors; Assistant Bridge and Building Foremen; Steel Bridgemen (not including Steel Bridge or Assistant Steel Bridge Foremen); Bridge and Building Mechanics; Bridge and Building Painters; Bridge and Building Helpers; Welder Gang Foremen; Welders; Heat Treaters; Welder Helpers; Extra Gang Foremen; Fence Gang Foremen; Section Foremen; Assistant Extra Gang Foremen and Assistant Section Foremen; Trackmen; System Rail and Plow Gang Employees; Fuel Foremen; Pumps and Water Treaters; Machine Operators; Bridge and Building and Water Service Laborers; Fuel Station and Sand House Helpers and Laborers; Track, Bridge, Tunnel and Crossing Watchmen and Flagmen and such other classifications as may be shown in the appended wage scale or which may hereafter be added thereto.

**RULE 2 – SENIORITY**

2(a)- Establishment of Seniority. Except for track, bridge, tunnel and crossing watchmen/flagmen, who do not establish seniority as such, seniority shall "be established as Track Supervisor, Motor Track Inspector or in one of the following groups: \* \* \*

**Group 3. -**

- Class 1:** Section and Fence Gang Foremen and Extra Gang Foremen, excluding Extra Gang Foremen in charge of rail laying gangs or mechanized tie gangs.
- Class 2:** Assistant Section Foremen, Assistant Extra Gang Foremen and Assistant Fence Gang Foremen.
- Class 3:** Trackmen \* \* \*

**Group 7. -**

- Class 1:** Operators of Production Tampers (including Plasser switch tampers or equal) with raising and leveling and/or lining devices such as those manufactured by Tamper Inc., Plasser American Corporation, Jackson Vibrators, Inc., RMC Company and Matisa, or equal.
- Class 2:** Operators of Ballast Distributor-Cleaner (RMC) Ballast Maintainer Cars, Regulator or Equalizers (Fairmont including W-77, Kershaw, Tamper Inc., or equal) Brushcutter, Off-track Kershaw 'Klear-way' Crane, Burro Crane, Truck (P&H or Schield-Bantam) either lattice boom or telescoping boom Excavator-Tie Inserter/Remover (See Appendix 61.) Front End Loaders, (IHC TD-6) (AT-2495), Hough H-30 (AT-2492 & AT-3157) with Drott 4-in-1 Bucket, Allis-Chalmers HD-5 (AT-838) and Cat Model 933 'Traxcavator' (AT-978), Parsons UH-117 (AT-2489) or equal Intertrack Ballast Conveyor Car Motor Grader, Cat 112 and Galion 104 HB Tractor Crawler, less than 45 Drawbar horsepower (IHC TD-62, John Deere 1010 and others equal or less) Grapple Trucks Rail Pick-up Cars Speed Swing (P&M Model 441 or 442 or equal) with either tote hook, fork, bucket and/or magnet Spreader-Ditcher (Jordan Type A or J) with or without snow plow Straddle Buggy AT-9999 Switch Undercutter (Kershaw Model 42-1) AT-1975 Weed Burner, on-track, self-propelled (Fairmont W-55, AT&SF propane burner or equal) \* \* \*

**RULE 33 - OVERTIME SERVICE \* \* \***

**33(f) - Work Required on a Day which is Not Part of Any Assignment.** Where work is required by the Carrier to be performed on a day which is not a part of any assignment, it may be performed by the senior qualified and available employee off in force reduction or working in a lower class who will otherwise not have 40 hours or work that week; in all other cases by the regular employee. \* \* \*

**33(i) - Preference To Overtime Work.** Except when employees are utilized as provided in Rule 33 - (f), employees assigned to sections, work districts, specific areas and/or locations shall be given preference in relative seniority order among employees of the gang, work district or location to overtime work to be performed within such section, district, area or location. Employees assigned to road gangs, such as Track Extra Gangs and B&B Gangs, Machine Operators, etc., shall have preference to overtime work in relative seniority order in connection with work projects to which they are assigned.

***Position of Organization***

The Organization contends that on November 6, 2018, the Agreement was violated when the Carrier assigned employees from a surfacing gang to perform overtime service repairing a broken rail at Mile Post 481.2 Main One (M1) instead of calling and assigning the Claimants, who are the assigned section gang for the territory involved in this dispute.

***Position of Carrier***

On November 6, 2018, there was a broken rail on the main line at MP 480.2 of the Seligman Subdivision. The Carrier asserts that Claimants Dollarhide and Lucero were in fact called for the work in question at approximately 0120, but failed to answer. In an effort to prevent train delays, Carrier Supervision continued down the list making calls until Mr. Devries and Mr. Dunlavey answered their phones and accepted the work in question.

As the Carrier sees it, Claimants refused the overtime when they failed to answer their phones. BNSF cannot be expected to wait around for employees to

answer their phones when there is work that needs to be completed in order to prevent train delays.

*Analysis*

The Organization bears the burden of establishing its claim. It follows that employe phone records were needed to show whether or not the Carrier called the Claimant. However, these records were not made available to the Board. Without such evidence, the Board lacks an adequate basis for granting the claim. The Organization has not met its burden of proof in this case.

**AWARD**

Claim denied.

**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 29<sup>th</sup> day of July 2021.