Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
SECOND DIVISION

Award No. 14037
Docket No. 13890
10-2-NRAB-00002-080040

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

PARTIES TO DISPUTE: (International Brotherhood of Electrical Workers
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(BNSF Railway Company

STATEMENT OF CLAIM:

"1. That in violation of the April 1, 2004, controlling Agreement, Rule 4(a) in particular, the BNSF Railway Company compensated Telecommunications Department Electronic Technician Justin Edwards one hour at the pro rata rate on each of the dates of November 1, 6, and 16, 2006, for service performed immediately following and continuous with his regular work hours instead of compensating him at the punitive rate.

2. Accordingly, the BNSF Railway should be ordered to compensate Telecommunications employee Justin Edwards for the difference in pay between the pro rata rate and the punitive rate for the three occurrences.

3. That, accordingly, the BNSF Railway Company be ordered to cease the practice of improperly compensating employees whom perform overtime service outside bulletined hours."

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.

In November 2006, the Claimant, a Telecommunications Department Electronic Technician at the Carrier's Alliance, Nebraska Communications Shop, on three different occasions worked less than 40 minutes and was paid one hour of straight time. On November 1, the Claimant worked 35 minutes after his eight (8) hour shift and was paid one hour of straight time. On November 6, the Claimant worked 25 minutes after his assigned eight hour shift and was paid one hour of straight time. Lastly, on November 16, the Claimant worked 30 minutes after his assigned eight hour shift and was paid one hour of straight time. The Organization on his behalf here argues that the Claimant should have been paid at time and one-half rate for all such hours worked in excess of assigned eight hour shifts with a minimum of one hour at the punitive rate.

According to the Carrier, the payroll system is programmed to pay a minimum of one hour of straight time when an employee works 40 minutes or less beyond his/her scheduled eight hours. Anything over 40 minutes is paid at the time and one-half rate on a minute per minute basis. The Carrier argues that the fact that employees have historically been paid for time not actually worked does not change the controlling Agreement and does not entitle employees to pay not earned.

In support of their respective arguments, the Organization cites Rule 4(a) of the Agreement and the Carrier cites Rule 4(d).

RULE 4 – OVERTIME OUTSIDE BULLETINED HOURS

"(a) For service rendered immediately following and continuous with the regular work day hours, employees will be paid time and one-half on the actual minute basis with a minimum of one (1) hour for any such service performed.

* * *

> (d) Employees called or required to report for service outside of assigned hours and reporting will be allowed a minimum of four (4) hours for two (2) hours and forty (40) minutes or less and will be required to perform only such service as called for or other emergency work which may have developed after they were called."

The issue thus presented is whether the Agreement requires the Carrier to provide employees held over following regular work hours a minimum of one hour at straight time rate or at the punitive rate.

Although the Carrier relies on Rule 4(d) in support of its preferred interpretation, as noted, Rule 4(d) addresses employees called for duty outside regularly scheduled hours. It has no application to the Claimant's situation. While not applicable, however, examination of those terms, as with any cognate provisions, might reasonably be expected to illuminate the meaning of Rule 4(a). But Rule 4(d) does not employ parallel construction - it leaves no clues, avoiding reference to either straight time or time and one-half and instead converting straight time hours to overtime pay. Four hours are thus expressed as the equivalent of pay at time and one-half for 2 hours and 40 minutes.[1] So parsing Rule 4(d) in order to reveal the intended meaning in a related provision is non-productive. Clearly, Rule 4(d) on its face does not support the interpretation of Paragraph 4(a) urged by Carrier. In setting forth the unqualified phrase "minimum of one (1) hour" the parties left the nickel on its edge. Rule 4(a) is patently ambiguous.[2]

As the parties are aware, it is axiomatic that the plain meaning of Agreement language determines the rights and obligations of the contracting parties. Where the language is susceptible of more than one interpretation, resort to extrinsic sources is appropriate in aid of clarification. Obviously, while no amount of past practice

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[1] The Carrier argues that it is inconsistent for the Organization to claim the punitive rates under Rule 4(a) while not asserting the same claim under Rule 4(d). The argument is not persuasive. While the unadorned reference to one hour under Rule 4(a) may reasonably refer to the punitive rate in context, no plausible claim for time and one-half can be made relating to the plainly quantified "minimum of four hours" under Rule 4(d).

[2] If the parties had intended the treatment urged by Carrier for compensating work in conjunction with continuous service it appears to the Board to have been a simple matter. One easy possibility: "For service rendered immediately following and continuous with the regular work day hours, employees will be paid time and one-half on the actual minute basis with a minimum of one (1) hour of straight time for any such service performed." Or they may have recited pay on an actual minute basis "with a minimum of one (1) hour for forty (40) minutes or less for any such service performed."

inconsistent with clear contract language may operate to vary such terms, "Evidence of custom and past practice may be introduced for any of the following major purposes: . . . (2) to indicate the proper interpretation of ambiguous contract language. . . ." Elkouri and Elkouri, How Arbitration Works, 990 (5th ed. 2003) at 630. "Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not changed during contract negotiations." Ibid, citing Metal Specialty Co., 39 LA 1265, 1269 (1962) (Volz, Arb.)

The Organization produces abundant evidence, unchallenged by the Carrier, demonstrating that for several decades the recognized practice on the property for the minimum payment for overtime continuous with regular work hours in the Telecommunications Department was one hour at the punitive rate. The record further indicates that effective with the matter arising in the instant arbitration, the Carrier unilaterally changed its practice. In the end, with considerable ambiguity in Agreement language addressing the rate of pay for work immediately following and continuous with the regular work day hours, past practice provides the most reliable basis for decision making. That practice supports compensation based on a formula of time and one-half, not straight time, for work beyond the normal work day with a minimum of one hour at overtime rate for any such service performed.

The Carrier is directed to compensate the Claimant for the difference in pay between the pro rata rate and the punitive rate for the three occurrences at issue.

Injunctive Relief NRAB lacks authority to grant such relief.

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 Second Division

Dated at Chicago, Illinois, this 28th day of December 2010.