

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 19947
Docket Number SG-19595

Frederick R. Blackwell, Referee

PARTIES TO DISPUTE: (Brotherhood of Railroad Signalmen
(George P. Baker, Richard C. Bond, Jervis Langdon, Jr.,
(and Willard Wirtz, Trustees of the Property of
(Penn Central Transportation Company, Debtor

STATEMENT OF CLAIM: Claim of the General Committee of the Brotherhood of Railroad Signalmen on the former New York, New Haven and Hartford Railroad Company that:

Carrier pay to Assistant Signalman D. Tarasevich additional time equal to sixteen and one-half (16½) hours at his overtime rate and one and one-half (1½) hours at his double time rate because signal employees of New Haven seniority district were used on the Boston seniority district in connection with a derailment which occurred on March 22, 1970.

OPINION OF BOARD: The Carrier concedes that claimant should have been called to perform work on his rest day, and that claimant is entitled to pay for its failure to do so. Carrier's tender of pro rata pay has been declined, however, on the ground that if claimant had been called he would have earned overtime and also some double time pay.

The Petitioner alleges that the claim should be paid under the time limit provisions because, although dated within the time limits, the Carrier's initial denial letter was postmarked two days beyond the governing time limits. However, the record contains no evidence of the untimely postmark and, hence, there is no basis for concluding that Carrier violated the time limits. Thus, the sole issue before us is whether claimant should receive pay for work not performed at the pro rata rate or whether he should be paid at the overtime and/or double time rate which would have applied if he had performed the work.

Prior Awards on this issue are in conflict. We shall therefore examine the reasoning in Award 4616 (Carmody), which is representative of the straight time Awards, and Award 13738 (Dorsey), representative of the overtime authorities. In ruling for straight time pay in Award 4516, this Board stated:

"We come now to the matter of adjusted compensation. Claimant was deprived of the opportunity to earn on his regular assignment by action of the Carrier. The right to perform work is not the equivalent of work performed in so far as the overtime rule is concerned. Whether

"the overtime rate be construed as a penalty against the employer or as the rate to be paid an employe who works in excess of eight hours on any day, the fact is that the condition which brings either into operation is that work must have been actually performed in excess of eight hours. One who claims compensation for having been deprived of work that he was entitled to perform, has not done the thing that makes the higher rate applicable. . . ' (Award 4244) See also Award 2346 on penalties.

We conclude Claimant will be protected in his rights and adequately compensated and the Carrier adequately penalized for its default if Carrier is required to pay Claimant the equivalent of straight time at his Signalman's rate for time he was held away from and did not work his regular position and pro rata or straight time at Maintainer's rate for all of the time he was required to work the Maintainer's position."

In the contra ruling for overtime in Award 13738, the Board said:

"Had Claimants been called and performed the work involved, as was their contractual entitlement, they would have been paid, by operation of the terms of the Agreement, time and one-half for the hours worked. In like circumstances this Board has awarded damages at the pro rata rate in some instances, and the overtime rate in others. The cases in which the pro rata rate was awarded as the measure of damages, in a number of which the Referee in this case sat as a member of the Board, are contra to the great body of Federal Labor Law and the Law of Damages. The loss suffered by an employe as a result of a violation of a collective bargaining contract by an employer, it has been judicially held, is the amount the employe would have earned absent the contract violation. Where this amount is the overtime rate an arbitrary reduction by this Board is ultra vires. Therefore, we will sustain the claim for damages as prayed for in paragraph (2) of the Claim."

From our study of the foregoing and similar Awards, we perceive that the straight time Awards are based upon a distinction between the contractual right to perform work and the actual performance of work. The reasoning is that the overtime rate applies when the right to perform work is converted into the actual performance of work, because the contract so requires,

but that the overtime rate is not usable in the computation of damages when such right is not converted into actual performance, because the contract does not so require. In contrast the overtime Awards do not give any significance to this distinction, nor to the absence from the contract of a provision authorizing the use of the overtime rate in measuring damages when an employee's contractual right to perform work has been violated. Proceeding on the make whole theory of damages, these Awards simply hold that if overtime is involved, in whatever amount of pay the employee would have earned absent the contract violation, there is no reason for its exclusion in measuring damages.

Carrier urges adherence to the straight time rule in the "contract" cases, arguing that the overtime rule in the "make whole" cases is predicated upon the assumption that the employee would have worked had he been given the opportunity. This is not sound, Carrier says, because there is no guarantee that claimant would have worked had he been called, and to say otherwise would be pure supposition.

These contentions are not wholly without merit and Carrier's presentation in general is an impressive one. Also, we frankly acknowledge that there is a credible rationale to support each line of the conflicting authorities. We are concerned, though, that the straight time authorities are characterized by an undue absorption in the historical purpose of overtime, as well as a strained search of the contract itself to find specific guidelines on the measure of damages. Overtime rates evolved both from public laws and negotiation at the bargaining table, but we fail to see in this history any express or implied prohibition against taking the loss of overtime into account, along with the loss of straight time, when a Carrier's violation of an employee's contractual rights to work is under appraisal. Also, we know that many things are left unsaid in a collectively bargained agreement and that the measure of damages for a contract violation is one of the most common among them. On balance, therefore, we are skeptical about the rationale of the straight time authorities for we believe it may contain underlying defects which are absent from the overtime rationale. Accordingly, we shall adhere to the ruling laid down in Award 13738 and sustain the claim.

FINDINGS: The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds and holds:

That the parties waived oral hearing;

That the Carrier and the Employees involved in this dispute are respectively Carrier and Employees within the meaning of the Railway Labor Act, as approved June 21, 1934;

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That this Division of the Adjustment Board has jurisdiction over the dispute involved herein; and

That the Agreement was violated as conceded by Carrier.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

ATTEST:

A.W. Pauls
Executive Secretary

Dated at Chicago, Illinois, this 28th day of September 1973.