Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD Award No. 28240
THIRD DIVISION Docket No. CL-27128
90-3-86-3-307

The Third Division consisted of the regular members and in addition Referee Edward L. Suntrup when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Elgin, Joliet and Eastern Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10099) that:

1. Carrier violated the effective Telegraphers' Agreement when it called Extra Operators R. Blunt and C. Voss from the extra list on May 4 and 12, 1985, respectively, and then unilaterally and without notice, deducted five hours from the amount of time claimed, thereby paying them improperly.

2. Carrier shall now compensate claimant Blunt an additional five hours' pay at the straight time rate of Operator-Barrington for June 10, 1985, and shall further compensate Extra Operator C. Voss an additional five hours' pay at the straight time rate of Operator-Barrington for June 10, 1985."

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 Organization filed separate, but similar Claims on behalf of the Claimants for the dates of May 4 and 12, 1985. These Claims are presented to the Board for adjudication under the same docket.

Both Claimants were Extra Board Employees called to work at Barrington, Illinois. Both put in for a full day's pay. The Carrier unilaterally deducted five (5) hours' pay for the dates in question, "from subsequent earnings." The Claims filed state that "there is no provision in our agreement for a three-hour day. The minimum day's pay is eight hours. The only provision allowing for three hours' pay is Article 41 which applies to overtime calls for employees outside regular hours."

When the Claims were denied by the Chief Train Dispatcher he alleged, first of all, procedural defect on grounds that the "claims were not presented within the time limits provided for in Article 44." The Rule states that "...claims or grievances must be presented in writing by or on behalf of the employee involved ....within 60 days from the date of the occurrence...." The Claims state that payment for the relief requested was withheld "on or about June 10, 1985." The Claims were filed on July 19, 1985. There was no violation of Article 44 by the Organization.

On merits the Claims were denied because the "Claimants were called to perform work not continuous with the regular work period....(and)...there was no regular position assigned to work at Barrington on claim dates." According to the Carrier, both employees were advised beforehand that they would be allowed three (3) hours "pay for this unassigned work and were ...working on a 'call' basis."

The resolution of the instant dispute centers on whether the call of the Extra Board Employees was covered by Article 41 as the Carrier argues, or whether it was covered by some other provisions of the Agreement.

These pertinent sections of the contract state the following:

"ARTICLE 25 - WORK FIRST-IN, FIRST-OUT

Ability and qualification being sufficient, extra employes will, so far as practicable, work first-in, first-out, but cannot claim extra work in excess of forty hours in their workweek, if a following or junior extra employe who has had less than forty hours work in his workweek is available. Extra employes must accept the work to which they are entitled under this article."

"ARTICLE 31 - BASIC DAY

Eight (8) consecutive hours, exclusive of meal period shall constitute a day's work, except that where two (2) or more shifts are worked eight (8) consecutive hours shall constitute a day's work."

"ARTICLE 32 - THE 40-HOUR WORKWEEK

* * * * *

(H) Rest Days of Extra Employes

To the extent extra or furloughed men may be utilized under this agreement, their days off need not be consecutive; however, if they take the assignment of a regular employe they will have as their days off the regular days off of that assignment.

Extra employes assigned to fill a temporary vacancy on a regular position will take the status as to workweek, compensation, and rest days of the employe they are relieving, and will work on the regular workdays of such vacancy at straight time rate for each day other than the rest days of the assignment, as long as said vacancy exists, even if same results in such extra employe working in excess of forty hours in a calendar week and even if there may be another extra employe who works less than forty (40) hours in that calendar week.

(i) Beginning of Workweek

The term 'workweek' for regularly assigned employes shall mean a week beginning the first day on which the assignment is bulletined to work, and for unassigned employes shall mean a period of seven consecutive days starting with Monday.

(j) Work on Unassigned Days

Where work is required by the carrier to be performed on a day which is not a part of any assignment, it may be performed by an available extra or unassigned employe who will otherwise not have 40 hours of work that week; in all other cases by the regular employe."

"ARTICLE 36 - REPORTING AND NOT USED

An extra employe called and not used shall be allowed eight (8) hours' pay at the rate of the position called for."

"ARTICLE 41 - NOTIFIED OR CALLED

(a) Employes notified or called to perform work not continuous with the regular work period shall be allowed a minimum of three (3) hours at time and one-half rate for the first three (3) hours of work or less. For all time worked over three (3) hours time and one-half will be allowed on the actual minute basis. Each call to duty after being released shall be a separate call.

(b) Employes required to report for duty before the assigned starting time and who continue to work through the regular shift shall be paid three (3) hours at time and one-half rate for the first three (3) hours of work or less and at time and one-half rate thereafter on the actual minute basis for the time required to work in advance of their regular starting time."

As a preliminary point the Carrier argues that it made clear to all employees called to work at Barrington that they must fill out forms which clearly showed that they were working on a "call basis." These forms which were filled out on the days in question by the Claimants are found in Carrier's Exhibit F attached to its Submission. Since it is application of these forms, and what they imply, to Extra Board Employees which is precisely the nature of the dispute before the Board in this case the forms themselves must be viewed as conjecture on the part of the Carrier rather than evidence. The Carrier cannot resort to its own interpretation of its actions as justification for those same actions.

The Organization argues that the Agreement contains no provisions permitting part-time work and that when Extra Board Employees are assigned to work, they are assigned to work a basic day as outlined in Article 31. The Organization states that this interpretation of Article 31 is supported by Article 36 which holds that if Extra Employees are called and "not used" they still shall be allowed "eight (8) hours' pay." Further, according to the Organization, Article 32(j) covers the type of situations both of the Claimants found themselves in when they were called to work on what the Carrier calls "unassigned days." This Article states that such work "may be performed by an available extra...employee who will otherwise not have 40 hours of work that week." This was exactly the condition of the Claimants, according to the Organization.

The Carrier, on the other hand, argues that since there was no regular position "assigned to work at Barrington Station" it could call whomever it wished under the Call Rule and pay the minimum of three (3) hours at overtime. According to the Carrier, the "Claimants did not supplement the regular work force or work on a regular workday and no definite assigned starting times were involved."

The Board observes that the conditions the Carrier describes are those covered by Article 32(j) and the Carrier exercised its rights under this Article by calling the Claimants as Extra Board Employees. Even if the Carrier had not worked the Claimants, after calling them, it would still have been obligated to pay them eight (8) hours' pay under Article 36. The Carrier, however, argues that this did not make any difference since it interpreted what Article 32(j) calls "work...to be performed on a day which is not part of any assignment" as overtime work under Rule 41. The Carrier argues, further, that if the Agreement really means what the Organization is arguing it means then they would never have put on the bargaining table, in 1977 after filing a Section 6, the following language to be added to Article 36:

"Eight (8) consecutive hours or less, exclusive of the meal period, shall constitute a day's work for which eight (8) hours' compensation shall be allowed except that where two (2) or more shifts are worked eight consecutive hours shall constitute a day's work."

The Carrier is correct when it argues that the introduction of such language would have eliminated the dilemma created by the instant Claims by explicitly requiring the Carrier to pay Extra Employees a full eight (8) hours' pay irrespective of how many hours they worked after a call. As such, this language would have clearly and unambiguously eliminated a potential situation where an Extra Employee would be paid a full eight (8) hours for not working at all but only the actual hours at straight time rate for what time is worked. If the Carrier is right in this case then the Organization is now trying to get from this Board what it was not able to get at the bargaining table since the Carrier did not agree to put such language into the contract. If the Organization is right in its arguments in this case before this Board, the 1977 proposed language would simply have eliminated the necessity to file Claims such as the instant ones since the 1977 language in question, but explicitly states rights and privileges already inherent in the Agreement anyway.

After studying the pertinent language of the Agreement the Board cannot find where it provides for part-time work at pro rata for Extra Board Employees called for work, whether it be to fill regular assignments, or work which is not part of any assignment as was the case here. On the other hand, the Agreement clearly gives the Carrier the right to call Extra Board Employees to cover either type of eventuality. But, does it permit the Carrier to interpret its compensation obligations to Extra Board Employees under Article 41 and thus pay them the overtime minimum, rather than eight hours pro rata? While the Agreement is not as clear on this point as might be wished, which is why the Organization ostensively introduced the language it did during the 1977 negotiations, a combination of the provisions found in Articles 31, 32 and 36 spell out privileges of Extra Board Employees which, in the view of the Board, are consistent with the instant Claims. Absent provisions dealing with part-time days, and since Extra Board Employees can be called to do work which is not part of any assignment, and since they are to receive full day's wages even if they do not work at all, the logic of the language of the Agreement suggests that as a corollary it follows that Extra Board Employees should also be paid a full day's wages even if they work less than a full day.

Since the Carrier originally interpreted its actions as protected under Article 41 it is unclear why it then decided to pay the Claimants at straight time rate. When it attempted to correct this at the highest level of handling by then offering to pay the Claimants at overtime rate, the Organization refused such settlement. For the Organization to have accepted such settlement would have been to admit that the original Claims were in error. However, for the Carrier to have been consistent in its position, it should

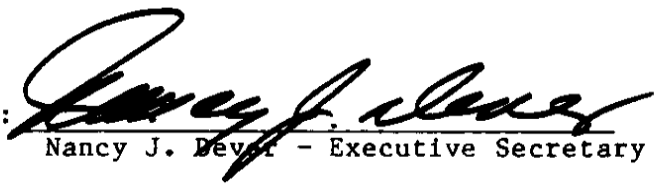
have simply corrected its error and have paid the Claimants at overtime rate for the minimum three hours. It never did this. Since it did not do this the Carrier leaves this Board with the factual conclusion that it was not really Article 41 which was the basis for its actions in the first place, since that is an overtime provision, but rather that it somehow had the right to pay Extra Board Employees only for the hours they were called to actually work under the conditions at bar. The Agreement supports no such arrangement. The Agreement was violated and the Claims are sustained in full. Each Claimant shall be paid five (5) hours' pay at straight time rate.

The Board has restudied various arbitral precedent in this industry dealing with application of basic day rules comparable to Article 31 here at bar. Those Awards generally deal with employees on unassigned, furloughed or extra status who are called to work regular positions and/or to work positions which supplement the workforce and can be distinguished from the facts of the instant case (See Third Division Awards 1803, 13155, 15504 inter alia).

A W A R D

Claims sustained.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Attest: 
Nancy J. Dever - Executive Secretary

Dated at Chicago, Illinois, this 11th day of January 1990.

CARRIER MEMBERS' DISSENT
TO
AWARD 28240, DOCKET CL-27128
(Referee Suntrup)

The rationale for the Majority's sustaining Award is set forth as follows:

> "Absent provisions dealing with part-time days, and since extra board employees can be called to do work which is not part of any assignment, and since they are to receive full day's wages even if they do not work at all, the logic of the language of the Agreement suggests that as a corollary it follows that extra board employees should also be paid a full day's wages even if they work less than a full day."

The difficulty with the Majority's syllogism is that the major premise is erroneous. The Majority posits its conclusion on its belief that employees "receive full wages even if they do not work at all." Such position is based upon Article 36 of the Agreement which the Majority recites as follows:

> "Article 36 - Reporting and Not Used
>
> An extra employe called and not used shall be allowed eight (8) hours' pay at the rate of the position called for."

The fact of the matter, however, is that Article 36 of the parties' Agreement does not read the same as quoted above. Instead, it provides:

> "Article 36 - Reporting And Not Used
>
> An extra employe who reports for work and is not used shall be allowed four (4) hours' pay at the rate of the position called for and stand first out."

In this case, the Claimant was paid three hours at the time and one-half rate. He thus was paid more than the amount called for under Article 36.

To state that the Majority Award has no precedential value, however, may be going too far. We believe that the reasoning of the Majority clearly demonstrates that if it had gotten the facts correct, its analytical approach would have resulted in a denial Award. To that extent, the Award may prove beneficial in future disputes involving this issue.

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