

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 44640
Docket No. MW-44339
22-3-NRAB-00003-210230**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

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

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
(Railroad)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier failed to call and assign Group 3 Machine Operator (Skid Steer #X2400707) L. Fryer to perform rest day work on January 9, 2016 (System File T-D-4879-L/11-16-0217 BNR).**
- (2) As a consequence of the violation referred to in Part (1) above, Claimant L. Fryer shall now be compensated for twelve (12) hours at his applicable time and one-half rate 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.

Group 3 Machine Operator L. Fryer has established and maintained seniority within the Carrier's Maintenance of Way Department. At times relevant Mr. Fryer was assigned within the Roadway Equipment Sub-department to the Skid Steer Loader #X2400707. On Saturday, January 9, 2016, the Claimant's rest day, the Carrier assigned Foreman A. Hohle of the Track Sub-department to operate Mr. Fryer's skid loader. The Organization states that the Claimant was qualified, available and willing to work the overtime, but was not called. The Carrier states that the Claimant was called and declined the overtime because of the weather. The Organization has timely filed and properly processed the claim on Mr. Fryer's behalf with no resolution on the property. Therefore, the claim has been progressed to this Board for final and binding adjudication.

In contending that the claim should be sustained, the Organization relies on Rules 2.A. and 24.J., the latter rule said to be clear and unambiguous. The Agreement was violated when the Section Foreman operated the Claimant's assigned machine and the Claimant was not called to work on his rest day. Seniority is a fundamental element of the negotiated agreement and is to be used in assigning overtime opportunities such as the one to replace FRA defects. The Claimant denies having a prior conversation with Division Engineer Pacheco about working the weekend. The claim is not about obtaining a windfall but about a lost opportunity. The Claimant was available but the work was assigned to a junior employee in a foreign sub-department. While the Carrier alleges that the Claimant ignored an order to show up for the overtime, there is no evidence that he was disciplined for the alleged rule violation.

In asserting that the claim should be denied, the Carrier insists that the Organization offered no proof of a violation, leaving an unsubstantiated allegation and no prima facie case. The claim embodies an unresolvable factual dispute that requires that the claim be denied or dismissed. The Claimant had no right to choose his daily assignment. The Organization improperly relies on Rules 1, 2 and 5. The on-property record includes a statement that the Claimant was called and declined the work.

Rule 2. Seniority Rights and Sub-Department Limits, reads in relevant part: "A. Rights accruing to employees under their seniority entitles (sic) them to considerations for positions in accordance with their relative length of service with the Company as hereinafter provided." It is well settled that Rule 2.A. includes

consideration for overtime work in accordance with other relevant Rules in the Agreement. Rule 24.J. Work on Unassigned Days, requires that such work be performed “by an available extra or unassigned employee who will otherwise not have forty (40) hours of work that week; in all other cases by the regular employee. The record does not establish Foreman Hohle as an available extra or unassigned employee with less than forty (40) hours during the week beginning Sunday, January 3, 2016. There is no dispute that the Claimant was the regular assigned operator and that he is senior to Foreman Hohle.

On the property, the Organization provided the Claimant’s handwritten statement that he asked his Foreman, Gene Johnson, if he would be needed on Saturday, January 9 and was told that he would not be needed. The Claimant further wrote that “Prior to January 11th I did not have a conversation with D. E. Pacheco about working at all on weekend or about weather or anything.” On the property, the Carrier asserted that the Claimant was told of the Saturday work and responded that he would not be there because of the weather. An e-mail from Roadmaster Larry D. Sanders to D. E. Pacheco states that “The claimant was told to work on Saturday with the rest of all the people and he did not show up for work and was called by nick hahler (sic) to see where he was so Adam Hohle used the machine to pull the crossing to help gauge the Fra defect. Deny this claim since he was called and did not show up for work.” There are no statements from Foreman Johnson or D.E. Pacheco. In other words, there are no Carrier first-person statements to controvert the Claimant’s statement.

Furthermore, logic dictates that greater weight be given to the Claimant’s statement. The Board finds plausible the Organization’s contention that had the Claimant disobeyed an order to work on that Saturday, he would have been informed of an investigation into his behavior, as the record includes approximately twenty (20) notices of investigation following instances of alleged failures on the part of other employees to report for work as directed. The Board does not find an irreconcilable factual dispute that requires dismissal or denial of the claim.

The Board has considered the Carrier’s submission of Awards that speak to damages but finds them unpersuasive. When the Carrier violated the Agreement by not giving the Claimant the opportunity to work on a rest day, it deprived him of the opportunity to work at the overtime rate of pay. Therefore, the Claimant shall receive

the overtime rate for the number of hours worked by Foreman Hohle on January 9, 2016.

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 15th day of December 2021.