

Form 1

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 29505
Docket No. MW-29890
93-3-91-3-266

The Third Division consisted of the regular members and in addition Referee Hugh G. Duffy when award was rendered.

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 the Carrier assigned junior Welder C. Miller instead of Welder R. I. Harding to perform overtime welding work on the TCOM unit working between Mile Posts 290 and 300 on the Latrobe Sub-Division on October 31, November 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16 and 17, 1989 (System Docket MW-1018).

(2) Mr. R. I. Harding shall be compensated at the appropriate overtime and double time rates for all wage loss suffered as a consequence of the violation referred to in Part (1) above."

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.

On October 31, November 1, 2, 3, 6, 7, 8, 9, 10, 13, 14, 15, 16 and 17, 1989, the Carrier assigned a junior Welder instead of the Claimant to perform overtime welder repair work on the Pittsburgh mainline on the Latrobe Sub-Division.

The record contains a statement by the Claimant in which he asserts that he was never offered the work in question. The Carrier asserts that Claimant was offered the work but declined it; however, it offered no statements by supervision to buttress its contention. After reviewing the entire record, we conclude that the Organization has established a prima facie case that Claimant's seniority entitled him to the work, and that the Carrier did not bear its burden of proof when it raised the affirmative defense that he had been offered and had refused the work.

The question then is what the remedy should be. The Carrier argues that there should be no monetary damages since Claimant was fully employed on the fourteen claim dates and had earned thirty hours of overtime during that period. The Organization argues that he should be paid eight hours overtime and four hours double time for each day listed. We do not agree with either of the parties' positions.

In deciding this issue, the Board is guided by Third Division Award 26431, between the parties and directly on point. There the Board held:

"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."

We therefore conclude that Claimant should be made whole, and compensated at the overtime rate for all work he could have performed if properly utilized under the Agreement. In determining the number of hours for which the Claimant is entitled to compensation, the Carrier is directed to examine the payroll records for the dates in question and make the appropriate adjustment in the Claimant's compensation.

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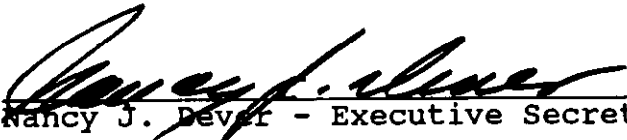
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A W A R D

Claim sustained in accordance with the findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 3rd day of February 1993.