Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 26934
THIRD DIVISION Docket No. CL-26384
88-3-U-3-97

The Third Division consisted of the regular members and in addition Referee Eckehard Muessig when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, (Freight Handlers, Express and Station Employes
(The Monongahela Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-) Claim submitted in favor of Mr. G. P. Bokoch (249-l-83)

(a) Please allow difference in Rate of Pay as outlined below for Overtime Driving Service performed as follows, which rate of pay was allowed in accordance with notice of R. D. Jones, Director Labor Relations and Personnel, Notice dated September 7, 1982, effective September 10, 1982.

(b) This practice is in violation of Clerks' Agreement, Rule entitled 'Preservation of Rates' and past practice which has existed on the Monogahela (sic) Railway Company. Also a violation of Extra List Agreement dated 11/2/82.

(c) Date and Time of Service: 9/25/82 - 1:00A-6A & 11:15A-3P
Hours of Service: 9. 3 hours - Punitive
Compensation: M-28 Rate - $155.12
Compensation Claimed: M-31 Rate - $172.35
Difference in Earnings (Amount of Claim)
$17.23"

FINDINGS:

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

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes 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 waived right of appearance at hearing thereon.

The key issue in this dispute is the proper rate of pay for a regularly assigned employee who volunteered for driving service. The claim arose after the Carrier sent a letter to the Organization which in pertinent part reads:

"A misapplication of Articles IV and V of our Memorandum of Agreement dated November 2, 1981, relating to the establishment of an extra list effective November 30, 1981, has just recently come to my attention when I was preparing for a meeting scheduled with Vice General Chairman Giles on September 2, 1982.

The Memorandum of Agreement in Article V provides for the participation of employees in the overtime calls for driving service under Article IV(b), when no extra employees are available at the pro rata rate of pay, upon their filling of a written request to be called for this service based on their seniority. In the application of this provision, regularly assigned employees who have been used at their own request for this service apparently have been paid in error at the rate of their regular assignment rather than at the established rate of the driving service."

The claim is based primarily on the Organization's contention that the Carrier violated Rule 39, Preservation of Rates, which reads:

"Employes temporarily or permanently assigned to higher rated positions shall receive the higher rates while occupying such positions; employes temporarily assigned to lower rated positions shall not have their rates reduced.

A temporary assignment contemplates the fulfillment of the duties and responsibilities of the position during the time occupying same, whether the occupant of the position is absent or whether the temporary assignee does the work, irrespective of the presence of the regular employe. Assisting a higher rated employe due to temporary increase in the volume of work does not constitute a temporary assignment."

The Carrier essentially contends that Rule 39 was intended to protect employees who are temporarily or permanently assigned to either a higher or lower rated position so that if assigned to a higher rated position, the employee would earn the higher rate and if assigned to a lower-rated position, the employee would be guaranteed the higher rate of the position from which he had been assigned. Thus, what the Carrier is arguing is that because the Claimant volunteered to work the position at issue, he was not "assigned" by the Carrier and, therefore, Rule 39 was not violated. It then relies upon the Extra List Agreement, which was signed on November 2, 1981. That Agreement states that its intent was to permit employees who desire to voluntarily work overtime, the opportunity to do so. In this respect, it points to that part of the Agreement which reads:

> "Employees desiring to be called for overtime service "ill make their desires known in writing with the Superintendent, with copy to the Local Chairman." (Underscoring Added)

Moreover, it argues that the final paragraph of the Agreement nullifies any prior understandings because it states as follows:

> "This Memorandum of Agreement shall become effective November 2, 1981 and shall amend, supersede and cancel any prior agreements, rules, practices or interpretations however established which conflict therewith. It "ill also continue in full force and effect unless changed in accordance with the provisions of the Railway Labor Act, as amended." (Underscoring added)

The Board has carefully reviewed the record, including the Awards both parties have relied upon in advancing their respective positions. We conclude, following this review, that the claim must be sustained.

The Carrier's advocate before us has argued with great skill and forcefulness. However, he cannot overcome the plain language of the pertinent Rule and Agreement provisions that apply to the facts of this case.

The Extra List Agreement essentially provides a new source of applicants. There is no language therein which states that work will be compensated at a lower rate. Moreover, the Extra List Agreement does not speak to Rule 39 in any specific manner. Clearly, had the parties intended to nullify that Rule or to supersede it, appropriate language to accomplish that purpose would have been included in the Extra List Agreement.

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 30th day of March 1988.