

CORRECTED

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26431
Docket Number MW-26313

Elliott H. Goldstein, Referee

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way **Employes**
(Consolidated Rail Corporation

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

(1) The Agreement was violated when B&B Foreman W. S. Gresham was not called and used to perform overtime service on his assigned position (foreman of Gang 318) on October 23, 24 and 27, 1982 (System Docket CR-186).

(2) Because of the aforesaid violation, **B&B** Foreman W. S. Gresham shall be allowed seventeen (17) hours of pay at his overtime rate for October 23 and 24, 1982 and he shall be allowed pay at his overtime rate for **an** equal number of overtime hours worked by Gang 318 on October 27, 1982."

OPINION OF BOARD: **Claimant**, a **B&B** Mechanic in the Bridge and Building Department, was assigned as a temporary Foreman with Gang 318 at the time this dispute arose. The parties disagree as to the facts from that point on, however.

According to the Claimant's statement, on Thursday, October 21, 1982, Assistant Superintendent Green informed the Claimant and the other men of this gang of the availability of overtime work for that evening. Claimant's statement indicates that he told Supervisor Green he did not wish the overtime work that day because his wife was ill and he wanted to go home to assist her. Claimant worked his regular shift on Friday, October 22, 1982. and was assigned to perform maintenance work with his gang on Bridge 59.36 at Spencer, Indiana. Not until Monday, October 25, 1982, did Claimant learn that Carrier had required **B&B** forces to perform overtime work on Saturday, October 23, 1982, and Sunday, October 24, 1982, Claimant insists.

With **reference** to the October 27, 1982. Claim date, Claimant states that his gang, 318, was sent to assist Gang 310 to work on Bridge 115.90 at Petersburg, Indiana. As the end of the regular workday approached, the crane operator and two other **employees** were told to take the crane they were using to Spencer for work the following day. Claimant was instructed to remain at Bridge 115.90 to assist in the completion of work at that location. At **5:30** P.M., Claimant was released to go home; he now claims that the remainder of Gang 318 performed overtime work until late **in** the evening in connection with delivering the crane to Bridge 59.36 and preparing for the following day's work.

Carrier's version of the facts differs considerably from that of the **Organization's**. carrier **insists**, first, that with regard to the October 23 and 24, 1982, Claim dates, Supervisor Green advised the Claimant and the other men of the gang that overtime was available for October 21, 23 and 24, 1982. According to the Carrier, Claimant advised his Supervisor that he did not want any of these overtime days because of his wife's illness.

Moreover, Carrier notes that on October 27, 1982, Claimant did work 2 1/2 hours overtime when he supervised the employees remaining at Bridge 115.90, and he therefore has no demand rights to additional overtime.

Carrier argues further **that** the entire Claim must be denied because the Organization has not overcome its burden of proving or showing how the Carrier allegedly violated the Rules of the applicable Schedule Agreement. The mere filing of a Claim without supporting evidence is not enough, Carrier reminds the Board. I" the instant case, Carrier's version of the facts suggests that Claimant made it clear that he was **not** available for overtime on two of the dates in question, and that Claimant was **in** fact paid overtime for the time he worked on October 27. Accordingly, this Claim must be denied in its entirety.

The Organization **maintains** that Claimant did not decline the opportunity to perform overtime work on October 23 **and 24**, 1982, and that his handwritten statement so indicating is the only evidence on this point. Carrier failed to present contrary evidence from Supervisor Green, the Organization points **out**, and thus, Claimant's statement should be credited. In addition, the fact that Claimant was not available for overtime work on October 21, 1982, did not render him automatically unavailable for overtime work on subsequent days, the Organization asserts. Finally, the Organization stresses that, on October 27, 1982, the uncontroverted facts show that Claimant was required to suspend work while junior employees performed overtime work at Bridge Nos. 115.90 and 59.36. Therefore, this Claim must be sustained.

Our review of the record indicates that there is a significant factual dispute as to whether or not the Claimant was informed of the availability of overtime work on October 23 and 24, 1982, and whether he accepted or declined the offer. Unquestionably, there is a burden of proof involved, and numerous Awards have spoke" to this issue. (See, e.g., Public Law Board No. 2366, Award 27 and cases cited therein.) Herein, notwithstanding the Carrier's assertions that Claimant was offered, and declined, overtime on the dates in question, we find nothing presented on the property which purports to be a statement from Claimant's Supervisor so stating. The only item in the record is Claimant's handwritten statement, and we will credit his version of the events at issue, absent any contrary statement on behalf of the Carrier. That being the case, we cannot agree with Carrier's assertion that Claimant was unavailable to work on October 23 and 24, 1982. Therefore, we will sustain that portion of the Claim.

With reference to the October 27, 1982, Claim date, however, Claimant has failed to show that there was any need or reason for him to work overtime hours beyond those already worked on that day. From the record, it appears that the junior Foreman worked, as did Claimant, 2 1/2 hours overtime. Accordingly, that portion of the Claim is denied.

As a final matter, we note that the Carrier has urged that, in the event this Claim is sustained, compensation should be based only on straight time. However, had Claimant been called and performed the work involved, he would have been paid, by operation of the terms of the Agreement, at the overtime rate. This Board is aware that there are cases in which only the pro rata rate was awarded as the measure of damages, but believes that the better reasoned and more persuasive cases have concluded that the loss suffered by an employee as a result of a violation of the Collective Bargaining Agreement is the amount the employee would have earned absent the **contract** violation. (Compare, Third Division Awards 13738, 19447, 21767 with Third Division Awards 3955, 9748, 10990.) Therefore, we will sustain the Claim for damages as requested with respect to the October 23 and 24, 1982, Claim dates.

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 Employees involved in this dispute are respectively Carrier and Employees 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.

A W A R D

Claim sustained in accordance with the Opinion.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest::


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 24th day of August 1987.