

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 37746
Docket No. MW-38221
06-3-04-3-105**

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

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employees
(The Texas Mexican Railway Company)

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The dismissal of Track Inspector P. Benavides for alleged violation of GCOR Rules 1.5 and 1.6 was arbitrary, capricious, on the basis of unproven charges and in violation of the Agreement (System File EPTM-03-91/236).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Benavides shall now ‘ . . . be compensated for all loss of time starting from June 9, 2003, and still continuing, including the reinstatement of all seniority rights unimpaired back to him, for all vacation rights and including all personal expenses to be reimbursed back to him while driving from his home to the Texas Mexican railway Yard, while attending an investigation at 10:00 AM at Laredo, TX. . . .’”

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 incident on June 9, 2003, the Claimant had established seniority as a Track Inspector with approximately 31 years of service. The Claimant was arrested by federal authorities in connection with an alleged drug ring transporting contraband drugs across the border and past customs by means of on-track hi-rail vehicles. The Claimant was notified on August 1, 2003 by the Carrier that he had been found guilty of the charges and was being dismissed from service.

It is uncontested that the criminal charges against the Claimant were dismissed and the Claimant was reinstated to service. Thus, a portion of this claim relating to the Claimant's dismissal is moot and no longer a matter in dispute. It is also uncontested that the Claimant was provided full backpay for the time spanning his dismissal date until his date of reinstatement. However, the question raised by the Organization is whether the Claimant is entitled to pay for overtime, holiday and vacation time for the period during which he had been dismissed. The Organization asserts that he was entitled to said compensation. The Carrier contends that Rule 17(e) requires payment only for full-time regular hours.

Rule 17(e) states:

"If the charge against the employee is not sustained, it shall be stricken from the record. If by reason of such unsustained charge the employee has been removed from position held, reinstatement will be made and payment allowed for the assigned working hours actually lost, while out of the service of the railroad, at no less than the rate of pay of position formerly held or for the difference in rate of pay earned while out of service." (Emphasis added.)

The burden of proof rests with the Organization. Both sides have presented precedent to support their position. However, we find that the precedent presented by the Organization is insufficient to sustain the claim.

In Public Law Board No. 3012, Award 1, Referee Dolnick wrote:

“... It is a well established principle supported by numerous awards of the National Railroad Adjustment Board and Public Law Boards that an employee wrongfully deprived of work and does not actually work, is not entitled to penalties such as overtime pay and arbitraries. These latter penalties are payable only when work is actually performed.”

The parties to the Agreement called for compensation for “assigned working hours.” Had the parties chosen to include additional compensation such as overtime or other benefits, they could have done so. The Board therefore finds that the language of Rule 17(e) means that only those hours actually assigned are compensable; not those hours that are speculative. Thus, the Board concludes that the Carrier acted properly when it compensated the Claimant only for the regularly assigned hours.

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 21st day of March 2006.