NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26508

THIRD DIVISION Docket Number MU-26185

Robert W. McAllister, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(National Railroad Passenger Corporation
(Amtrak) - Northeast Corridor

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

(1) The Carrier violated the Agreement when it assigned Trackman B. Hulse instead of Truck Driver T. Lamb to perform overtime service on December 18, 1982 (System File NEC-BMWE-SD-628).

(2) Truck Driver T. Lamb shall be allowed ten and one-half (10 l/Z) hours of pay at his time and one-half rate because of the violation referred to in Part (1) hereof."

OPINION OF BOARD: On Friday, December 17, 1982, the Carrier notified all of the Members of Gang M-872 to report for overtime on Saturday, December 18, 1982. The gang's regularly assigned truck driver accepted this overtime. He did not report for duty at his scheduled time, however, nor did he notify the Carrier he would be absent. Instead of calling out another truck driver for the work, the Carrier used a trackman from Gang X-872 to drive the vehicle. The trackman assigned was a qualified operator, but he did not at the time possess truck driver seniority.

The Organization contends the Claimant should have been used for the work. He was a qualified truck driver with seniority, and he enjoyed a preferential right to the overtime work by reason of Rule 55, which reads:

> "(a) Employes residing at or near their headquarters will, if qualified and available, be given preference for overtime work, including calls, on work ordinarily and customarily performed by them, in order of their seniority.
>
> (b) The provisions of the Rule 55 will not apply to employees at locations where it has been agreed to stagger the work week in accordance with the provisions of Rule 38; employees at work during their bulletined working hours, may be used in emergencies on other than their own section and may complete such emergency work without being considered as violating the seniority rights of employes assigned to the section involved who are off duty an their regular assigned rest days.

> (c) When it is necessary to call employees for service in advance of their hulletined working hours, or after men have been released from work commenced during bulletined hours, the same preference will be given on rest days as on other days to employees residing at or near headquarters who are qualified and available."

Under the circumstances present on Saturday, December 18, 1982, the Carrier should have called the Claimant For the overtime work when the driver who had been scheduled failed to show up instead of assigning the driving to a trackman who did not have seniority. The Claim will be sustained.

The Claim seeks payment at the time and one half rate. The Organization contends that time and one half is appropriate because it is the rate the Claimant would have been paid if the had been called. Carrier argues that appropriate payment should be straight time because the rate for work not performed is straight time. Both have cited Awards in support of their conclusions.

The Carrier particularly urges the Board adopt Award 14, PLB 3932, involving a case on this property with this Organization as controlling. In that Award, the Board stated:

> "The prevailing weight of railroad arbitral authority holds that the punitive rate is not available for work not performed."

The Board does not find that Award persuasive because, among other things, the generalized statement is not supported in any fashion by any authority.

On the other hand, the Organization has cited a number of Awards which conclude that time and one half payments are appropriate. In Third Division Award 19947, the sole issue before the Board concerned the rate to be allowed in a claim the Carrier conceded. The Board stated:

> "Carrier urges adherence to the straight time rule in the 'contract' cases arguing that the overtime rule in the 'make whole' cases is predicated upon the assumption that the employee would have worked had he been given the opportunity. This is not sound, Carrier says, because there is no guarantee that claimant would have worked had he been called, and to say otherwise would be pure supposition.

> These contentions are not wholly without merit and Carrier's presentation in general is an impressive one. Also, we frankly acknowledge that there is a credible rationale to support each line of the conflicting authorities. We are concerned, though, that the straight time authorities are characterized by an undue absorption in the historical purpose of overtime, as well as a strained search of the contract itself to find specific guidelines on the measure of damages. Overtime rates evolved both from public laws and negotiation at the bargaining table, but we fail to see in this history any express or implied prohibition against taking the loss of overtime into account, along with the loss of straight time, when Carrier's violation of an employe's contractual rights to work is under appraisal. Also, we know that many things are left unsaid in a collectively bargained agreement and that the measure of damages for a contract violation is one of the most common among them. On balance, therefore, we are skeptical about the rationale of the straight time authorities for we believe it may contain underlying defects which are absent from the overtime rationale. Accordingly, we shall adhere to the ruling laid down in Award 13738 and sustain the claim."

Third Division Award 21767 had the opportunity to reconsider the rationale of Third Division Award 19947. Therein, the Board stated:

> "In argument to this Board, Carrier sought to show what it considered to be the inconsistency in our approach to the entire damage question, but we do not - in this Award - seek to reconsider that entire topic. If the Claimant had been called to work, he would have been compensated at the punitive rate. Under those circumstances, and consistent with Award 19947, we will sustain the claim."

There have been a number of Awards adopted since Third Division Award 21767 which reached the same result. The most recent being Third Division Award 25601.' In that decision, those Awards relied on by the Carrier and the more than seventy-five Awards listed by the Organization were reviewed. In its conclusion, the Board stated:

"Better reasoned opinions remedy a" overtime violation with a make whole payment. Here the evidence shows that Claimant, if he had worked, would have earned 8 hours and 20 minutes at time-and-one-half. There is no element of retribution or punishment in such a remedy. Carrier and Claimant are placed in the same position they would have been had not Carrier violated the Agreement. Payment would have been made at the overtime rates. It is Claimant who would be penalized if he were reimbursed at straight time or only for actual hours worked. The payment to the junior employee is the result of the Carrier's improper assignment and does not make a remedy which makes Claimant whole a penalty.

On the basis of the foregoing authority, the Board concludes that payment of this Claim at the time and one half rate is appropriate.

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.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 9th day-of September 1987.

CARRIER MEMBERS' DISSENT
TO
AWARD 26508, DOCKET MW-26185
(Referee McAllister)

In sustaining this claim, the Majority usurped two sound principles of this Board, i.e., stare decisis and logic.

While the Majority correctly summarizes the facts in this case, they err in evaluating the "circumstances present" on the day of the alleged violation. Given the failure of the regular truck driver who had accepted the rest day assignment in question to report or mark off in advance, the carrier could not logically or contractually be expected to call in another truck driver while the fully assembled gang sat around. Further, carrier stated on the property without rebuttal that claimant was not, in essence, available given the geographic distance between the work site and home. The fact is that the overtime rule, Rule 55 was complied with and Rule 58, the preservation of rate rule which, temporarily, specifically allows carrier to assign qualified and available employees to different classes of work as long as the rate paid was in accordance with Rule 58. This is exactly what was done in this case. The Majority ignored the factual situation and illogically held that the carrier is obligated to call in another employee despite the distance from the starting point, despite the fact that other members of the crew would be just idlily killing time while carrier would be obligated to pay the overtime rate and lose valuable man hours. So much for logic.

A second argument advanced on the property, in considerable detail and heavily documented, was the carrier paying overtime call violations at the straight time rate. Not only was the practice well documented, but that documentation was sufficient basis for the Neutral in Award 14 of Public Law Board 3932 to order the Carrier to pay only the straight time rate as opposed to the overtime rate. So much for Stare Decisis.

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