Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32551
Docket No. TD-32785
97-3-96-3-102

The Third Division consisted of the regular members and in addition Referee John C. Fletcher when award was rendered.

PARTIES TO DISPUTE: (American Train Dispatchers Department/International
(Brotherhood of Locomotive Engineers
(
(Burlington Northern Railroad Company

STATEMENT OF CLAIM:

"The Burlington Northern Railroad Company (hereinafter referred to as the Carrier) violated the current effective agreement between the Carrier and the American Train Dispatchers Department, (hereinafter referred to as the Organization) Letter of agreement dated May 31, 1973 in particular, when on Sept. 26, 1994, Dispatcher G. R. Amack was not called to perform service as Senior qualified dispatcher available under the hours of service law. Junior Dispatcher W. L. Gwyer was used instead at the overtime rate.

The Carrier shall now compensate dispatcher G. R. Amack eight (8) hours at the overtime rate account he was entitled to this work but was not called."

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 were given due notice of hearing thereon.

The Organization asserts Carrier improperly called a junior Train Dispatcher to perform overtime service on September 26, 1994, when Claimant was available to work. Carrier does not deny that its failure to call Claimant for this service was a violation of the Agreement. It argues, however, that Claimant is entitled to compensation at the straight time rate of pay, rather than the overtime rate as claimed by the Organization.

The Board is cognizant of the vast arbitral precedent of awarding pay at the overtime rate when an employee is improperly denied the opportunity to perform service that would have entitled him to compensation at such a rate of pay, notwithstanding the fact the employee performed no service. Carrier, however, argues it should not be bound by that precedent in that there is a past practice on this property of making such payments at the straight time rate. According to the Carrier, there has been a system-wide practice, at least since 1972, of settling claims of this nature with the Organization at the straight time rate.

While the Agreement sets forth the basis of pay had Claimant been called to work, it says nothing about how he is to be paid when he is improperly denied the opportunity to work. This Board, in remedying similar situations on other properties, has given its interpretation of a "make whole" remedy in the absence of specific language in the Agreement. However, where the Agreement is either silent or ambiguous, the Board may draw upon an existing and established past practice on a particular property. Where we find such a past practice to exist, it should be given deference over how we have decided cases on other Carriers. To do otherwise would upset the labor relations equilibrium the parties have established between themselves.

After reviewing the evidence in this case, The Board is satisfied there is a sufficient past practice on this Carrier, and with this Organization, that claims of this nature are routinely settled by payment for the hours the employee would have worked at the straight time rate of pay. Accordingly, we will direct that Claimant be compensated eight hours pay at the straight time rate of pay if such a payment has not already been made.

AWARD

Claim sustained in accordance with the Findings.

ORDER

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 29th day of April 1998.

Labor Member's Concurrence and Dissent
To
Third Division Awards 32551, 32552, 32553, 32554 and 32555
Dockets TD-32875, 32787, 32860, 32892, 32893
Referee Fletcher

To the extent that the claims in the above disputes were sustained, concurrence with the findings of the majority is warranted. However, to simply state "I dissent" wholly understates my dismay regarding that portion of the decisions pertaining to the payment of overtime.

In each case, an employee was improperly by-passed for an overtime assignment. The carrier admitted the violations. Absent the violations, each claimant would have been afforded their rights under the agreement and compensated at the overtime rate of pay.

In defending against the claims, the carrier **asserted** that the straight time rate of pay was appropriate reparation for its admitted violations of the agreement. Further, the carrier **asserted** that there was an on-property practice which supported such a conclusion. This Board has consistently recognized the burden assumed by a party asserting a past practice as an affirmative defense against a claim.

Third Division Award No. 13720

"Carrier defends by alleging past practice...It offered no evidence...We have held on many occasions that mere assertion is not proof. Award 12942. Carrier had the burden of proving its affirmative defenses."

Third Division Award No. 14732

"Innumerable awards of this Board have stated that the burden of proving a customary practice is upon the party asserting same."

Third Division Award No. 14583

"It appears that the Carrier is a victim of one of its own much used defenses; to wit: failure to satisfy the burden of proof....the carrier has failed in the handling on the property, to meet the burden of proof which would be necessary to sustain the allegations presented as a defense to the claim."

Third Division Award No. 29033

"It is axiomatic that the party asserting the practice has the burden of proving the requisite elements of its existence."

The Referee in this case is no stranger to the well accepted principle that the party raising an affirmative defense must prove it.

Third Division Award No. 29703

"When Carrier raises an 'emergency' defense as license to deviate from the basic requirement that forces subject to the scope of an Agreement are entitled to perform work subject to the Agreement, it is obligated to come forward with sufficient evidence establishing that an emergency did, in fact, exist."

Third Division Award No. 29696

"Carrier has defended its use of a District 13 employee on District 14 on the grounds that it was emergency work. Carrier is obligated, when relying on an emergency excuse, to demonstrate that an emergency actually existed."

So, what evidence was there in the record of these cases that convinced the Referee that there was indeed a past practice on this property of only paying claims at the straight time rate? Well, don't look to awards for the answer because there is no discussion about the evidence. So let's examine the record between the parties.

In the handling of the disputes, the Carrier made its assertion in letters by simply stating:

"The appropriate remedy for payment of overtime work not performed under *the agreement is payment at the pro rata rate, which has long been the practice* on this property."
(Carrier letter of 2/19/95 - Award No. 32551, Carrier letter of 4/13/95 - Award No. 32554 and Carrier letter of 4/13/95 - Award No. 32555)

"...*the past practice on this property for disposition of similar disputes* is settlement at the straight time rate."
(Carrier letter of 3/14/95 - Award No. 32552)

"...Claimant was nevertheless compensated at the straight time rate as has been the practice on the property for work not performed."
(Carrier letter of 11/2/94 - Award No. 32553)

These were only bald assertions by the carrier - not evidence of a past practice. So, the Organization challenged the carrier to bring forward real evidence in support of its asserted past practice.

> "Also, contrary to your assertion, I am not aware of any past practice on this property for disposing of similar claims by allowing only straight time. As the party asserting such a practice, you assume the burden of proving it. This you have not done. (ATDD Letters of 9/26/95 - Awards 32552, 32553, 32554 and ATDD Letters of 10/18/95 - Award 32551 and 32555)

The carrier then responded in the lowest form of one upmanship recently witnessed by this writer. In its zeal to support it position, the carrier made reference to **non-referable** claim settlements that allegedly existed.

> "...the Carrier is ready, willing, and able to present claim settlements between the parties as evidence of the past practice on this property wherein payment was sought at the punitive rate account not called for overtime and ultimately settled at the straight time rate of pay. Moreover, the Carrier is also able to present other settlements wherein the Organization initially appealed claims for only the straight time rate involving similar disputes. However, as is custom on this property, **all of these claims were settled on a non-referable basis.**" (Emphasis added to Carrier letter of 11/22/95 - Award No. 32553 and Carrier Letters of 11/30/95 Award Nos. 32551, 32552, 32554, 32555)

Thereafter, the carrier sought the Organization's permission to bring forward its alleged evidence of settlements. If, as the carrier readily admits, settlement of claims was reached with the Organization on a **non-referable** basis, it is entirely improper to then reference the settlements at all, let alone as evidence of some sort of practice between the parties. Even if the settlements between the parties did exist (and the record is devoid of any real evidence of such), they should not be considered in the resolution of a matter before this Board.

> Second Division Award No. 11282
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> "Numerous settlements of Claims were put in the record and said to be determinative of the jurisdictional issue. This Board rejects this supposition. If Boards were to utilize settlements to determine present controversies, the settlement process would be irrevocably dampened."
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> Third Division Award 30719
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> "It is a long-established tradition, in this and other arbitral forums, that pre-arbitration settlements are not per se dispositive of similar issues, and that holding so would serve to discourage either party from withdrawing or otherwise settling matters prior to adjudication by arbitration.."

Fourth Division Award No. 4906

"First, this Board will not respond to the arguments and issues involved in the negotiations and settlements made on the property. They have no standing before us as settlements are neither admissions of agreement violations, nor admissible probative evidence. Over and over again, this Board has held to the unshakable premise that prior settlements, offers or compromises will not be introduced into disputes as such might discourage future settlements of claims. Consequently, they have no bearing whatsoever on the claim at bar (Fourth Division Award 3829; Third Division Awards 28844, 26336, 21075; Second Division Awards 11101, 5864)." (Emphasis in original)

Turning for a moment to the carrier's other so-called evidence of a practice, there were statements included in the record from carrier officers concerning the payment of overtime versus straight time in the settlement of claims. The problem is that the carrier officers' statements again reference the *settlement* of claims, which, as shown above, are inadmissable before this Board. In addition, the Organization's present and past General Chairmen made statements that directly contradicted the carrier officers' statements. At a minimum, even if the issue of prior claim settlements was a proper topic of review, this left the Board with conflicting evidence concerning the issue of a past practice. This Board functions as an appellate body and it has no way of resolving evidentiary conflicts or factual disputes. (Third Division Award No. 28790). Since the carrier raised the issue of a past practice as an affirmative defense, it alone shouldered the burden of proof on this point.

Third Division Award No. 26817

"When confronted with an irreconcilable conflict over a material fact, we must *resolve the conflict* ***against the party holding the burden of proof.***" (Emphasis added)

Award No. 2, Public Law Board 2433

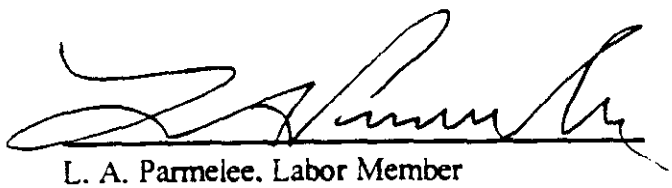
"...this Board reminds the parties that a finding of a valid practice to such effect can only be made **if the party relying thereon is able to show with probative evidence** that the alleged practice has been clear and clearly understood, has been mutually understood for a reasonable long period, and has been approved by responsible high officers on both sides." (Emphasis added)

Labor Member's Dissent
Awards 32551, 32552, 32553, 32554, 32555

So, once again, what evidence of probative value was it that caused the Referee to find a practice of clear understanding between the parties that existed for a reasonably long period of time and was properly presented to this Board? The answer is simple - there was **none**. There were only the vague and unsupported assertions of the carrier.

These decisions make a mockery of well established Board precedent regarding the burden of proof assumed by a party asserting a practice, and the rejection of settlements between the parties as dispositive of issues brought to this Board. On this basis, these awards are palpably erroneous and set no precedent whatsoever.

I dissent to these faulty decisions.



L. A. Parmelee, Labor Member

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Carrier Members' Response
to
Labor Member's Concurrence and Dissent
to
Third Division Awards 32551-32555
(Dockets TD-32875, TD-32787, TD-32860, TD-32892, TD-32893)
(Referee Fletcher)

These disputes were submitted to this Board on the Organization's claim that each of the Claimants was entitled "by contract" to compensation at the time and one-half rate.

As the Organization has noted at page 2 the Carrier did deny the claims on the basis of past practice. But that is not the full breadth of the Carrier's position. In the Carrier's November 30, 1995 reply (docket TD-32875) we find:

> "...once the alleged violation was brought to the Carrier's attention, it acted in good faith by compensating Claimant at the straight time rate, in accordance with both the Agreement and past practice on this property...
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> First, the overtime rule stipulates that the time and one half rate is paid only when work or service is performed:
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> ARTICLE 2(B) OVERTIME
>
> Time worked in excess of eight hours....
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> ARTICLE 2(D) CALLS
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> ....a regularly assigned train dispatcher called to perform service...shall be paid actual time for such service...
>
> ARTICLE 3(b) SERVICE ON REST DAYS
>
> A regularly assigned train dispatcher required to perform service...will be paid at the rate of time and one-half for service performed..."

Following this citation of contract language support on the property there was a citation of several Awards in support submitted to this Board. See Third Division Awards 3955, 10990, 30639, 9748, 7242, 7110, 6019, 6158, 6444, 6562, 6750, 6854, 6875, 6891, 6974, 6978, 7030, 7079, 7100, 7105, 7138, 7203, 7222, 7239, 7288, 7293, 7316, 7324, 7827, 7858, 8414, 8415, 8531, 8533, 8534, 8568, 8766, 8771, 8776, 9393, 9489, 9566, 9749, 9811, 9823, 10033, 10070, 10125, 10224, 12135, 13034, 13125, 13165, 13191, 13697, 13837, 13992, 14088, 14149, 14174, 14238, 14464, 14472, 14513, 14707, 15008, 15888, 16033, 16338, 16372, 16376, 16430, 16796, 16829, 17745, 18691, 18942, 19083, 19248, 19605, 19814, 19884, 22071, 26340, 26534, 27088, 27606, 27701, 27973, 28168, 28180, 28181, 28192, 28231, 28277, 28990, 29349, Second Division Awards 6843,

6891, 6892, 6988, 6989, and PLB 588 Awards 19, 20, 24, 28, 29, 30, 31, 32, 33, 34, 37, 38, 45. (These last decisions involved the same parties.)

Both by reference to specific contract provisions and to a wealth of precedent for the payment of the straight time rate for work not performed, the Carrier backed up its denials.

Next, it was unrefuted in the on-property handling that Carrier had a practice going back to 1963 (or seven years before the inception of BN) where it had not paid the overtime rate for work not performed. This practice was supported with 9 statements by supervisors. The Organization responded with a statement of the former General Chairman that claims were filed for the overtime rate but no evidence was produced by the Organization that would show that any claim for work not performed had been paid for at the 1½ rate.

At page 3 of the Organization's Concurrence and Dissent, he quotes the Carrier's offer to produce non-referable claim settlements to support its position. However, he failed to quote the rest of that paragraph which stated:

> **"Please advise if you are agreeable to allowing these settlements to become part of the record and thus satisfy your request that the Carrier prove that such a practice existed on this property."**
>
> **The Organization refused.**

Given this wealth of material submitted in response to the Organization's claims, it is troubling that the Organization finds fault with the decision rendered. There was no evidence of a payment made with this Organization that upheld its contention of payment at the time and one-half rate for work not performed in the entire record.

The first and really the most basic requirement in the arbitration of disputes in this industry, is that the Organization must present sufficient facts and contract support to give credence to its claim. In this matter, the Organization NEVER submitted contractual support, never refuted with evidence the Carrier's statements, never presented any documentation that would substantiate its claims. It is noted at page 4 of the Concurrence and Dissent that this Board cannot resolve evidentiary conflicts. That is correct. But there must be something more that the simple assertion "not so" and a plea for "equity" to sustain a claim.