

The Third Division consisted of the regular members and in addition Referee Joseph A. Sickles when award was rendered.

PARTIES TO DISPUTE: ((Brotherhood of Maintenance of Way Employees
(Duluth, Missabe and Iron Range Railway Company

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

(1) The Agreement was violated when Mr. J. Rowe was not permitted to perform overtime service on September 8, 1985 (Claim J49-85).

(2) Because of the aforesaid violation, Mr. J. Rowe shall be allowed an additional eight (8) hours of pay at his one-half time rate."

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employes within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

The Claimant was called to work overtime at 3:00 P.M. on the day in question and was compensated at the time and one-half rate. At the completion of eight hours of overtime (11 P.M.) the Claimant was relieved from duty and the Carrier replaced him with a junior mechanic to perform the remaining overtime work, which continued until 7 A.M. on the next day. Because the Claimant was sent home after working eight hours, he submitted a Claim for violation of Rule 20. The Port Manager agreed that the Claim was valid and he authorized the Claimant to be paid an additional eight hours at the straight time rate. The Claimant then claimed the difference between the overtime and the straight time rate for the eight hours in question. That request was denied since Rule 17 only authorizes overtime rates of pay for "time work", i.e., the overtime rate must be earned by virtue of working the time.

The Carrier concedes that the Claimant was erroneously refused an eight hour work shift on the day in question and had he been permitted to work said shift he would have been paid at the premium rate. Nonetheless, as stated above, the Carrier states that premium rates shall be paid only for

"time work" since no rule of the Agreement provides for premium rate when no work has been performed.

This dispute presents yet another opportunity for a Referee to review the numerous Awards cited by both parties which have reached diametrically opposite conclusions as to whether or not straight time or punitive rate should be paid when a Carrier precludes an employee from performing work which would have produced the overtime rate had the work been performed.

The Carrier stresses the fact that its Agreement does not provide for the premium rates since that is reserved to situations where there is time worked. In our view, that argument loses sight of the fact that it was the Carrier's violation of the Agreement which precluded the Claimant from performing the work. Indeed, one could argue that straight-time is only payable when an employee "works" yet the Carrier is prepared to pay straight-time when the employee performed no work at all due to its erroneous interpretation of the Agreement.

We have reviewed the more recent decisions of the Third Division in this regard, and find that they continue to reach opposite results. However, in the view of this Board, the positions espoused in Third Division Awards 25601 and 27335 should be controlling and, therefore, we will sustain the Claim.

A W A R D

Claim sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest:


Nancy J. Decker - Executive Secretary

Dated at Chicago, Illinois, this 2nd day of February 1989.