

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(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 machine operator to perform overtime service on January 24, 25, 26, 30, 31 and February 1 and 2, 1984, instead of using Machine Operator J. Nunes, who was senior, available, qualified and willing to perform that service (System File NEC-BMWE-SD-993).

(2) Machine Operator J. Nunes shall be allowed seventy (70) hours of pay at his time and one-half rate."

FINDINGS:

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

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees 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 Claimant herein originally sought pay for 70 hours at time and one-half rate for work performed by a less senior employee. The record shows that the Carrier and the Organization, during the claims handling procedure on the property, agreed that the Agreement was violated with the understanding that the appropriate time period on which to base compensation is 60 hours.

The sole issue before the Board, therefore, is whether the 60 hours is properly payable at straight time rate, or at the rate of time and one-half. In confining the dispute to this single point, the parties once more venture into a controversy which has been reviewed and decided in a seemingly

unending chain of disputes. The Board fully recognizes that innumerable Awards have ruled in favor of straight time as an appropriate remedy, and innumerable Awards have ruled in favor of the time and one-half pay remedy. Counting the number of Awards or reviewing the arguments in favor of either position would be to no avail, except to highlight one obvious conclusion. This conclusion is that, in general, agreement language does not clearly and unambiguously specify which position is correct. The decisions are made on various bases such as precedent, practice and/or the diverse views as to the purpose of punitive pay (reward for extra hours of work) in contrast with a make-whole theory to provide compensation in lieu of lost work opportunity.

Further, many Awards recognize a general consistency which exists within single Divisions of the Board. For example, the Organization cites two Third Division Awards, in which this Referee participated, sustaining time and one-half pay based on the "great weight of previous Awards of this Division" (Award 26448) and "in keeping with the predominant practice on this Division" (Award 25968). There are, however, other Third Division Awards which direct straight time payment. On the other hand, the Carrier cites five Second Division Awards, in which this Referee also participated, providing for straight time pay "in keeping with established precedent" on the Division (Award 8708), and "previous reasoning and decision" (Award 7747). See also Awards 8254, 7504 and 7356.

To further show lack of clear direction, the Organization and the Carrier received five separate Third Division Awards in 1987, each addressing the issue, directly or indirectly, with mixed results. Award 26508 examined Third Division precedent generally and sustained the claim for time and one-half. This was echoed in Award 26690. To the contrary, Award 26235 determined that straight time payment was appropriate, given "past practice on the property," among other factors. Award 26456 also sustained the claim at straight time, but without providing any reasoning therefor. Finally, Award 26534 examined the issue in detail, particularly as it applies to the parties' particular circumstances, and ruled in favor of payment of straight time.

The particular circumstances involving the parties are significant. As pointed out by the Carrier, many claims have been settled on the property where the settlement provided straight time only for missed overtime work. The Carrier argues that this has been consistent practice. In rebuttal, the Organization points to the inherent danger of relying on on-property resolutions, which may be of a compromised nature and thus not applicable to any underlying principle. Upon examination of the record, however, the Board finds that many of these on-property resolutions demonstrated no evidence of compromise settlements.

In sum, this Board continues to recognize these diametrically opposed views as represented by a long history of consideration of the question. The Board cannot clarify the matter in the absence of unequivocal agreement language, obviously not present. The history of this issue on the property, however, as contrasted to Third Division consideration generally, leads to the conclusion that the payment of straight time is the more consistent result, and in this concurs with the reasoning in Third Division Award 26534, as follows:

"... we cannot ignore a rather substantial history exhibited by the parties since the establishment of the 1976 Agreement wherein numerous similar disputes in the past have been resolved by payment at the pro rata rate. We do not view the numerous dispositions of prior disputes in the fashion accomplished by the parties under the circumstances of this case as the type of settlement agreements that should not be considered by us out of a danger that such consideration might discourage the parties from entering into settlements in the future
....

... we are compelled to conclude that since 1976 an interpretation has evolved by litigation and practice wherein the remedy for an improper overtime assignment under this Agreement on this property is to provide for payment in accord with the Carrier's position at the pro rata rate rather than the punitive rate."

This Finding and Award conform to the Statement of Claim as originally provided to the Board. Thus, the claim is sustained, but only to the degree that the proper payment to the Claimant is 60 hours pay at straight time, if not previously allowed.

A W A R D

Claim sustained in accordance with the Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dover - Executive Secretary

Dated at Chicago, Illinois, this 17th day of May 1988.