Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13004
Docket No. 12895
96-2-94-2-41

The Second Division consisted of the regular members and in addition Referee Marty E. Zusman when award was rendered.

PARTIES TO DISPUTE: (International Brotherhood of Firemen
(and Oilers
(
(Burlington Northern Railroad

STATEMENT OF CLAIM:

"1. That in violation of the current Agreement, Mr. S. Sapp, Relief Foreman and Laborer Havre, Montana was denied the displacement allowance contained in the September 25, 1964 Agreement, even though he had been placed in a worse position as a result of a transfer of work.

2. That accordingly, the Burlington Northern Railroad Company be ordered to provide Mr. Sapp with the afore-mentioned displacement allowance commencing with the month of August 1992 and would continue through July 1997."

FINDINGS:

The Second 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 waived right of appearance at hearing thereon.

The crux of the instant dispute is the calculation of the Claimant's test period earnings. The Claimant had filled vacancies as a Relief Foreman in the Montana Seniority District. There is no

dispute over the fact that he had earned overtime.

Effective August 15, 1992, the Carrier instituted a transfer of work under the September 25, 1964 National Agreement which thereafter decreased the need for the Claimant to fill Foreman vacancies and earn overtime. The Organization's claim for displacement allowance based on the loss of overtime availability attributable to the transfer of work was denied on the property.

There is no dispute on the basic facts. The Carrier gave notice on May 12, 1992, that it intended to transfer work from Havre, Montana, to sites in Minnesota, Nebraska, and Washington. On June 12, 1992, the Carrier and Organization entered into an Implementing Agreement which stated that:

> "6. In the event any employee who is not a 'present employee' as that term is defined in the Merger Protective Agreement dated December 29, 1967, is 'deprived of employment' or 'placed in a worse position with respect to compensation and rules governing working conditions' by this transaction, will be entitled to the protective benefits of Article I of the September 25, 1964 National Agreement."

The Organization argues the applicability to the Claimant of Section 6, supra. The Organization maintains that the Claimant was placed in a worse position following the transfer. The Carrier significantly increased the ratio of Foremen to employees at Havre and thereby placed the Claimant in a worse position with regard to wages. The Organization thereafter argues entitlement for a displacement allowance based upon Claimant's full earnings. Claimant's full earnings included compensation as a function of filling supervisory vacancies as the designated Relief Foreman.

The Carrier denied the inclusion of the Claimant's earnings as a Relief Foreman. The Carrier argued on property that the Claimant held a Laborer's position at the time when the transfer under the Implementing Agreement occurred. Subsequently the Claimant could have used his seniority to bid to a higher rated Truck Driving position, but displaced to a Hostler Helper position. Regardless of choice, the Claimant earned more after the transfer of work than he had previously earned as a Laborer. Claimant was therefore not adversely affected and not due displacement allowance. As for the argument that the Claimant lost compensation from his inability to fill supervisory vacancies, the Carrier argues that the "... work performed by Foremen in the Mechanical Department is not Laborers' work per the Agreement...."

It is evident from this record that the resolution must rest upon the Implementing Agreement and the language of the September

25, 1964 Agreement. The Carrier's arguments are that the two Agreements stand between the Organization and the Carrier and cannot include earnings obtained outside those Agreements. As stated:

> "The IBF&O does not represent the work of or the positions of supervisory foremen. Nowhere in the agreement does it refer to entitlement to exempt work. There has been no actual practice and application of your theory on this property and certainly no evidence has been presented that such protection was also intended to cover exempt work."

The Organization argues that the Carrier should compute as part of Claimant's displacement allowance all compensation earned. The Organization maintains that the Agreement contemplates such earnings into the computation of displacement allowance from what was earned by the Claimant in filling supervisory vacancies.

First, the Implementing Agreement contains no applicable language written to exclude said income from compensation. When the Implementing Agreement was negotiated, it referred only to entitlement as guaranteed under the protective provisions of Article I of the September 25, 1964 Agreement.

The September 25, 1964 Agreement has been studied. Section 5 has language relating to being placed in a worse position "with respect to compensation." There is no exclusionary provision denying applicability or restricting applicability as the Carrier argues. Section 6(a) states that:

> "... no employee ... shall ... be placed ... in a worse position with respect to compensation and rules governing working conditions.... so long as he is unable in the normal exercise of his seniority agreements, rules and practices to obtain a position producing compensation equal to or exceeding the compensation of the position held by him at the time of the particular coordination...."

Sections 6 (a) (b) and (c) of the Washington Job Protection Agreement of May 1936 as governing benefits determines displacement allowance by calculation of "total compensation" during the last 12 months. Section (c) carries no exclusions as the Carrier desires. The language of Section (c) could have easily excluded this income if the parties had desired or such could have been eliminated by the Implementing Agreement.

A careful study of the Awards cited by the Carrier finds that

they are not on point. Public Law Board No. 5457, Award 1, for example, excluded abnormal earnings, but supports applicability of average overtime earnings.

The facts here demonstrate that the Carrier reduced as a part of its transaction the supervisory force at Havre. There is no dispute in the record that the Claimant was allowed to fill Foreman vacancies until the transaction. Thereafter, there was an excess of Foremen available to fill vacancies and the Claimant could not. In short, the Claimant was placed "... in a worse position with respect to compensation." As this was the case, he was entitled to a displacement allowance which by language of the Agreement considers "total compensation" received and has no written exclusions.

The Awards presented by the Organization are on point and applicable. Those Awards have been studied and the language of Appendix C-1 Arbitration and New York Dock Arbitration, Section 5(a) have similarly held that compensation includes all earnings earned in the previous twelve months. The language of those protective Agreements and the September 25, 1964 Agreement are similarly written and applicable (see New York Dock Arbitration, Arbitrator Fletcher, CSX and IBEW, 1990).

The Board holds that it has no authority to write exclusions or by way of interpretation introduce exclusions not created by those negotiating the Implementing Agreement. Such exclusions could easily have been included. The provisions must be given the meaning of the negotiated language. The language does not discuss rates of pay or a Laborer's position, but the employee's total compensation. While the Claimant has no entitlement to exempt work, he has an entitlement under the protective Agreement to protection from the Carrier's transaction. When his "normal" compensation for work performed over the previous year includes regular and consistent voluntary overtime in another craft covering supervisory positions which are no longer available due to Carrier's action, Claimant is due compensation. The claim must be sustained. The Claimant is to be compensated as if he held the highest rated position his seniority would have allowed.

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 Second Division

Dated at Chicago, Illinois, this 18th day of April 1996.