

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

Award No. 41283
Docket No. MW-39282
12-3-NRAB-00003-060027

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

(Brotherhood of Maintenance of Way Employees Division -
(IBT Rail Conference
PARTIES TO DISPUTE: (
(Mississippi Export Railroad Company

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The Carrier violated the Agreement when it failed to call and assign Machine Operator P. Bolton to perform machine operator overtime service (operate tamper) on November 12, 13 and 14, 2004 and instead assigned Foreman C. Johnson (System File 1112040).
- (2) As a consequence of the violation referred to in Part (1) above, Claimant P. Bolton shall now ‘. . . be allowed thirty-two (32) hours and forty (40) minutes of pay at the Machine Operator’s time and one-half rate of \$29.205 for a total of \$954.03.’”

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 all times relevant to this dispute, the Claimant was assigned as a Machine Operator on the Mark III Tamper headquartered at Moss Point, Mississippi. His regular hours of assignment were 6:00 A.M. to 4:00 P.M. Monday through Thursday. Friday, Saturday and Sunday were his regular rest days.

On October 27, 2004, the Claimant signed a Waiver of Investigation and thereby accepted discipline in the amount of ten days, five of which were actual working days of suspension from Monday, November 8 through and including Monday, November 15, 2004. The remaining five days of discipline were deferred for six months.

The Carrier had work to be performed requiring the use of the Mark III Tamper on Friday, November 12, Saturday, November 13, and Sunday, November 14, 2004. The Carrier acknowledges that had the Claimant not been serving a disciplinary suspension, he would have stood for this work and would have been paid for the hours worked at the overtime (time and one-half) rate. Instead, Foreman C. Johnson performed the work in question and was paid 32 hours and 40 minutes at the overtime rate. The Organization now claims that the Claimant should be compensated at the overtime rate for the hours worked by Foreman Johnson.

The Organization argues that the effect of denying the Claimant the opportunity to work on his assigned rest days converted the discipline of five working days to eight working days. In support of its position, the Organization cited Third Division Award 40560. In that case, the claimant had received a five-day suspension that began with the start of his shift on Monday and ran through the end of his shift on Friday. Overtime work was available the following Saturday and Sunday and was assigned to an employee with less seniority than the claimant. The involved carrier denied the employee's claim for pay on the basis that he was not the "regular assigned employee." The Board, in sustaining the claim to the extent it was proven that a junior employee had worked the overtime, wrote:

“On these facts, the dispute turns on the meaning of ‘regular employee’ in Rule 24J. Shallenberger was a temporary, substitute replacement during the Claimant’s suspension. The Claimant was the employee who normally and routinely held the crew position consistent with his seniority. When his suspension ended sometime before the start of the February 19 overtime assignment, he had returned to his previous bid place and Shallenberger’s status became subordinate. Any other reading is irreconcilable with the common meaning of ‘regular,’ extends Claimant’s 5-day unpaid suspension into a seven days’ inability to earn wages and creates overtime limitations found nowhere in the Rules or established practice.”

The Carrier argues that it has had a past practice of denying overtime opportunities to employees during the course of a disciplinary suspension. It notes that the Organization failed to produce any examples of a contrary practice. The Organization responds to this argument by contending that the burden of proof in showing the existence of a past practice lies with the Carrier, inasmuch as it is an affirmative defense. It contends that the Carrier produced no evidence supporting its position that such a past practice exists. In fact, asserts the Organization, in 20 years there has been only one other disciplinary suspension imposed upon a member of this bargaining unit, and the issue of overtime work during that suspension did not arise.

The Board agrees with the Organization that the Carrier has the burden of proving the existence of a past practice, and we further agree that there is no evidence in the record of actual instances where employees were denied overtime work during the course of a disciplinary suspension. We cannot find, therefore, that a past practice exists. We have also been referred to no Rule in the Agreement that would restrict an employee’s right to overtime work under these circumstances. Accordingly, the only applicable Rule is the general seniority Rule which would entitle the Claimant to the work.

In issuing the Claimant his suspension, the Carrier specified that it was for five days. It identified the first and last days of the suspension. Within that time frame, there were five regular work days, but eight calendar days. The suspension

was not merely from November 8 through November 15; it was identified as being for five days. Obviously, the five days of the suspension were the days the Claimant was regularly scheduled to work. If the Carrier intended that he be ineligible for work on Friday, Saturday and/or Sunday, the suspension would effectively be for eight days. As was the case in Award 40560, that would be contradictory to the Claimant's agreement with the Carrier that he would serve only a five-day suspension. By denying the Claimant the opportunity to work those three days, the Carrier was in violation of the Agreement.

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 28th day of March 2012.