Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 13651
Docket No. 13509
01-2-99-2-113

The Second Division consisted of the regular members and in addition Referee Edwin H. Benn when award was rendered.

(International Brotherhood of Electrical Workers
((System Council #16)
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway

STATEMENT OF CLAIM:

"1. That in violation of the current Agreement, Rules 26 and 48 in particular, a Communication Department Supervisor performed work of the Telecommunications Department Employees.

2. That accordingly, the Burlington Northern/Santa Fe Railroad Company be ordered to compensate Technician T. L. Whitehead for 2.7 hours at the punitive rate of pay."

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 were given due notice of hearing thereon.

At the time this dispute arose, the Claimant held an Electronic Technician's position at the Denver, Colorado Radio Shop with assigned hours of 7:30 A.M. to 3:30 P.M., Saturday - Wednesday. On January 25, 1998, a trouble call was reported.

Supervisor R. Schnell proceeded to the Denver location arriving at 5:21 P.M. Schnell was advised at 5:29 P.M. by the Telecommunications Network Operation Center in Forth Worth that the system had rebooted itself. The claim was filed on the Claimant's behalf with the assertion that the Claimant should have been called out and Supervisor Schnell improperly performed work of the craft.

Rule 26(a) provides:

> "None but mechanics regularly employed as such shall do mechanics' work as per special rules of each department."

However, there is no evidence that Supervisor Schnell did any craft work that would support our finding that the Claimant should have been called. At most, all the record shows is that Schnell went to the Denver location. The system rebooted itself. Schnell did no craft work. See Third Division Award 31076:

> ". . . The Organization is correct that the Carrier may not assign supervisors to perform Scope covered work. However, there has been no showing that the Carrier did that in this case.
>
> The Organization has failed to prove that the supervisor performed machine operator duties sufficient to constitute a violation of the Scope Rule. . . ."

While it is not clear from the record that the Carrier did so, the fact that the Carrier may have offered to pay the claim at the straight time rate rather than at the punitive rate as sought by the Organization does not change the result. Here, the Organization makes reference to an April 26, 1999 letter for the assertion that the Carrier offered to pay the claim at the straight time rate. Our review of the record shows that in an April 26, 1999 letter, the Carrier only asserted that " . . . even assuming arguendo that your claim had merit, the proper payment would be at straight time" which does not appear to be an offer to settle the claim at straight time. That statement does not appear to be an offer of settlement, but merely an argument that should the Organization prevail, the remedy should only be at the straight time rate. But, in any event, it has long been held that offers of settlement cannot be used as admissions of liability. If such offers are considered as admissions as argued by the Organization, then the parties would be very reluctant to make offers to attempt to

resolve disputes. See Hill and Sinicropi, Evidence In Arbitration (BNA, 2nd ed.), 154 ("... [I]t is a general tenet of arbitration that compromise efforts to settle a grievance will not be permitted to prejudice the party's case when the matter goes to arbitration ... a party might be reluctant to make compromise offers if it believes that any offer made could be introduced against the party as a tacit admission of the weakness of one's position."). See also, Rule 408, Federal Rules of Evidence ("Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. ... "). Indeed, if the Organization could prevail on this argument, then the Carrier would be able to argue that willingness by the Organization to accept something less than full make whole relief in a future claim can be construed as an admission by the Organization that the claim lacks merit. It is a two way street. In order to encourage parties to attempt to resolve disputes on their own, as a matter of policy, offers to settle are not considered as admissions. Parties often make offers to settle motivated by reasons other than the merits of a particular dispute (e.g., expediency, cost, etc.). For whatever reasons, this dispute did not settle. The case then had to be decided on the merits. As discussed, the facts developed on the property do not demonstrate a violation of the Agreement.

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 Second Division

Dated at Chicago, Illinois, this 11th day of December, 2001.