

NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISIONAward No. 30467
Docket No. CL-29920
94-3-91-3-308

The Third Division consisted of the regular members and in addition Referee James E. Mason when award was rendered.

PARTIES TO DISPUTE: (Transportation-Communications International
(Union
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(Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM:

"Claim of the System Committee of the Organization
(GL-10598) that:

- (a) Carrier violated the provisions of the current Clerks' Agreement at Los Angeles, CA, on March 14, 1990, when it failed to pay H.M. Dix for additional time on duty of Position No. 6330, and
- (b) H.M. Dix shall now be compensated 30 minutes' pay at the time and one-half rate of Transportation Service Specialist Position No. 6330 for March 14, 1990, in addition to any compensation Claimant may have received for this day."

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 employee 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.

This dispute concerns the subject of proper compensation which should accrue to an employee on this property who is involved in random drug testing under the provisions of the Random Drug Testing Program which was mandated by the Federal Railroad Administration, U.S. Department of Transportation.

The fact situation in this case reveals that Claimant was an employee who was subject to the random testing specified by the FRA mandate. She was regularly assigned to a position scheduled to perform service from 11:00 p.m. to 7:00 a.m. On March 14, 1990, after Claimant reported for service, she was notified that she had been selected for random testing during that tour of duty. She performed her regular assigned duties from 11:00 p.m. until 6:00 a.m., at which time she was transported by a Carrier official to the testing site. At the conclusion of the test, Claimant was transported back to her assigned location where she was released at 7:30 a.m. For all time on duty, i.e., from 11:00 p.m. until 7:30 a.m., Claimant was allowed payment of 8 hours and 30 minutes at the straight time rate of pay. This claim asks for payment of 30 minutes at the overtime rate of pay for the time from 7:00 a.m. to 7:30 a.m. in lieu of the straight time rate already allowed for the 30-minute period.

The negotiated rules agreement of the parties contains the following provision:

"RULE 32 - OVERTIME AND CALLS

Time in Excess of Eight Hours

- 32-A. Except as otherwise provided in Rule 32-I, time in excess of eight hours, exclusive of the meal period, on any day will be considered overtime and paid on the actual minute basis at the rate of time and one-half."

Rule 32-I states in pertinent part:

"For continuous service after regular working hours, employees will be paid time and one-half on the actual minute basis"

In their handling of this case, Carrier argued that Claimant was not entitled to the overtime rate for the 30-minute period here in question because she did not perform "work" or "service" during that period of time. It contended that activities performed under the FRA mandated testing program do not constitute "work" or "service." Before the Board, Carrier argued that "Claimant was not on duty" while she was taking the random drug test. The Carrier further argued that there is, in fact, no Rule requirement for even the payment of the 30 minutes at the straight time rate of pay for the time from 7:00 a.m. to 7:30 a.m., "But, as a gratuity, [Carrier] elected to pay Claimant at the straight time rate."

The Organization contended that the language of Rule 32-A is clear and unambiguous in its requirement that "time in excess of eight hours" is overtime payable at the time and one-half rate. It argued that the FRA mandated Random Drug Testing Program requires that testing under the program must be performed while the employee is "on duty." Therefore, it says that the time and one-half rate of pay is required for the 30-minute on-duty period from 7:00 a.m. to 7:30 a.m.

The Random Drug Testing Implementation Guide issued by the FRA outlined the following criteria:

"4. Notification of Employee: 49 CFR 219.601(b)(4)&(6)

- a. Procedures for notifying the employee are clearly delineated to show that management and supervisors (other than those responsible for the selection process itself) receive notice of an employee's selection only so far as is reasonably necessary prior to the employee's next intended tour of duty. This means that the date, time, location, category and so forth related to the selection process remain entrusted to the designated selecting official for as long as possible prior to the shift when the testing is to take place.
- b. The plan specifically provides for employee testing only during the time when the employee is on duty during the same duty tour in which they have been notified.

- c. When railroads intend to test employees other than when they first report for duty, the notification procedure describes at what point during the shift the employee is informed of the requirement for testing. The procedure also accounts for reasonable protections to assure the employee's availability once selected. That is, under normal circumstances a procedure not acceptable would be where the employee is informed of the testing at the beginning of the shift, the employee works the shift, and then is tested near the end of the shift, or cancelled because of hours of service considerations."

Additionally, the FRA issued a series of questions and answers relative to random drug testing programs which stated, in pertinent part:

"The following items were prepared by the Office of Safety as guidance to railroads preparing random drug testing programs for review by the Federal Railroad Administration (FRA) in accordance with 49 CFR 219. The items are presented as 'questions and answers' arranged in eight groups: General, Administration, Selection, Participation, Collection, Testing, Reporting, and Records.

* * * *

- S5. Question: Testing of covered employees can only be performed while they are on duty. What about commingled service, or, during limbo time? Can they be tested then?

Answer: Service in excess of the 12-hour rule, or other applicable limitation, will constitute an Hours of Service violation. Employers who contemplate testing toward the end of a shift should allow sufficient time in the event there are delays. The key is that they are 'on duty' (219.601(b)(6)). That does not mean they must actually be performing covered service work at the time of selection, if they are assigned to perform duties including covered service during the duty tour. Remember, the railroad designates who may perform covered service, and all of those persons are subject to random testing during their 'tour of duty' (219.601(b)(4))."

It is clear to the Board that the several Awards cited by the Carrier in its defense against this claim do not involve analogous situations. One of the citations, however, contains language which is beneficial to our determination of this case. In Fourth Division Award 4831, in relying on the opinion expressed in Public Law Board No. 1760, Award 1, the Board held:

"Generally, if the classes at which employee attendance is mandatorily required is held solely to benefit the Carrier, . . . claims for compensation were . . . sustained."

Award 4831 went on to rely on Fourth Division Award 3325 which held that:

"The purpose of the program is relevant and must be considered in each instance."

Award 4831 continued in its reliance on Award 3325 which concluded:

"This Board shares the opinion expressed by Referee Preston Moore in Third Division Award 10808, 'We are of the opinion that any time of the Employee directed by the Carrier is work or service, with certain exceptions. Two exceptions are where such time is for the primary benefit of the Employee and in cases where mutuality of interest exists. Awards have held that classes on operation rules and safety rules are such exceptions. We are not inclined to enlarge upon those Awards.'"

The Board is of the opinion in this case that the mandatory testing was solely for the benefit of the Carrier. Carrier is required by the FRA mandate to conduct such testing. Carrier determines who will be tested and when they will be tested. Carrier's contention that "Claimant was not on duty" at the time of the testing flies in the face of the FRA requirement that testing under the program must be performed while the employee is on duty. Carrier's contention that no payment whatsoever was required for the 30-minute period in question is specious and without basis in the Agreement or elsewhere. With certain exceptions, none of which are present in this case, "any time of the Employee directed by the Carrier is work or service" (Third Division Award 10808).

The Board finds, therefore, that under the circumstances of this case, Claimant is entitled to be compensated at the overtime rate of pay for the "time in excess of eight hours" during which she was on duty under the direction of the Carrier on the claim date.

AWARD

Claim sustained.

O R D E R

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 13th day of September 1994.