Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 35847
Docket No. MW-34469
01-3-98-3-101

The Third Division consisted of the regular members and in addition Referee Steven M. Bierig when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Montana Rail Link, Inc.

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned Mobile Machine Operator B. C. Spooner to perform overtime service at the Laurel Yard on March 22, 1997 and failed and refused to allow him the daily stipend of forty-one dollars ($41.00) as provided within the provisions of Rule A-11 of the Craft Specific Provisions (System File MRL-134/C-3139).

(2) The Agreement was violated when the Carrier assigned Mobile Machine Operators T. Kennedy and D. E. Ness to perform overtime service at the Laurel Yard on January 11, 19, 25 and 26, 1997 and failed and refused to allow them the daily stipend for each day worked as provided within the provisions of Rule A-11 of the Craft Specific Provisions (System File MRL-133/C-3141).

(3) As a consequence of the violation referred to in Part (1) above, Machine Operator B.C. Spooner shall be allowed forty-one dollars ($41.00) for the stipend he was denied on the date in question.

(4) As a consequence of the violation referred to in Part (2) above, Machine Operator T. Kennedy shall be allowed one hundred twenty-three dollars ($123.00) and Machine Operator D. Ness shall be allowed eighty-two ($82.00) for the stipend they were denied on the dates in question."

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.

At the time of the incidents in question, Claimant B. C. Spooner was assigned as a Mobile Machine Operator on Gang 1952. Claimants T. Kennedy and D. E. Ness were also assigned by bulletin as Mobile Machine Operators. The Claimants were assigned and working their respective positions on the dates immediately preceding and following the dates involved in this dispute.

On Saturday, March 22, 1997, the Carrier called and assigned Mobile Machine Operator Spooner to the weekend overtime duty of repairing track following a derailment at Laurel Yard in Laurel, Montana.

On Saturday, January 11, Saturday, January 25 and Sunday, January 26, 1997, the Carrier called and assigned Mobile Machine Operator Kennedy to the weekend overtime duty of snow removal at Laurel Yard.

On Sunday, January 19, 1997 and Sunday, January 26, 1997, the Carrier called and assigned Mobile Machine Operator Ness to the weekend overtime duty of snow removal at Laurel Yard.

Rules A-9 and A-11 are relevant in this matter. In relevant part, these Rules indicate:

"A-9 Headquarters

. . . Permanent traveling gangs, seasonal gangs or seasonal positions, except those filling leave-of-absence type positions, may be assigned either with a fixed headquarters point or with a mobile headquarters point. . . . (Emphasis added)

A-11 Expenses – Mobile Crews

* * *

B. If the Company chooses not to provide mobile lodging facilities for a crew assigned with mobile headquarters, employees assigned thereto will receive a daily stipend of $35.00 per day for each day worked in lieu of such mobile lodging facilities." (Emphasis added)

* * *

It is undisputed that the mobile crew stipend was increased to $41.00 per day in the parties' October 3, 1994 Letter of Agreement.

It appears to be undisputed that in all three cases, the Claimants were normally assigned to mobile gangs and were observing a rest day when they were called to perform overtime service at Laurel Yard. In each of the three cases, the Claimants were paid at their proper overtime rate, but did not receive the daily stipend. That is the dispute in this matter. Claimant Spooner worked one day, Claimant Kennedy worked three days and Claimant Ness worked two days. All of the Claimants lived in the Laurel area and thus did not have to travel away from home to get to Laurel Yard.

The Organization contends that the Claimants are Mobile Machine Operators who were not provided lodging. Thus, the Organization claims that they are entitled to the daily stipend for Mobile Machine Operators which is $41.00 per day. Regardless of the fact that they were working at Laurel Yard, and lived nearby, the Organization maintains that the Claimants were working and were paid as Mobile Machine Operators. As such, they are entitled to the stipend of $41.00 per day for each day worked.

The Carrier takes the position that the Organization has not met its burden of proof in this matter. The Carrier takes the position that simply because an employee is regularly assigned to a mobile gang eligible to receive a daily stipend, this does not mean that all service rendered by the employee must be accompanied by the payment of a daily stipend. In this case, the Claimants were called on their rest days for overtime service on the Laurel section crew. They accepted the call and they therefore accepted the conditions of that assignment. They replaced employees on a Section Crew which does not receive the stipend. Thus, the Claimants, accepting the work of a Section Crew are not entitled to a stipend. Further, the Carrier argues that the mobile crews to which the Claimants were assigned were not required to work and therefore, there was no opportunity for these crews to receive the stipend.

After a careful review of the evidence, the Board finds that the Organization has sustained its burden of proof in this matter. We find that the Carrier's interpretation would place a limitation on the payment of the per diem where none exists. When a Board is called upon to interpret provisions that have a plain and certain meaning, we need not resort to implication, but must enforce the provisions as written. Here, the Claimants were all assigned as Mobile Machine Operators, positions that entitled them to a per diem payment of $41.00 per day worked. On all days worked by the Claimants, they were paid as Mobile Machine Operators and compensated at the appropriate daily overtime rate. Their overtime work as a member of a Section Crew did not convert their employment to an employee of a Section Crew. Thus, they are entitled to the relevant stipend of $41.00 per day worked.

We also note that the Claimants all lived in the Laurel area and did not have to travel beyond their home to do this work. This does not affect the outcome. Part of Rule A-11 provides:

> "Note: In the event an employe, who is assigned to a mobile headquarter crew with outfits provided, is requested to perform temporary service away from his regular outfits, at a location which is within thirty (30) miles of his regular home residence, therefore not requiring this employe to be away from his residence at night, such employe will not be entitled to receive the 'away from home' expenses provided for in Article E of the Quality Work Life Agreement. <u>However, this will not otherwise affect his daily stipend provided for in Paragraph A above</u>." (Emphasis added). (See Also Third Division Award 16463.)

Based on this language as well as the discussion above, the claims are sustained.

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 18th day of December, 2001.

CARRIER MEMBERS' DISSENT
TO
THIRD DIVISION AWARD 35847; Docket MW-34469
(Referee Steven M. Bierig)

In our opinion, the instant claim before the Board involved the same controlling facts and the same contractual provisions as were submitted for adjudication in denial Third Division Award 35576, which is incorporated herein by reference. Clearly, any differences between the two are so insignificant as to be meaningless as to the facts and issues involved.

While the Board has recognized on more than one occasion that we, as a Board, would not be hesitant to reach a different conclusion were we to be absolutely convinced that a prior Award was palpably wrong, the Board has also recognized that precedent cannot be lightly regarded, because to do so would endanger the prompt and orderly settlement of disputes on the property as contemplated by the Railway Labor Act. In this regard, the Board held as follows in Second Division Award 3991 rendered on May 31, 1962:

> "We are aware of the fact that prior Awards of this or any other Division of this Board are not binding upon us in the same sense that authoritative legal decisions are. Nevertheless, all Divisions of this Board have consistently held that, if a dispute involves the same controlling facts and the same contractual provisions as were submitted for adjudication in a previous dispute, the Award in the prior case will generally be followed, except when such Award is shown to be glaringly erroneous or substantially unfair. See: Awards 15921 and 17780 of the First Division; 2471 and 3023 of the Second Division; 6784, 6833, and 6935 of the Third Division; 506, 793, 993, and 1277 of the Fourth Division. The rationale underlying those rulings is that in the interest of stable and satisfactory labor relations identical rules must necessarily be given like interpretations. Otherwise, employes doing the same work and covered by the same labor agreement would not be afforded the benefit of equal treatment and equal protection under the law. Moreover, general adherence to previous rulings, except where deviation therefrom is warranted on the basis of the above indicated exceptions, signifies that our rulings are based on reason and intended to exclude further litigation. They are not merely random judgments indefinitely inviting further litigation. See: Shulman, Reason, Contract, and Law in Labor Relations, 68 Harvard Law Review 999, 1020 (1954-55)."

Subsequent to the Referee having heard the parties' arguments in the instant case on April 27, 2001, and before he rendered his decision, Docket MW-35104 was argued

before Referee Ann Kenis on May 10, 2001 and she promptly rendered her denial decision, which was adopted as Third Division Award 35576 on July 24, 2001.

We are confident that had Third Division Award 35576 been before him at the time the case was argued, no doubt he would have found nothing in the instant record that would justify a different ruling and he would have followed the then existing precedent. This is so, because the Board has consistently held that such is the appropriate course of action, even if the subsequent Referee might have ruled differently had it been his decision to make in the first instance, so as to promote harmonious labor/management relations and not indefinitely invite further litigation or forum shopping.

Given the foregoing scenario, at worst, the "score" is "one to one." However, for the reasons set forth above, in the event the Organization files yet another identical dispute before this Board, we would strongly urge the third neutral to follow long-established Board precedent and deny the claim.

Michael C. Lesnik

Martin W. Fingerhut

Paul V. Varga

December 18, 2001