NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 20413
THIRD DIVISION Docket Number CL-20422

Joseph Lazar, Referee

PARTIES TO DISPUTE: (Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes
(Grand Trunk Western Railroad Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood (GL-7389) that:

(1) The Carrier violated the Agreement when, on April 24, May 1, 22, June 5, 12, 19, 26 and July 3, 1972, it required a regular assigned employee to suspend work during his regular hours to absorb overtime on Outbound Rate Clerk Mrs. R. W. Jeffrey's position and then allowed the resultant claim at the straight time rate instead of time and one-half rate.

(2) Outbound Rate Clerk Mrs. R. Jeffrey now be allowed the difference between straight time and time and one-half account of violation referred to in Part (1) of this claim.

OPINION OF BOARD: The Carrier concedes the contract violation and there is no dispute here over the facts. The only question before this Board is whether the instant claim should have been allowed at the straight time rate of pay, as paid by the Carrier, or at the time and one-half rate of pay, as claimed by the Organization.

Claimant was regularly assigned to the position of Outbound Rate Clerk in the Freight Office at Pontiac, Michigan, which position worked Tuesday through Saturday, with rest days of Sunday and Monday. On the claim dates involved in this case, which were Mondays, the Chief Clerk's position absorbed and performed the necessary duties of Claimant's Outbound Rate Clerk position. Effective Monday, July 10, 1972, the Claimant's work week was changed to that of Monday through Friday, with Saturday and Sunday as rest days and no further claims were submitted. During the progression of this claim on the property, the Carrier allowed the Claimant eight hours' pay at the straight time rate of the Outbound Rate Clerk's position for the claim dates involved herein.

We view the claim at the time and one-half rate of pay as one for compensatory damages and not as for punitive damages or as for liquidated damages. The Carrier here did not act blatantly in deliberate and willful violation of its Agreement. In good faith, error was committed and acknowledged in an effort to carry out the Management responsibility for efficient operation under the Agreement. Accordingly, we do not view

the facts in this case as posing a question of punitive damages designed to punish the Carrier for malicious or willful violation.

We do not view the Agreement as providing for liquidated damages in the present circumstances inasmuch as the Agreement is silent and makes no stipulation or provision for the breach here involved. Rule 51(e) provides for time and one-half for service "rendered" and Rule 44 concerns employees "notified or called to perform work" or "held on duty", but neither rule speaks directly to the present circumstances where no service is rendered, or where an employee is not notified or called to perform work, or where an employee is not held on duty. These rules contemplate compensation for service but are not designed to provide compensation for contractual breach, and therefore, in our view, do not constitute provisions for liquidated damages. In this connection, we have seriously considered the various settlements contained in the Carrier's submission, Carrier's Exhibits Nos. 1 through 6, wherein the Organization accepted settlement of particular claims on a straight time basis rather than time and one-half. In these settlements, the Parties recognized the requirement for particular and individual disposition of the specified claim there involved, and in doing so evidenced, in our opinion, the absence of a general or continuing agreement or understanding pertaining to the measure of compensation due an employee in the event of contractual breach. These settlements, in our opinion, do not constitute a liquidated damage agreement.

We view the nature of the claim before us, accordingly, as one for compensatory damages. Compensatory damages are a kind of damages awarded to compensate for actual losses sustained by reason of the contract violation. The purpose of compensatory damages is to put the injured party, insofar as money can do so, in as good a position as if the other party had performed the contract. Speculative or conjectural losses, or enrichment of a claimant, are not included in the doctrine of compensatory damages. Normally, in the making of agreements, parties contemplate the good faith performance of their promises, and it is silently understood that compensatory damages will lie in the event of breach. In the present case, the Carrier's payment of straight time rate appears to recognize this silent understanding. As stated in Award Number 19947, "...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."

In the light of the above analysis and discussion, the question here before this Board may be restated: Is the straight time measure of compensatory damages adopted by the Carrier in the instant case the correct measure of compensatory damages, i.e., to put the injured claimant in as

good a position as if the Carrier had performed the contract, or is the time and one-half rate asked by the Organization the correct measure of compensatory damages.

The doctrine of compensatory damages, it will be recalled, is not intended to compensate an employee who has not suffered a loss or injury, and it is not intended to enrich him for a conjectural or speculative loss. As stated in Award No. 13177, "Carrier should not be held responsible for damages which are speculative." The element of speculation is also recognized in Award Number 19947 in giving serious consideration to the Carrier's views therein, stating:

> "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."

It is in this context that we note and seriously consider the Carrier's letter of June 8, 1973, addressed to the General Chairman, stating:

> "Regarding your contention that the loss suffered by an employee as the result of an agreement violation, is the amount the employee would have earned absent the contract violation, I would like to point out that such theory, while sounding simple, is really of a hypothetically nature because there is no way of determining whether the claimant was available for the work claimed. This, in the opinion of the carrier is the basis of the wording of the rules involved in this case, which require that the employee actually works to be entitled to the punitive rate. It would be gross error to require punitive payments because hypothetically, the claimant <u>might</u> have been available to work."

The Carrier's views here are substantial and material in the application of the doctrine of compensatory damages to the facts in the concrete case before us. The record is clear, however, that Claimant was available for service on dates claimed. On November 15, 1972, the Director, Labor Relations, wrote to the General Chairman, in part, as follows:

"In view of the provisions of Rule 51(f) of the Clerks' Working Agreement and the holdings of the Third Division, N.R.A.B., Award No. 14903, the Carrier is agreeable to allowing this claim for eight hours pay at the pro rata rate of the Outbound Rate Clerks position for each Monday, commencing April 24, 1972, to July 3, 1972, on which Ms. Jeffrey's was available for service, with the exception of May 29, 1972.

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Clerk R. W. Jeffrey will be allowed payment of eight hours pay at the Outbound Rate Clerk's rate for April 24, May 1, 8, 15, 22, June 5, 12, 19, 26 and July 3, 1972, on the payroll check receivable on December 6, 1972."

In view of Claimant's availability for service on dates claimed, and in the absence of probative evidence establishing any doubt of Claimant's willingness to work on such dates, although there is no guarantee that Claimant would have worked had she been called, we think it appropriate to believe, as a prima facie presumption, that she would have worked and earned the time and one-half rate except for the breach of contract. Award No. 13738, quoted in Award Number 19947, stated:

"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."

We shall adhere to the ruling laid down in Award 13738 and Award 19947 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 Employes involved in this dispute are respectively Carrier and Employes within the meaning of the Railway Labor Act, as approved June 21, 1934;

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. Paulos
Executive Secretary

Dated at Chicago, Illinois, this 27th day of September 1974.

CARRIER MEMBERS' DISSENT TO AWARD NO. 20413 -
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Both parties agreed as to the pertinent rules involved. These rules, which were relied upon by the parties, contemplate that an employe must actually perform work in order to receive the punitive rate of pay.

This Board has issued many Awards, which have upheld the position of the Carrier, in the absence of any agreement provision supporting the penalty awarded. Also the practice on this Carrier over the years, which was accepted by the organization, is that in instances where the employe does not actually perform service payment is made at the straight time rate.

This is an erroneous Award and we dissent thereto.

H. F. M. Braidwood

P. C. Carter

W. B. Jones

G. L. Naylor

G. M. Youhn