

Award No. 16820
Docket No. MW-17754

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

(Supplemental)

David H. Brown, Referee

PARTIES TO DISPUTE:

**BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY**

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when, on January 5, 6, and 7, 1967, it used a section laborer junior to Mr. E. E. Rector for overtime service and then allowed the resultant claim at the straight time rate instead of at the time and one-half rate.

(System file M-1208-67/10-3.)

(2) Section Laborer E. E. Rector now be allowed thirty-five (35) hours' pay at one-half of his straight time rate because of the violation referred to in Part (1) of this claim.

EMPLOYEES' STATEMENT OF FACTS: The claimant was regularly assigned as a section laborer on Section Gang Y-5, headquartered at Alliance, Nebraska. He was the senior section laborer assigned to the gang.

The factual situation involved in this dispute is fully and accurately described in letters reading:

"1-16-67

Mr. L. D. Scott
Local Chairman
BMWE

E. E. Rector will no doubt write you and place a claim for overtime. He was left behind at Alliance to take care of Yards while the rest of us went to the wreck at Natick — my instructions given me by the dispatcher was to leave the oldest man — in this case was 'Ernie' Rector — he told me he was going to claim overtime and I told him I would write you and confirm the fact that he was left behind.

Sincerely yours,

/s/ Alfred P. Wyland
Section Foreman
Box 756
Hemingford, Nebr."

CARRIER'S STATEMENT OF FACTS: On January 5, 1967, Section Foreman A. P. Wyland and his section gang were called from Alliance, Nebraska to Natick, Nebraska, by H. W. Wolcott, Roadmaster, to assist in cleaning up a derailment at Natick, Nebraska. Foreman Wyland, Laborers G. D. Ward, Fred Alvarado and Paul Sanchez worked continuously from 10:30 P. M., Thursday, January 5, 1967, until 6:00 P. M., Friday, January 6, 1967. They were released from duty at 6:00 P. M., January 6, 1967, afforded hotel accommodations to obtain rest and again worked from 5:00 A. M., Saturday, January 7, and returned to Alliance at 8:30 P. M. that same day.

E. E. Rector, who was senior to one of the section laborers used on the Natick, Nebraska derailment, was not called to assist in cleaning up this derailment. Mr. Rector was left at Alliance, Nebraska to perform work around the yards.

In total, 35 hours of work were required to clean up the derailment at Natick, Nebraska. The Carrier compensated Foreman Wyland, Laborers G. D. Ward, Fred Alvarado, and Paul Sanchez for 27 hours at the punitive rate of time and one-half and 8 hours at the pro rata rate, in accordance with the provisions of Rule 39.

Claims were filed by the Organization on behalf of Foreman Wyland, Laborers G. D. Ward, Fred Alvarado and Paul Sanchez for the difference between the punitive rate and the pro rata rate paid for the 8 hours, 7:30 A. M. to 4:30 P. M. on January 6, 1967. However, these claims were not progressed but were permitted to expire under the time limit rule because the Union recognized that claimants were properly paid under Rule 39.

The Carrier admitted error in using an employe junior to Mr. Rector for this clean-up work. In handling this claim on the property, the Carrier reimbursed Mr. Rector an additional 27 hours at his pro rata rate. Mr. Rector worked his regular 8-hour assignment on January 6, 1967, and received the pro rata rate for that period, or a total of 35 hours for 8 hours worked.

In filing this claim, the Organization seeks to have Mr. Rector compensated an additional 35 hours' pay at one-half of his straight time rate.

In effect, the Organization claims the punitive rate for the 8-hour regular work period of Mr. Rector on January 6, 1967, for which he was paid his pro rata rate and for which the junior employe was paid pro rata rate, and they also seek punitive pay for the remaining 27 hours of the 35 hours that were required to clean up the derailment at Natick.

OPINION OF BOARD: In this case the Carrier admittedly violated Rule 40(a) of the Agreement when it assigned overtime work to an employe junior to Claimant. The sole issue is whether Claimant should receive straight time or time and one-half for the lost opportunity to work.

The precedents in cases of this nature are illustrated by Awards 7062 and 3277, both awards by Referee Edward F. Carter and reaching opposite results on comparable facts.

We endorse the reasoning of Referee John H. Dorsey in Award No. 13738: "The loss suffered by an employe as a result of a violation of a collec-

tive bargaining contract by an employer . . . is the amount the employe would have earned absent the contract violation."

Claimant has proved he would have earned twenty-seven (27) hours of overtime here had the Agreement been respected. His claim will be sustained to such extent.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated.

AWARD

Claim sustained for pay differential for twenty-seven (27) hours.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of THIRD DIVISION

ATTEST: S. H. Schulty
Executive Secretary

Dated at Chicago, Illinois, this 19th day of December 1968.