

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 41614
Docket No. SG-41317
13-3-NRAB-00003-100129**

The Third Division consisted of the regular members and in addition Referee Marty E. Zusman 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 J. Juarez for 85 hours at his overtime rate of pay, account the Carrier violated the Current Signalmen’s Agreement, particularly Rule 68(E) when it failed to fully compensate the Claimant backpay for all hours lost when he was held out of service between September 2, 2008 and September 25, 2008. Claimant was exonerated of all charges in connection with an investigation held on September 16, 2008. Carrier’s File No. 1512286. General Chairman’s File No. UPGC-86(E)-004. BRS File Case No. 14300-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.

The Claimant was pulled out of service relative to an EEOC charge on September 2, 2008. Subsequent to an Investigation on September 16, 2008, the Claimant was notified that the charges against him had not been sustained. Once the charges were dropped, the Carrier notified the Claimant that the charges would be expunged from his personal record and that he would be paid for all time lost as per Rule 68(e) which states:

“In the event the charge is not sustained, it will be stricken from the record and the employee reinstated if he has been removed from his position, and compensated for his net wage loss.”

The Carrier expunged all record of the incident and paid the Claimant backpay for all time lost.

The Organization argues that during the time that the Claimant was withheld from service, “his gang worked lots of overtime” due to Hurricane Ike, which hit Southern Texas. The Carrier did not fully compensate the Claimant when he was out of service; it only paid the Claimant the straight time wages that he lost; he was not paid for the 85 hours of overtime that he would have worked had he not been withheld from service. The Organization supports its claim by noting that the Carrier does not refute the fact that the Claimant had always accepted overtime on the gang over the several months that he worked. The Claimant submitted a statement asserting that, “Each time I was offered overtime work, I worked it. I would have worked this overtime if I had not been held out of service by the Carrier.” The Organization argues that this is a settled issue, because the Carrier knows when the gang worked overtime and could properly compensate the Claimant. Furthermore, Third Division Award 30987 put it best when it stated:

“It is past time to cease burdening the over-extended resources of this Board with such a claim. By now there should be no doubt that the proper ‘make whole’ remedy for lost overtime work opportunity is payment at the overtime rate. In short, Claimant was entitled to be made whole for the earnings he would have achieved but for Carrier’s admitted violation.”

The Carrier contends that it fulfilled its responsibility to the Agreement when it properly compensated the Claimant at the straight time rate of pay. It argues that there is no support for the request for overtime based on speculation. The Carrier

argues that the Organization failed to support its argument that the Claimant lost work, in that he did not work. The Carrier contends that Awards have long held that the proper rate of compensation for making a Claimant whole is to pay straight time and not overtime in addition to actual lost wages (Public Law Board No. 5531, Award 2; Public Law Board No. 2439, Award 17; Second Division Awards 11003, 10926 and 9237; Public Law Board No. 3199, Award 29).

The Board is aware that the Organization argues that its request for overtime is not speculative, but actual as in Third Division Award 30987. The Board does not agree. Third Division Award 30987 is not on point. It is neither on this property, nor speculative. In that Award, the Claimant should have been called to work five hours of overtime, but although entitled to the overtime, the Carrier violated his rights, assigned an improper employee and then paid straight time arguing that the Claimant never performed the service. There is no speculation in Third Division Award 30987. It is an overtime call. Therein the claimant actually lost overtime pay that he was entitled to receive.

This case does not directly involve overtime. The evidence in this record does not prove either that the Claimant would have been called for overtime, or that he would have performed the work. Nor does it show how the hours were claimed. The Organization presented the fact that "his gang worked lots of overtime" due to the hurricane when the Claimant was withheld from service, but what the Claimant would actually have performed is unknown, speculative, and has had a long list of Awards supporting the language of the Agreement to mean only the pay loss of his usual assignment (Public Law Board No. 3994, Award 6; Public Law Board No. 5531, Award 2; Public Law Board No. 3199, Award 29; Public Law Board No. 4418, Award 26). The Organization has not cited a list of Awards that support its position. As stated by Public Law Board No. 2439, Award 17 interpreting the issue, "Principally because of the speculative nature of requests such as this, it has long been the practice of Boards as well as Divisions of the National Railroad Adjustment Board to consider a proper payment for time not performed as pro rata rather than penalty pay."

Accordingly, the Board will not delve into the realm of equity, but rather will follow the language of the Agreement. Nothing in that language explicitly states that the Claimant is to receive assumed or potentially lost overtime, a calculation averaged or speculated as lost overtime. While the Claimant actually may have and theoretically did lose overtime, the Rule is payment for his normal service assignment. Therefore, the claim must be denied.

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 24th day of April 2013.