NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26690

THIRD DIVISION Docket Number MW-26286

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 a junior foreman to perform overtime service on May 21, 1983 instead of calling and using Foreman J. Yager who was senior, available and willing to perform that service (System File NEC-BMWE-SD-719).

2. Foreman J. Yager shall be allowed eleven and one-half (11 1/2) hours of pay at his time and one-half rate."

OPINION OF BOARD: On Friday, May 20, 1983, Claimant, Foreman of Gang Z-102 headquartered at Carrier's Philadelphia Division Penn Coach Yard, called in sick. Sometime later that same day, Carrier scheduled the compactor and ballast regulator assigned to Gang Z-102 to work on Saturday, May 21, 1983. That evening, Carrier contacted a junior employee and asked him to work with Gang Z-102 on overtime on Saturday. Collins worked eleven and one-half hours that day.

The Organization contends the Agreement was violated when Carrier did not call the Claimant for the Saturday work and that he should now be paid an amount equal to that which he would have earned had he been used. The Carrier contends it was proper to assume that Claimant's sickness on Friday made him unavailable for work on Saturday and, thus, the Claim is without merit. Also, the remedy sought is said to be improper because assertedly, the accepted rate of payment for work not performed, is straight time.

There is no dispute as to the facts in this case. Were it not for the fact that the Claimant reported off sick on Friday, he would have been entitled to work with Gang Z-102 on overtime on Saturday. Both parties have submitted a list of prior Awards in support of their positions. We find Third Division Awards 9436 and 15640 by the Organization to be persuasive.

In Third Division Award 19260, the Board considered a case quite similar to this one. In that case, an employee marked off sick on a Friday and stated he would return to his assignment on Monday. This Board concluded it was improper for the Carrier to assume that an employee was unavailable for overtime assignments on Saturday and Sunday.

In Third Division Award 19954 dealing with "carrier assumptions of unavailability," the Board stated:

"Carrier's contractual obligation to call Claimant was not subject to avoidance or evasion on the predicate of Carrier's assumption."

Third Division Award 22446 holds:

"Even if it can be said that the Employe was not available on September 5, that does not compel a conclusion that he wasn't available on the next day Carrier should have, at least, attempted to contact him on the 6th."

In adopting the foregoing, we reject Carrier's contention that it had ". . . every legitimate reason to believe that he would not be available to work overtime on the very next day, Saturday, May 21, 1983" because reporting sick one day does not necessarily suggest, without further advice, that the employee will not be available for work the next day.

Accordingly, it is our view the Agreement was violated when Carrier failed to call the Claimant to work on Saturday, May 21, 1983. Regarding the remedy for this violation the Carrier contends the proper rate wherein no work is performed is the straight time rate. In Third Division Award 26508 involving the same parties, we reviewed the Carrier's contention and concluded that time and one-half was the appropriate rate where the lost work opportunity would have been paid at the time and one-half rate.

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;

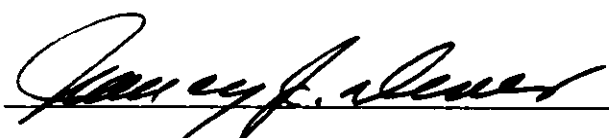
That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

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 23rd day of November 1987.

CARRIER MEMBERS' DISSENT
TO
AWARD 26690, DOCKET MW-26286
(Referee McAllister)

Once again, the Majority has not only reached an incorrect solution to a given set of facts, but has studiously ignored the time-honored doctrine of stare decisis. Albeit, the Majority did refer to Award 26508 of this Division in sustaining this dispute, the problem with Award 26508 is that the same Majority did then, as it has now, ignored past practice and a precedent setting Public Law Board Award, i.e., Award 14 of PLB 3932 (involving the identical parties as here in dispute) supporting the practice of settling claims involving an incorrect application of the overtime rule for the straight time rate.

With an accepted, well documented past practice and an award supporting that practice, a reasonably prudent person would logically assume that in settling minor disputes involving incorrect applications of the overtime call rules, that appropriate penalty for time lost (but not worked) would be at the straight time rate.

The doctrine of stare decisis has been upheld by numerous other majorities of the Adjustment Board, for instance, in Second Division Award 11323 the majority held that:

> "In summary, the Board notes the essential issues and the parties are the same as those involved by this Division when rendering Awards 11108 and 11109. Therefore, and after consideration of the Organization's vigorous dissent to those Awards, this Board again concludes that the resolution of disputes between the same parties concerning the same basic issues should not be disturbed by a subsequent holding unless it is found that the initial Award(s) were palpably in error. Predictability of Awards between the same parties tends

to facilitate an orderly resolution of disputes. Accordingly, given the foregoing, the Claim is denied."

In Third Division Award 26222:

"Nothing presented herein persuades us that those Awards are palpably erroneous. Thus, consistent with the time honored doctrine of stare decisis this Claim must also be denied."

In Third Division Award 26235:

"This Board has carefully reviewed the record of this case, including the Agreement language in question, as well as applicable Awards. We must conclude that given the language in question, past practice on the property and the existence of a prior Award involving the parties to this dispute, Carrier's position is the more persuasive. By custom, history, and practice, overtime has not been paid in this instance for the time not worked."

In Third Division Award 26305:

"The records of this Division and others are legion with Awards which hold that once a basic interpretative question is answered it should stand. Typical of this line of thinking is Third Division Award 13135 which stated:

> 'In order that our awards will be of benefit to the parties, we feel that we should follow precedent cases, wherever and whenever it is possible. The utility of our decisions is lost if we bounce back and forth between various theories on the same general subject.'

On the other hand, the Board has overturned Awards that are 'palpably erroneous.'

An Award is not palpably erroneous merely because another Referee, when faced with the same question, would have decided the matter differently if it were he who faced the question in the first instance."

In Third Division Award 26534:

"First, although dissented to by the Organization in both cases, the issue in this case has been recently decided in Third Division Award 26235 and Public Law Board 3932, Award No. 14 holding that the appropriate remedy for improper assignment of overtime work under this Agreement on this property is payment at the pro rata rate. For us to agree with the Organization in

this case, we would be required to ignore those prior Awards. The Organization's arguments in this case essentially reiterate the basic arguments made in the prior cases. We can find no compelling reason in this record to disregard the prior Awards that have decided this identical issue and have given finality to the dispute. See Fourth Division Award 4527."

By ignoring the doctrine of stare decisis, it could be assumed that the Majority was determined to impose its own brand of industrial justice, but then that would not be a correct assumption, particularly in view of the same neutral's decisions in Second Division Awards 10522, 10547, 10549 and 10962 wherein it was held that the agreement was violated but the appropriate remedy was the pro rata rate even though if the Claimants would have done the work they would have been entitled to the time and one-half rate, as claimed.

Obviously, we do vigorously dissent.

Robert L Hicks
R. L. Hicks

M. W. Fingerhut
M. W. Fingerhut

Michael C. Lesnik
M. C. Lesnik

P. V. Varga
P. V. Varga

James E. Yost
J. E. Yost