Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 32555
Docket No. TD-32893
97-3-96-3-243

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 December 1, 1994, the Claimant was not called to perform service as Senior qualified dispatcher available under the hours of service law. Junior Dispatcher was used instead at the overtime rate.

The Carrier shall now compensate the Claimant 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 December 1, 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. As the record shows Claimant was already compensated for eight hours pay at the straight time rate, we find that the Agreement was not violated.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 29th day of April 1998.

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...
>
> First, the overtime rule stipulates that the time and one half rate is paid only when work or service is performed:
>
> ARTICLE 2(B) OVERTIME
>
> Time worked in excess of eight hours....
>
> ARTICLE 2(D) CALLS
>
> ....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.

The tragedy of this exercise is that this Board will have to go through this exercise again and again in the near future. It is expected with the same result.

P. V. Varga

M. W. Fingerhut

M. C. Lesnik