

NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 25601  
Docket Number MW-25858

James Robert Cox, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes  
(  
(The Atchison, Topeka and Santa Fe Railway Company

STATEMENT OF CLAIM: Claim of the System Committee of the Brotherhood that:

(1) The Agreement was violated when Section Foreman A. R. Lopez was not used to perform overtime service on his assigned section territory on October 13 and 31, 1982 and November 21, 1982 (System File 40-33-8225/11-1580-220-351).

(2) Section Foreman A. R. Lopez shall be allowed eight (8) hours and twenty (20) minutes of pay at his time and one-half rate.

OPINION OF BOARD: Claimant Lopez, contending that he was improperly denied overtime opportunities October 13, 31 and November 21, 1982, seeks 8 hours and 20 minutes pay at time-and-one-half.

An employee with less seniority than Claimant worked on a call out basis for about an hour October 13th adjusting a switch and the 31st of October performed spacing and adjusting of head block ties for 1-1/2 hours. November 21st this junior employee worked three hours overtime.

The claim is for 4-hour call-outs (2 hours and 40 minutes at the time-and-one-half rate) for the 13th and 31st and three hours at the overtime rate November 21st, a total claim of 8 hours and 20 minutes at time-and-one-half.

Carrier's bypass of Lopez for the overtime assigned is not disputed, only the remedy.

The Carrier contends that loss of a right to work overtime should not be treated as the equivalent of actually performing overtime work under the overtime and call-out Rules, reciting a number of Awards including Fourth Division Award 3333 and Third Division Awards 10776, 5708, 5929 and 5967. Carrier asserts that Claimant should be paid only on a pro rata basis and not at an overtime rate since the hours were not actually worked on that basis. It argues that overtime work is to be compensated with a premium payment only when the overtime is actually worked and that Claimant is entitled to be paid at a straight time rate for the hours actually worked by the junior employee improperly assigned since payment at time-and-one-half would constitute a penalty against the Carrier. Third Division Award 4244 states, "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."

The Organization, however, lists more than 75 Awards, the most recent of which are 15909, 16254, 16295, 16481, 16748, 16811, 16814, 16820, 17748 and 17917, which support its position that the remedy should be the earnings Claimant would have received had the improper assignment not been made.

Better reasoned opinions remedy an overtime violation with a make whole payment. Here the evidence shows that Claimant, if he had worked, would have earned 8 hours and 20 minutes at time-and-one-half. There is no element of retribution or punishment in such a remedy. Carrier and Claimant are placed in the same position they would have been in had Carrier not violated the Agreement. Payment would have been made at the overtime rates. It is Claimant who would be penalized if he were reimbursed at straight time or only for actual hours worked. The payment to the junior employee is the result of the Carrier's improper assignment and does not make a remedy which makes Claimant whole a penalty.

Lopez is to be paid 8 hours and 20 minutes at time-and-one-half.

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;

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

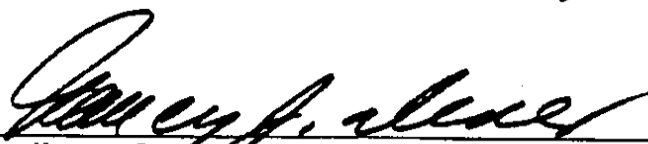
That the Agreement was violated.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD  
By Order of Third Division

Attest:

  
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 22nd day of August 1985.

