Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 36520
Docket No. MW-35377
03-3-99-3-249

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(Burlington Northern Santa Fe Railway (former Burlington
(Northern Railroad Company)

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when the Carrier assigned junior Crane Operator G. R. Swenson to operate a truck crane at Jamestown, North Dakota on September 7, 8, 14, 15 and 21, 1996, rather than assigning Claimant V. E. Malard who was senior, qualified, available and willing to perform the work (System File T-D-1244-H/MWB 97-01-08AH BNR).

(2) As a consequence of the violation referred to in Part (1) above, Claimant V. E. Malard shall be allowed pay for seventy-one (71) hours at his respective time and one-half rate and four (4) hours at his respective double time rate of pay."

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.

There is no dispute on the facts presented by the Organization in setting out the basis of its claim. By letter of September 24, 1996, the Organization asserted that on specified dates the Carrier directed G. R. Swenson to operate the Truck Crane, rather than the Claimant who was available, willing and the senior employee. The Organization points specifically to Rule 2A which states:

> "Rights accruing to employes under their seniority entitles them to consideration for positions in accordance with their relative length of service with the Company, as hereinafter provided."

The Organization argues throughout this dispute that the Claimant was the senior employee who had a contractual right, supra, and was denied his right while a junior employee worked.

The Carrier's defense is that the Claimant had refused requests for operating cranes in the past. Roadmaster Padberg, the Claimant's supervisor, stated that the Claimant "operated Ohio crane three years ago for two days. At that time, said he would rather not operate a crane if somebody else was available." The Carrier argues that, in recognition of the Claimant's wishes, it approached other employees to operate cranes when they were available. The Carrier maintains that the Claimant's seniority was honored; in that as he was unwilling to operate the cranes, a junior employee was called. The fact that the Claimant "had a change of heart" is not the Carrier's fault.

The Carrier's defense must fail. It is not relevant that three years before this instant case the Claimant stated that he would rather not operate the crane if others were available. There is no showing in this record that this Claimant ever declined a request to operate a crane in the three years prior to this claim. Similarly, it is also irrelevant that after the date of this claim the Roadmaster and the Claimant had a confrontation to which the Claimant admittedly stated that he "would not operate cranes for him in the future."

What is relevant is Rule 2A. It provides the contractual obligation of the Carrier and entitlement of the Claimant to a consideration of his seniority to work opportunity to operate the Group 1 crane. The facts prove that the Claimant was not provided his Agreement rights. The Carrier's defense is not persuasive. The Carrier failed to show

any evidence whatsoever to demonstrate a pattern or even a single instance where the Claimant refused an offer to operate the Group 1 Truck Crane in line with his seniority. The Board also rejects the Carrier's argument of a conflict in facts, wherein the claim should be dismissed due to the Roadmaster saying that the Claimant requested not working if someone were available, and the Claimant indicating that this never happened. Under these circumstances, this is not a decisive element.

The claim before the Board is assignment to a junior employee to operate a truck crane in violation of the Claimant's seniority. What happened three years earlier or after the fact is not germane. The Rule is clear and in these facts, the Carrier's actions violated the Agreement. On this property, after full review of the numerous Awards presented by both parties as to the remedy, and under these circumstances, the Board holds that the Claimant is to be compensated at his straight time rate of pay for the 51.5 hours when he was not called to perform service.

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 23rd day of April 2003.

EMPLOYE MEMBER'S
CONCURRING OPINION AND DISSENT TO
AWARD 36520, DOCKET MW-35377

(Referee Zusman)

The Board correctly found that the Agreement was violated when the Carrier failed to call the Claimant to perform the overtime work involved here. This finding was not difficult to make inasmuch as the Carrier freely admitted that no calls were made to the Claimant. Having determined that a violation of the Claimant's seniority rights had occurred, the Board should have paid the claim at the overtime rate. The Board's finding that the Claimant was only entitled to receive pay at the straight time rate, instead of at the time and one-half rate, is an anomaly that diverges from the overwhelming arbitral precedent established on this issue in general and on this property in particular.

The purported reason for the Majority's decision to diverge from the well-established precedent to pay overtime claims at the overtime rate was its assertion that:

> "*** On this property, after full review of the numerous Awards presented by both parties as to the remedy, and under these circumstances, the Board holds that the Claimant is to be compensated at his straight time rate of pay for the 51.5 hours when he was not called to perform service."

The problem with such reasoning is that the record in this instance was unchallenged regarding the Carrier's failure to call the Claimant, in accordance with his seniority, to perform the overtime work involved here. As the Majority recognized in its opinion:

> "The claim before the Board is assignment to a junior employee to operate a truck crane in violation of the Claimant's seniority. What happened three years earlier or after the fact is not germane. The Rule is clear and in these facts, the Carrier's actions violated the Agreement. ***"

Obviously, had the Claimant not enjoyed a contractual right by virtue of his seniority to have been called to perform the overtime work, i.e., in lieu of a junior employe, then the claim would have been denied. The very fact that the record contained an uncontested failure by the Carrier to call the Claimant to perform overtime service to which he was entitled by virtue of his seniority mandated a full sustaining award. Either the Claimant was entitled to be called to perform the overtime work and receive the appropriate overtime pay, or he was not. Because his seniority rights were clearly violated, a fully sustained award was mandated.

Notwithstanding the above, the Board's failure to pay this claim at the overtime rate is an anomaly because it goes against overwhelming arbitral precedent established on this property and in the industry in general.

This award departs from the precedent established by on-property awards in three (3) areas. First, Awards **35719, 35744, 35961** and **35962**, involving these parties which were presented to the referee at the panel discussion, support our position that a claim for overtime denied must be paid at the rate the Claimant would have earned absent the violation of the Agreement. In Award **35719**, the Board held:

> "As a remedy, the Carrier shall compensate the Claimant, who was working at the time as a Trackman-Driver, for the difference in pay between the position of Trackman-Driver and Foreman for all of the hours that the Foreman performed the disputed work. In addition, the Claimant shall receive pay at the Foreman's overtime rate of pay for any hours that the Foreman performed the disputed work on an overtime basis."

Award **35744** is directly on point with the instant dispute, wherein the Board held:

> "*** On the subject of remedy, the Carrier argues that the Claimant was fully employed and therefore suffered no loss. We examined the cases cited and recognize the divergent views often expressed on this particular subject, but it appears that the precedent Awards involving the particular parties in this case hold that the Claimant lost his rightful opportunity to perform the work and is entitled to a monetary claim. See Public Law Board No. 4768, Award 1; Public Law Board No. 2206, Award 52; Third Division Award 20892."

Award **35961** paid the overtime rate without comment; however, Award **35962** involved a situation nearly identical to the instant dispute, i.e., the overtime rate for not being called for rest day work. The Board held in Award **35962**:

> "The Carrier's failure to demonstrate persuasively in this record that Roadmaster Schibblehut ascertained and verified that the Claimant heard his shouted 'call' makes this case analogous to bypassing a senior employee for overtime after making a single phone call to his calling number and having no one answer. See Third Division Award 26562 involving these same parties . See also Third Division Awards 2053, 17116, 17182, 17183, 17533, 18425, 18870, 19658, 20109, 20524, 20534, 21396, 21707, 22966, 23561, 27150, 27701, 28656, 28781, 28796 and 29527. As for appropriate remedy, on-property Third Division Award 25601 stands for the proposition that the measure of the Claimant's remedial damages is the amount he would have earned had he performed the overtime service performed by the junior employee."

Second, in addition to this Board, Public Law Boards on this property have sustained claims for overtime pay. In this connection, Award 26 of Public Law Board No. 2206 (Eischen) held:

> "The proper measure of damages is the overtime actually worked by the Rubber Tired Crane which Claimant should have been operating on and after April 14, 1977. See Awards 3-10009; 3-13315; 3-13758; 3-20637."

Award 52 of Public Law Board No. 2206 (Eischen) held:

> "With respect to damages accruing (Part (2) of claim) we refer to our numerous previous awards on this matter (for example 3-19898, 3-20041; 3-20412; 3-20633; 3-21340) in which we found that overtime damages shall be awarded were the work in question was performed on an overtime basis." (Underscoring added)

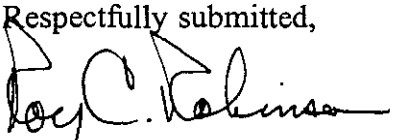
Third, this decision goes against literally hundreds of prior awards wherein claims for overtime payment were paid at the applicable overtime rate. For example, Third Division Awards 2341, 2426, 2467, 2706, 2716, 2717, 2827, 2980, 2994, 3049, 3193, 3222, 3271, 3277, 3292, 3371, 3375, 3376, 3504, 3514, 3651, 3660, 3744, 3760, 3761, 3814, 3822, 3837, 3858, 3860, 3861, 3862, 3868, 3876, 4023, 4037, 4038, 4102, 4103, 4200, 4244, 4245, 4246, 4257, 4278, 4307, 4467, 4477, 4531, 4552, 4571, 4603, 4645, 4728, 4803, 4815, 4817, 4962, 4963, 4970, 5091, 5117, 5172, 5177, 5236, 5243, 5271, 5388, 5441, 5465, 5579, 5978, 6144, 6306, 6473, 6474, 8188, 8849, 8859, 9203, 9210, 9241, 9257, 9334, 9419, 9436, 9440, 9477, 9557, 9614, 9644, 9646, 9658, 9834, 9951, 9952, 9998, 10009, 10378, 10451, 10633, 10835, 10848, 11080, 11152, 11207, 11225, 11226, 11333, 11604, 12221, 12769, 13158, 13315, 13469, 13720, 13738, 13833, 13928, 13946, 13974, 14071, 14074, 14137, 14161, 14302, 14304, 14472, 14510, 14624, 14703, 14704, 15048, 15375, 15640, 15909, 15950, 15951, 16095, 16103, 16126, 16254, 16259, 16295, 16346, 16481, 16528, 16541, 16551, 16569, 16571, 16598, 16612, 16625, 16672, 16726, 16748, 16777, 16783, 16793, 16798, 16811, 16814, 16820, 17748, 17917, 18393, 19947, 20413, 21767, 23386, 23404, 23853, 24332, 25449, 25501, 25601, 25937, 26403, 26404, 26405, 26431, 26448 and 26562.

On the other hand, in its submission the Carrier referred to two ancient awards, Third Division Awards 13992 and 14515, to support its argument that the claim should not be paid at the overtime rate. It must be noted that those awards did not involve these parties.

In conclusion, it is clear that the premise upon which the Board relied to pay only the straight time rate in this instance was invalid. Inasmuch as the precedential value of an award is no greater than the reasoning in the award, this award has no precedential value insofar as the

payment at the straight time rate is concerned. It is clear that the straight time remedy is an anomaly that is in conflict with the consistent and overwhelming majority of awards on the subject. Therefore, I dissent to that part of the award which sustains the overtime claim only at the straight time rate.

Respectfully submitted,



Roy C. Robinson
Labor Member

Carrier Members' Response
to
Labor Member's Concurrence and Dissent
to
Third Division Award 36520
Referee Zusman

This dispute rested on the undisputed position that Claimant had advised local supervision that he would "rather not operate a crane". Subsequently, it appears that Claimant and the Organization reneged on this statement of intent when a junior employee was used in September, 1996. All things being equal, there never was a question the Claimant was the senior employee. However, the Carrier's error was taking the Claimant at his word without getting such an avowal in writing. That should have obviated the Organization's subsequent contention, accepted by the Majority, that Claimant had not declined crane operator work. But that is shame on us for taking an employee at his word.

Dissentor takes issue with the conclusion of awarding compensation only for the actual time that Swenson was employed at the straight time rate. Despite Dissentor's assertion that "... the Carrier referred to two (2) ancient awards..." the Board was provided a large number of decisions, including Awards on this Carrier, supporting the conclusion that the payment for time not worked is at the straight time rate. For those interested, reference is made to the Carrier Member's Response to the Organization's Dissent in Award 32554 for an equally long list of Awards supporting this proposition.

Paul. V. Varga

Bjarne R. Henderson

Martin W. Fingerhut

Michael C. Lesnik