NATIONAL RAILROAD ADJUSTMENT BOARD

Award Number 26534

THIRD DIVISION Docket Number MW-27258

Edwin H. Benn, 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 Carrier violated the Agreement when it assigned junior Repairman P. Nelson to perform overtime service on November 25 and 26, 1984, instead of using Repairman K. Gruver, who was senior, available and willing to perform that service (System File NEC-BMWE-SD-1231).

2. Claimant K. Gruver shall be allowed an additional eight and one-half (8 1/2) hours of pay at his one-half time rate."

OPINION OF BOARD: Both Claimant and P. Nelson held the position of Repairman and were assigned to the same CWR gang headquartered in camp cars at Hunter Yard, Newark, New Jersey. Claimant and Nelson had the same tour of duty. Claimant had greater seniority than Nelson.

The Carrier required overtime work from 10 P.M. on November 25, 1984, until 6:30 A.M. on November 26, 1984, for the transportation of equipment. Although Claimant was available to perform the work, the Carrier assigned the overtime work to Nelson. Claim was filed by the Organization under Rule 55 (which gives preference in this case to the employee with greater seniority for the overtime assignment) seeking pay at the time and one-half (or punitive) rate for the 8 1/2 hours of work. The Carrier paid 8 1/2 hours at the straight time (or pro rata) rate.

The Carrier concedes that it improperly bypassed Claimant in favor of the junior employee for the overtime assignment. Therefore, the only issue before us is the remedy for the improper assignment of overtime to the junior employee. The Carrier urges the pro rata rate. The Organization argues for the punitive rate. Both parties respectively rely upon the differing lines of authority for this often litigated issue. The Carrier directs us to those Awards holding that the Agreement requires that work must actually be performed before time and one-half is paid and if no work is performed, the pro rata rate should be paid. See e.g., Third Division Awards 13697, 18942, 19884, 22071; Fourth Division Award 4516. The Organization points to those Awards using the rationale that time and one-half is appropriate under the make whole theory of damages in that the employee should be compensated for the rate the employee would have received had the employee performed the work and had the Carrier not violated the Agreement. See e.g., Third Division Awards 13738, 19947, 20413, 21767, 25601.

In this case, we need not choose which line of authority is the "better reasoned" or "prevailing" view. Other factors are present that lead us to conclude that the Organization's position must be rejected.

First, although dissented to by the Organization in both cases, the issue in this case has been recently decided in Third Division Award 26235 and Public Law Board 3932, Award No. 14 holding that the appropriate remedy for improper assignment of overtime work under this Agreement on this property is payment at the pro rata rate. For us to agree with the Organization in this case, we would be required to ignore those prior Awards. The Organization's arguments in this case essentially reiterate the basic arguments made in the prior cases. We can find no compelling reason in this record to disregard the prior Awards that have decided this identical issue and have given finality to the dispute. See Fourth Division Award 4527.

Second, as set forth in Third Division Award 26235, we cannot ignore a rather substantial history exhibited by the parties since the establishment of the 1976 Agreement wherein numerous similar disputes in the past have been resolved by payment at the pro rata rate. We do not view the numerous dispositions of prior disputes in the fashion accomplished by the parties under the circumstances of this case as the type of settlement agreements that should not be considered by us out of a danger that such consideration might discourage the parties from entering into settlements in the future. Further, we find no support in the Agreement as urged by the Organization that precludes our consideration of those prior dispositions. Rules 64(b) and (c) do provide a non-precedent effect for allowed or disallowed claims. However, those provisions apply only to the Carrier's failure to give timely notice and reasons for a disallowance of a Claim (Rule 64(b)), or the Organization's failure to timely appeal from the disallowance of a Claim (Rule 64(c)). Here, the record indicates that although some of the dispositions presented by the Carrier fall within the ambit of Rule 64(c) wherein no appeal was taken by the Organization from a denial of a claim made for the punitive rate, numerous other dispositions where payment was made at the pro rata rate appear to have been mutually agreed to by the parties ("[i]t is understood that payment as described above will constitute full and final settlement of the instant claim") and therefore exist by reason other than a party's failure to take action. Therefore, Rules 64(b) and (c) are not applicable to our consideration of those prior dispositions agreed to by the parties on this issue. Finally, we have been directed to no language in the dispositions that precludes subsequent consideration of those dispositions for the purposes offered by the Carrier herein.

Taking into account those two factors, we are compelled to conclude that since 1976 an interpretation has evolved by litigation and practice wherein the remedy for an improper overtime assignment under this Agreement on this property is to provide for payment in accord with the Carrier's position at the pro rata rate rather than the punitive rate. We therefore believe the prior Awards and the practice of the parties require that the Claim be denied.

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

Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 30th day of September 1987.