

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 20820
Docket Number CL-20645

William M. Edgett, Referee

(Brotherhood of Railway, Airline and Steamship
(Clerks, Freight Handlers, Express and Station
(Employes
PARTIES TO DISPUTE: (
(Burlington Northern Inc.

STATEMENT OF CLAIM: Claim of the Burlington Northern System Board of Adjustment (GL-7522) that the Carrier:

1. Violated the Working Agreement, with an effective date of March 3, 1970, at Balmer Yard, Seattle, Washington, on June 28, 29, and 30, 1972, when it assigned Mr. James L. Eustis, Machine Operator, to fill a vacancy on overtime on the position of General Clerk, and failed to pay him at the time and one-half rate of his regular assignment, which is superior to the rate of the assignment filled.

2. Shall now be required to make payment of difference between the time and one-half rates that were allowed and the time and one-half rate of his regularly assigned position.

OPINION OF BOARD: Claimant filled a vacancy on overtime on a position which paid a rate lower than that of his regular assignment. Carrier paid him at the rate of the position which he filled. The claim is for payment at the rate of his regular assignment.

Determination of the claim depends principally on the application of the following Rules:

Rule 36 Overtime

E. SERVICE ON REST DAYS. Service rendered by employes on assigned rest days (other than Sunday) shall be paid for under the call rule unless relieving an employe assigned to such day in which case they will be paid for eight (8) hours at the rate of the position occupied or their regular rate, whichever is higher. Where Sunday is one of the rest days, service on Sunday will be paid for as provided in Rules 37 and 38. Regular assigned rest days shall not be changed except after such advance notice to the employe as is required under applicable rules.

Rule 37 Assignment of Overtime

C. When it becomes necessary to fill short vacancies by working overtime, such overtime will be worked by available incumbent or incumbents of the classification where the vacancy exists by calling the senior available employe from that shift who is off duty that day. If unable to fill the vacancy from this source, calls will then be made in seniority order of available qualified employes from the other shifts in that classification who can be doubled or are off duty that day. If unable to fill by this method, available qualified senior employes from other classifications in the same immediate office will be called.

Rule 51 Preservation of Rates

A. Employes temporarily or permanently assigned to higher rated positions shall receive the higher rate while occupying such positions; employes temporarily assigned to lower rated positions shall not have their rates reduced.

Rule 51 makes it clear that if Claimant was temporarily assigned within the meaning of that Rule his rate would not be reduced while so assigned. Carrier argues that Rule 51 contemplates maintenance of the employee's regular rate only in those instances when the employee is required to work the position by action on the part of the Carrier. Carrier further argues that the requirement of Rule 36(e), which specifically requires payment at "the rate of the position occupied or their regular rate, whichever is higher" for service on rest days, indicates that the parties did not intend to apply Rule 51(a) in situations such as that found here. If the employee's argument that Rule 51 does apply here were accepted, Carrier argues, there would have been no need for incorporating Rule 36(e) into the Agreement and it is only because the framers of the Agreement recognized that Rule 51(a) would not provide payment at the higher rate that provision for payment on rest days was made. Carrier also relies on a decision of Special Board of Adjustment No. 336, Case No. 11. In that case, the Board denied the claims of employees who had augmented the mail handler force at St. Paul Union Depot. The record showed that the employees that performed the work did so on a voluntary basis because the quantity of mail was beyond the capacity of the regular mail handler force. The employees had asserted that Claimants were called and assigned on an overtime basis. The Board said: "Since Rule 51(a) applies only to employees' 'assigned', and since the Claimant must establish the facts necessary to support his claim, this claim cannot be sustained."

The employees point out that the Claimants, in Award No. 11 of SBA No. 336, were not "filling vacancies" as that term is defined in the Agreement. The distinction made in that case, and which has application to this case, was that the employees in question had not been assigned to work at SPUD as mail handlers by Carrier.

A point strongly emphasized by the employees is that the assignment flows directly from the provisions of Rule 37(c) and because of that fact it could in no way be considered to be voluntary service and it must also be considered to be service to which the employee was assigned by the Carrier. That is so, the employees say, because the Carrier is directed by the Rule to make overtime assignments in a specific order or sequence. When the employees' turn in that sequence appears he is then assigned by reason of the Rule. The fact that Carrier has permitted employees to turn down the overtime assignment and has also instituted a system by which they indicate in advance whether they desire to be called in their turn, does not change the contractual basis of the assignment. The employees urge, therefore, that an employee who works an overtime assignment to which he is entitled and called under the provisions of Rule 37, must necessarily be considered temporarily assigned to such a position within the meaning of Rule 51(a).

The Referee sitting with the Board in this case recognizes that the result reached here is contrary to that reached in Award No. 18652. There are differences in the two cases. However a primary reason for the different result reached here is the emphasis placed upon the application of Rule 37(c) of the parties' Agreement. Carrier, by that Rule, has agreed to assign employees to overtime work in a certain order. An employee who accepts the assignment in his turn does not volunteer and create an unanticipated obligation on Carrier's part. The groups of employees with a right to the work are established by contract. Acceptance of the offer of overtime work is not a voluntary act which places Carrier in the position of extending an unanticipated benefit to the employee. The Agreement governs both the assignment (Rule 37(c)) and the rate of pay (Rule 51(A)). The fact that employees indicate in advance those assignments they will not accept and Carrier's agreement to permit refusal of the assignment does not change its contractual nature. Rule 51(a) does not mean that Carrier must coerce the employee, or that the employee may not be permitted an option to refuse the assignment. Where, as here, the temporary assignment is one to which the employee has a contractual right, his acceptance of that right is by Carrier's direction and authority and is a temporary assignment within the meaning of Rule 51(a). As such, the rate of pay attached to it is specified by the Rule.

Carrier argues that Rule 36(e) by its provision for payment of at least the regular rate on rest days, indicates an intention to exclude days which are not rest days from that requirement. Under all of the circumstances present here that argument is not conclusive. It is a point which Carrier has argued artfully and which has been given much thought. As everyone recognizes the Agreement has to be read as a whole. When that is done Rule 36(e) cannot be accorded the meaning which Carrier ascribes to it.

For the reasons stated the claim must be sustained.

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.

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 30th day of September 1975.