

Form 1

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 40852
Docket No. SG-41103
11-3-NRAB-00003-090493**

The Third Division consisted of the regular members and in addition Referee Margo R. Newman when award was rendered.

PARTIES TO DISPUTE: (**(Brotherhood of Railroad Signalmen**
(Union Pacific Railroad Company

STATEMENT OF CLAIM:

“Claim on behalf of the General Committee of the Brotherhood of Railroad Signalmen on the Union Pacific Railroad:

Claim on behalf of K. W. Bland Jr., for 61.5 hours at his overtime rate of pay, account Carrier violated the current Signalmen’s Agreement, particularly Rule 16(A) when it failed to compensate Claimant for trouble calls on his assigned territory when he was wrongfully held out of service from March 12, 2008, through April 13, 2008, causing the Claimant numerous lost work opportunities. Carrier’s File No. 1504589. General Chairman’s File No. S-16(A)-947. BRS File Case No. 14214-UP.”

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.

This dispute raises the issue of whether an employee is entitled to compensation for lost overtime opportunities, occurring as a result of trouble calls on his assigned territory, while he was held out of service pending an investigation of a disciplinary offense that was later found not to have merit. The following provision of the Agreement is relied upon by the Organization:

“RULE 16 - SUBJECT TO CALL

- A. Employees assigned to regular maintenance duties recognize the possibility of emergencies in the operation of the railroad, and will notify the person designated by the Management of their regular point of call. When such employees desire to leave such point of call for a period of time in excess of two (2) hours, they will notify the person designated by the management that they will be absent, about when they will return, and, when possible, where they may be found. Unless registered absent, the regular assignee will be called, except when unavailable due to rest requirements under the Hours of Service Act, as amended by Public Law 94-348.”

The record reveals that the Claimant was issued a Notice of Investigation on charges of operating a company vehicle during off-duty hours for his own personal use with a minor and not wearing a seat belt. The Carrier alleged violations of four different Rules including one Conduct Rule which was a dismissible offense. The Claimant was withheld from service between March 12 and April 13, 2008, pending the results of the Investigation. The facts were found to be true, but only three of the Rule violations were upheld (not the Conduct Rule) and the Claimant was assessed Level 3 discipline (five-day suspension) which he served between April 14 and 18, 2008. The Claimant was returned to work on April 22, 2008, and was compensated for all straight time hours missed as a result of being held out of service between March 12 and April 13, 2008. He was not compensated for any of the trouble calls that occurred on his territory during that time period. This claim seeks compensation for 61.5 hours at the overtime rate associated with such trouble

calls. Evidence was introduced indicating that the Claimant had worked some, but not all, overtime during the months prior to being withheld from service.

The Organization argues that the Claimant was wrongfully withheld from service pending the Investigation of these relatively minor offenses, and that the appropriate make-whole remedy for the time he missed includes the overtime work related to the trouble calls on his territory that he had a contractual right to under Rule 16(A) and that he would have worked but for his improper removal from service, citing Third Division Awards 25601, 30987, 32414 and 33901.

The Carrier first contends that the Claimant was charged with a violation of a serious dismissible offense, permitting it to pull him out of service pending the results of the Investigation, which found him guilty of all charges except the one requiring dismissal. It distinguishes this case from ones in which an employee is found not guilty of the charged conduct. The Carrier asserts that by practice on this property and precedent, it is not obligated to pay the Claimant for overtime that may have been worked while he was out of service for a disciplinary matter due to its speculative nature, relying on Second Division Awards 9237, 10926, 11003; Third Division Award 31140; Public Law Board No. 2439, Award 17; Public Law Board No. 5531, Award 2; Public Law Board No. 3199, Award 29; Public Law Board No. 4599, Award 14; Public Law Board No. 4418, Award 26; Public Law Board No. 3994, Award 6; Public Law Board No. 3012, Award 1. It notes that the Claimant regularly marked off for personal reasons. The Carrier also argues that the Organization failed to sustain its burden of proving how the cited Rule was violated, because the Claimant was not assigned to his position while he was suspended. Finally, the Carrier contends that the claim is excessive with respect to the number of hours being sought by the Claimant in relation to the actual trouble calls on his territory worked during the relevant period.

A careful review of the record convinces the Board that, under the facts of this case, which are distinguishable from those relied upon by both parties, the Organization failed to establish that the trouble calls that the Claimant would have been eligible for under Rule 16(A) had he been regularly assigned to his position and not registered absent between March 12 and April 13, 2008, were a required part of a "make-whole" remedy for the Carrier's action in pulling him out of service pending investigation of charges that could have resulted in the Claimant's

dismissal from service. There is no dispute that the Carrier properly compensated the Claimant for all straight time hours he would have been scheduled to work during this time period. As noted in numerous Awards, including Second Division Award 11003, as well as Public Law Board No. 2439, Award 17; Public Law Board No. 3994, Award 6, the fact that the Claimant would have worked any (let alone 61.5 hours) overtime on trouble calls while simultaneously having the option to mark off or otherwise be unavailable for duty, is at best, speculative. While there are circumstances where missed overtime opportunities might not be speculative and would be appropriately included in a make whole remedy, this is not one such case. It has long been held that an employee wrongfully deprived of work is only entitled to penalties such as overtime for time actually worked, not for work not performed. See, e.g. Public Law Board No. 3012, Award 1. The Awards cited by the Organization do not require a different result because they do not deal with an employee being withheld for disciplinary purposes, but assignments to employees other than those with a contractual right to the work and whose availability was not challenged. For all of these reasons, the claim must fail.

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 11th day of January 2011.