NATIONAL RAILROAD ADJUSTMENT BOARD

THIRD DIVISION

Award Number 26235
Docket Number MW-26365

Charlotte Gold, Referee

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(National Railroad Passenger Corporation
(Amtrak) - Northeast Corridor

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

(1) The Agreement was violated when Truck Driver L. Holt was not used to perform overtime service on his regularly assigned position as truck driver on Gang Z-072 on July 16, 1983 (System File NEC-BMWE-SD-734).

(2) As a consequence of the aforesaid violation, Truck Driver L. Holt shall be allowed an additional ten and one-half (10 1/2) hours of pay at his one-half time rate."

OPINION OF BOARD: There is no dispute over the fact that Carrier violated Rule 55 of the Agreement when it assigned a Truck Driver from another Gang to Truck Driver overtime with Gang Z-072 on July 16, 1983, instead of utilizing Claimant, who was on a rest day. What is at issue is whether Claimant is owed 10 1/2 hours at the overtime rate, as alleged by the Organization, or whether he should be compensated at the straight time rate, as contended by Carrier.

Carrier points out that Rule 64 of the Agreement (Claims for Compensation-Time Limits for Filing) makes no provision for allowance of claims at the punitive rate based on merit consideration. At the same time, the Overtime Rule stipulates that the time and one-half rate is paid only for time worked. Further, there is a long-standing practice, dating back to the inception of the Agreement in 1976, to compensate employes at the straight-time rate under the circumstances present here, as evidenced by Award 14 of Public Law Board 3932 involving the parties to this dispute.

The Organization contends that Rule 55 was clearly violated and that there are numerous Third Division Awards wherein the time and one-half rate was allowed for work lost. In particular Third Division Award 25601 notes that where a Claimant would have earned the overtime rate had he worked, payment at the time and one-half rate is appropriate and would not constitute a penalty payment based on retribution or punishment. Claimant is placed in the same position he would have been in had Carrier not violated the Agreement. The Organization maintains that the fact that other disputes have been settled on the property at the pro rata rate cannot be construed as acceptance by the Organization of Carrier's position.

This Board has carefully reviewed the record of this case, including the Agreement language in question, as well as applicable Awards. We must conclude that given the language in question, past practice on the property, and the existence of a prior Award involving the parties to this dispute, Carrier's position is the more persuasive. By custom, history, and practice, overtime has not been paid in this instance for time not worked.

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 not violated.

A W A R D

Claim denied.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 29th day of January 1987.

LABOR MEMBER DISSENT
TO
AWARD 26235 - DOCKET MW-26365
(Referee Gold)

The Majority depended upon three (3) reasons to deny the claim (1) "past practice on the property", (2) "the Agreement language in question" and (3) "the existence of a prior Award involving the parties to this dispute". Each of these reasons is invalid and therefore the award must be considered invalid.

The Majority's central reason appears to be that, "*** By custom, history, and practice, overtime has not been paid in this instance for time not worked." The problem with this reason is that the practice in question had no proper application to this dispute and should not have been given any consideration. It is not disputed that, in the past, claims for the overtime rate on this property have been settled on a compromise basis for the straight time rate. However, as this Board has so frequently recognized, compromise settlements made for pragmatic reasons have no precedential value (Awards 4534, 6964, 9639, 12383 and 16544). In fact, findings of the type in Award 26235 which recognize such settlements as binding precedent will only encourage the parties to avoid pragmatic settlement of individual cases and thereby increase the already heavy burden on this Board. Reason No. 1 is clearly invalid.

The Majority's second reason is that "the Agreement language in question" supports the Majority's findings. This reasoning is simplistic. Although the Majority has not clearly stated its reasoning, we assume the "language in question" is the language in Rule 44 which mandates overtime

pay for "Time worked in excess of eight (8) hours". Apparently, the Majority concluded that the time claimed in this case was not worked by the claimant and therefore he had no claim for pay at the overtime rate. This reasoning is simplistic because compensation at the straight time rate is also paid for time worked, i.e., employers customarily do not pay employes for not working. Yet, neither the Carrier or this Board has had any problem with allowing claims for pay at the straight time rate when the Agreement was violated during straight time hours. The reason for this, as this Board recognized so clearly in Award 19947, is that the measure of damages is not to be found in the Agreement language. It is so well known as to be axiomatic that many things are left unsaid in collective bargaining agreements and the measure of damages for a contract violation is one of the most common among them. Instead, the proper measure of damages is the amount the employe would have earned absent the contract violation. That principle was eloquently articulated by the renowned Referee Dorsey in Award 13738 where he stated:

> "*** 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. ***" (Emphasis in original)

The language of Rule 44 does not support the Majority's decision and therefore Reason No. 2 is invalid.

The Majority's third reason is that Award 14 of Public Law Board No. 3932 serves as controlling precedent. This reason is also invalid. That award is virtually devoid of any explanation or rationale on the pertinent issue. Moreover, the brief explanation that is presented, i.e., "*** The prevailing weight of railroad arbitral authority holds that the punitive rate is not available for work not performed. ***", is not supported by objective evidence and is contrary to both the most recent awards of the Third Division and the historical awards on the Carrier's property. Contrary to Award 14 of Public Law Board No. 3932, the most recent awards of the Third Division held:

AWARD 25501:

"As to the number of hours claimed, the Organization properly seeks those hours worked by any one of the junior employes which would have been available to the Claimant if he had been recalled. The propriety of the claim at premium rate is well established in the overwhelming majority of awards of this Division."

AWARD 25601:

"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." (Emphasis in upper case in original)

AWARD 25968:

"Also in dispute is the amount of time worked by the other employe. Records presented by the Carrier show that he worked nine hours overtime on December 26-27, not 14 as claimed by the Organization. The claim will be sustained to this extent, at the time-and-one-half rate in keeping with the predominant practice on this Division."

From a historical perspective, it must be noted that Rules 44 and 55 of the current Amtrak Agreement were taken virtually verbatim from Rules 4-C-1 and 4-E-2, respectively, of The Pennsylvania Railroad Company Agreement effective December 16, 1945. Early in the history of that Agreement The Pennsylvania Railroad -- Pennsylvania-Reading Seashore Lines Maintenance of Way System Board of Adjustment interpreted the pertinent rules and held:

"Decision No. 433.
Docket No. 563.
Applies to: Rules 4-E-1 and 4-E-2.

September 19, 1957.

THE PENNSYLVANIA RAILROAD--
PENNSYLVANIA-READING SEASHORE LINES
MAINTENANCE OF WAY SYSTEM
BOARD OF ADJUSTMENT

THE PENNSYLVANIA RAILROAD
Buckeye Region

SUBJECT

Claim of Mr. M. F. Rutherford, Trackman, headquarters Circleville, Ohio, District No. 1, Buckeye Region for pay of three (3) hours at his overtime rate of pay account of employe from adjoining section being called and performing overtime work (Snow Duty) at Washington Court House, Ohio on date November 19, 1955. Territory to which Mr. M. F. Rutherford is regularly assigned.

* * *

DECISION

"Since the facts in this case reveal that there was ample time to call the claimant to clear the switches involved for Train ZB-12, the claimant will be allowed two hours and forty minutes at the rate of time and one-half."

It is abundantly clear that the limited reasoning that exists in Award 14 of Public Law Board No. 3932 is not sound. As this Board held in Award 4516, "*** an award cited as a precedent is no better than the reasoning contained within it, especially where awards in conflict with it exist. ***" Therefore, Reason No. 3 is invalid.

It is clear that each of the reasons cited in support of Award 26235 is invalid. Hence, it is equally clear that Award 26235 is invalid and without precedential value. Therefore, I dissent.

D. D. Bartholomay
Labor Member

CARRIER MEMBERS' RESPONSE
TO
LABOR MEMBER'S DISSENT
AWARD 26235, DOCKET MW-26365
(Referee Gold)

It is obvious that it is the Labor Member's Dissent in this case which is invalid and not the Award. The reasons for dissenting are clearly self-serving, and completely evade the facts in this case.

We take no exception to the Labor Member's initial point that while claims for the overtime rate on this property have been settled on a compromise basis for the straight time rate, this Board has frequently recognized that compromise settlements have no precedential value. In fact, it is generally accepted that such settlements should not be introduced so as not to discourage future attempts to resolve claims informally during local handling. See Fourth Division Award 3829.

But in the instant case, Carrier documented the Organization's acceptance of the Carrier's position that in the case of a proven Agreement violation, it is firmly established that the pro rata rate is the proper rate of compensation for work not performed.

For example, in the Assistant Vice President Labor Relation's June 18, 1984 declination letter addressed to the General Chairman concerning Claim NEC-BMWE-SD-756, he quoted the Organization's Statement of Claim as follows:

> "That, on Sept. 26, 1983, Foreman Frank Bruno was allowed to work eight hours overtime providing flag protection by taking track out of service for contractors working on the property at MP 49 at Clarksville, N.J. (#1 track).

* * * * *

> "Therefore, following out the intent and spirit of the effective MW Agreement, claim is made for eight hours overtime at the Foreman's rate." (Emphasis added)

The Assistant Vice President Labor Relations' response continued to read in pertinent part as follows:

> "In the Organization's letter of March 19, 1984, which advanced this case to our handling, the claim was adjusted to eight hours at the pro rata Foreman rate." (Emphasis added)

In other words, the Majority correctly viewed the evidence set forth in the record as being illustrative of the Organization's practice of reducing on appeal, after exception was taken, its request from the punitive rate initially sought to the straight time rate. By no stretch of the imagination can the above-mentioned letter be construed to be a compromise settlement.

The Labor Member's second reason for dissenting seeks to totally ignore Agreement language and its importance in claim and grievance handling. The Majority examined Rule 64, which governs the handling of claims for compensation, and concluded that it contains no provision for allowance of claims at the punitive rate based upon merit considerations. Likewise, it was abundantly clear to the Majority that Rules 44, 45, 46 and 49 provide for payment at the time and one-half rate only for "time worked" or "work performed."

With respect to the Labor Member's final reason for dissenting, the undersigned submit that Award 14 of Public Law Board 3932 does serve as precedent on the property and is fully supported by a plethora of Awards addressing the issue of pro rata versus punitive payment for time not

worked. Award 14 was based on the same documented past practice present in the instant case. Furthermore, citation of Decision No. 433 on a predecessor railroad is without any historical significance because of the consistent claim handling practice on Amtrak and the fact pattern in that decision. What the Labor Member fails to point out is that the controlling rule in Decision No. 433, Rule 4-E-1 (Call Rule), required payment of two (2) hours and forty (40) minutes at the punitive rate. The reasoning in Award 14 of Public Law Board 3932 is perfectly sound and logical, and the Majority likewise clearly recognized this fact.

Based on the complete facts analyzed by the Majority, Award 26235 is wholly proper and of precedential value. Further the Award is fully supported by the well established doctrine of stare decisis without which the arbitration of issues such as this would be unending.

Michael C. Lesnik
M. C. Lesnik

Martin W. Fingerhut
M. W. Fingerhut

Robert L. Hicks
R. L. Hicks

P. V. Varga
P. V. Varga

James E. Yost
J. E. Yost