

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 35602
Docket No. MW-33270
01-3-96-3-742**

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

**(Brotherhood of Maintenance of Way Employees
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation**

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

- (1) The Agreement was violated when the Carrier called and assigned junior Repairman R. L. Walls to perform overtime service at London, Ohio on April 9, 1995 and although the Carrier paid senior Repairman D. E. Brower for the four (4) hours the junior repairman performed the overtime service, the Carrier failed and refused to pay the Claimant at the proper time and one-half rate (System Docket MW-3973).**
- (2) As a consequence of the aforesaid violation, Claimant D. E. Brower shall be allowed the difference between the four (4) hours of repairman's straight time rate he was paid and the repairman's time and one-half rate he was entitled to."**

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 sole issue for determination here is whether the proper remedy for an admitted failure on the part of the Carrier to provide opportunity of overtime work to the Claimant, who was available, qualified, and more senior than the employee utilized, is the time and one-half rate of pay, as claimed, or, conversely, the straight time rate of pay, as already allowed by the Carrier.

Basically, it is the position of the Organization that the Claimant is entitled to the amount of overtime that he would have received if properly called for the overtime service pursuant to Rules of the controlling Agreement.

The Carrier, on the other hand, maintains that because the Claimant did not perform any work whatsoever for the period of time at issue that the appropriate penalty for a failure to have called him as the senior employee for the overtime work is the straight time rate of pay, as already allowed. In this respect, the Carrier asserts that the overtime rate of pay is only due to an employee for work actually performed outside a normal tour of duty.

In study of arguments of the parties, the Board recognizes that there have been Awards as cited by the Carrier in which only the straight time rate of pay was held to be an appropriate measure of damages in concluding that work must actually be performed for an employee to be entitled to the overtime rate of pay. However, the Board finds the better-reasoned decisions rendered by the Board have concluded that affected employees are entitled to be made whole in the amount of compensation they would have earned absent the contract violation.

In this latter regard, the Board would especially note the following excerpt from Third Division Award 13738, a conclusion that has several times been referenced in subsequent Awards in holding that the time and one-half rate of pay is the appropriate measure of compensatory damages so as to put the affected employee in as good a position as if there had not been an evident breach of contract:

“Had Claimants been called and performed the work involved, as was their contractual entitlement, they would have been paid, by operation of the terms of the Agreement, time and one-half for the hours worked. In like circumstances this Board has awarded damages at the pro rata rate in some instances, and the overtime rate in others. The cases in which the pro rata

rate was awarded as the measure of damages, in a number of which the Referee in this case sat as a member of the Board, are contra to the great body of Federal Labor Law and the Law of Damages. The loss suffered by an employe as a result of a violation of a collective bargaining contract by an employer, it has been judicially held, is the amount the employe would have earned absent the contract violation. Where this amount is the overtime rate an arbitrary reduction by this Board is ultra vires. Therefore, we will sustain the claim for damages as prayed in paragraph (2) of the Claim.”

The Board thus finds that disposition of the case before us be in keeping with the doctrine mentioned in above referenced Award 13738 and decisions involving the Carrier party to this dispute in Third Division Awards 27181, 30987, 32107 and 33937, which Awards have likewise held that the appropriate payment in a claim involving the issue here in dispute is the time and one-half rate of pay.

Accordingly, the claim is sustained for the difference that the Claimant has already been allowed by the Carrier, i.e., four hours at the straight time rate of pay, and the time and one-half rate of pay for this four-hour period of time.

AWARD

Claim sustained.

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 24th day of July, 2001.