

**NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION**

Award No. 13713
Docket No. 13595
03-2-00-2-77

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

(National Conference of Firemen & Oilers
PARTIES TO DISPUTE: (
(Burlington Northern Santa Fe Railway Company

STATEMENT OF CLAIM:

- “1. That in violation of the current Agreement, the Burlington Northern Santa Fe Railroad Company has declined to compensate hostlers and hostler helpers for the skill adjustment for all hours paid (namely overtime continuous service and calls).
2. That, accordingly, the Burlington Northern Santa Fe Railroad Company be ordered to include the skill adjustment for all hours paid (namely overtime continuous service and call(s), commencing on April 28, 2000 and continuing until settled.”

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.

By Award dated May 2, 1994, a Joint Skill Adjustment Arbitration Committee established pursuant to Article VII of the November 27, 1991 Imposed Agreement

(referred to as the "Peterson Award") determined that there should be a sliding scale skill differential for Hostlers and Hostler Helpers. The skill differential was not part of an employee's basic wage rate; was not subject to subsequent general wage increases; and was not multiplied by one and one-half if the employee performed work outside regular working hours.

By Award dated June 7, 1994, PLB 5533, Award 5 (a dispute between the Illinois Central and the IAM, also referred to as the "McAllister Award") held that the skill adjustment applicable to the Machinists Craft was payable on vacation compensation but not payable on other types of compensation for time not worked.

The Carrier applied the skill differential from the Peterson Award to vacation days. However, a dispute arose between the parties concerning other hours paid, but not worked - specifically, holidays, bereavement leave, personal days, education/rules examination and jury duty. That dispute was decided in Public Law Board 3139, Award 175 (referred to as the "LaRocco Award").

In pertinent part, the LaRocco Award made the following findings:

* * *

"... [T]he Committee's award [the Peterson Award] is silent about when, and if, the skill differential should be paid on hours covering time not worked. Since the Committee's award is silent about the issue herein, this Board must look at the past practice of the parties.

For almost three years after the simultaneous issuance of the Committee's decision and Award No. 5 of Public Law Board No. 5533 [the McAllister Award], the Carrier applied the skill differential to all types of pay for time not worked as opposed to relegating the skill differential to just vacation pay. Whether the Carrier was aware or unaware of Public Law Board No. 5533, Award No. 5 is irrelevant. Whether the Carrier was slow in implementing the decision is also irrelevant. A past practice is established when the parties openly, notoriously and continuously adhere to a practice for a reasonable period of time. In this instance, the pay practice of the Carrier was known to both parties. The practice was uninterrupted even though the Carrier had, at some point, eliminated the

differential for time not worked (except vacations) in the machinists' craft. Lastly three years is more than a reasonable period of time.

In view of the ambiguity involved, the Carrier is mandated to continue the past practice on this property.

Inasmuch as this Board's decision rests on the finding of a past practice, this Board need not address the Organization's contention that Award No. 5 of Public Law Board No. 5533 is palpably in error or nonprecedential. Nothing in this decision should be construed to either affirm or nullify Award No. 5 of Public Law Board No. 5533.

* * *

Claim sustained. The Carrier shall pay Claimants the skill differential for all hours paid but not worked in accord with the claim. We remand this claim to the parties on the property to formulate the remedy. This Board retains jurisdiction over the case should there be a dispute about the appropriate remedy. . . ."

After issuance of the LaRocco Award and after certain payments were made, the Organization learned that employees were not compensated under the LaRocco Award for overtime continuous service and calls - which are hours paid, but not worked. The Organization sought clarification from Referee LaRocco concerning payment for those hours. After convening an executive session on April 26, 2000 and by letter dated April 28, 2000, and after the Carrier opposed the requested clarification, the Organization's request for clarification was not granted by Referee LaRocco. Referee LaRocco stated:

* * *

"The Board determined that the issue or issues raised by the Organization are not within the scope of this Board's Award and Order in Award No. 175."

This claim followed with the Organization taking the position that overtime continuous service and calls should be compensated in accord with the skill adjustment for all hours paid under the Peterson Award.

While the LaRocco Award did not specifically resolve the question before the Board (whether overtime continuous service and calls must be compensated in accord with the skill adjustment for all hours paid under the Peterson Award), for purposes of stability, the principles stated in the LaRocco Award shall govern the disposition of the claim. Specifically, those principles are: (1) the Peterson Award "is silent about when, and if, the skill differential should be paid on hours covering time not worked"; and (2) "[f]or almost three years after the simultaneous issuance of the Committee's decision . . . the Carrier applied the skill differential to all types of pay for time not worked . . . [and] the Carrier is mandated to continue the past practice on this property."

Therefore, if during the three-year period following issuance of the Peterson Award, the Carrier paid the skill differential to covered employees for overtime continuous service and calls, then, based upon the principles set forth in the LaRocco Award, the Carrier must compensate the affected employees for those payments at the applicable rate and accordingly make those employees whole commencing on the date set forth in the claim.

The Carrier's arguments do not change the result. The Carrier argues that this Board does not have jurisdiction to resolve the dispute. We disagree. Given that the Carrier opposed clarification before Referee LaRocco concerning how to compensate continuous service and calls; Referee LaRocco determined that his Award did not cover that dispute; and that Referee LaRocco determined that the Peterson Award "is silent about when, and if, the skill differential should be paid on hours covering time not worked," we find this dispute concerning overtime continuous service and calls is a new claim and we therefore have jurisdiction to resolve the dispute. The Carrier's further argument that the concept from the Peterson Award that to be eligible for compensation the hours must be actually worked and the disputed hours in this matter were not so worked does not change the result. Again, Referee LaRocco determined that the Peterson Award "is silent about when, and if, the skill differential should be paid on hours covering time not worked." While perhaps subject to debate, that determination is not palpably in error and, for purposes of stability, we are obligated to follow that determination.

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 20th day of March 2003.