Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 28272
Docket No. CL-28501
90-3-88-3-322

The Third Division consisted of the regular members and in addition Referee Herbert L. Marx, Jr. when award was rendered.

PARTIES TO DISPUTE: (Transportation Communications International Union
(
(Chicago and Illinois Midland Railway Company

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood (GL-10286) that:

1. Carrier violated the Agreement when, on the date of September 26, 1987, it called Ms. K. A. Stauthammer furloughed clerk to protect extra clerk position at Havana, Illinois working her from 4:00 a.m. until 8:00 a.m.; then released her and only compensated her for four (4) hours.

2. Carrier's action is in violation of Rule 37 of the Agreement between the parties.

3. Carrier shall now be required to compensate Ms. Stauthammer four (4) hours pay at the pro rata rate of Yard Clerk, Havana, Illinois for September 26, 1987 which represents the difference between four (4) hours allowed and that of compensation due, eight (8) hours at the pro rata 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, a furloughed Clerk, was called to protect an Extra Clerk assignment commencing at 4:00 A.M., September 26, 1987. Upon completion of her assignment at 8:00 A.M., the Claimant was released from duty. The Carrier compensated her for four hours. It is the Organization's contention that the Claimant should have received eight hours' pay.

The Organization relies on Rule 37, Day's Work, particularly paragraph (a), which reads as follows:

> "(A) Eight (8) consecutive working hours exclusive of the meal period shall constitute a day's work at points where one shift is employed."

In this case, there was "one shift employed."

Previous Awards have supported the view that Rule 37(a) requires payment of eight hours even where an employee is called to work for less than eight hours (on a non-punitive time basis). Such was held in Third Division Award 25504, where the Rule was virtually identical to Rule 37(a) here. It was similarly held in Third Division Award 26539, although that Award significantly noted:

> "Extra and unassigned employees must be compensated eight (8) hours absent an agreement that Carrier could call them for part-time vacancies." (Emphasis added.)

Here, Rule 37 contains a further specific provision which, according to the Carrier, sanctions the use of a recalled furloughed employee for less than eight hours' pay. This is Rule 37(c), which reads as follows:

> "(c) Regular assigned employes shall receive one day's pay within each twenty-four (24) hours, according to location occupied or to which entitled, if ready for service and not used or if required on duty less than eight (8) hours as per location, except on assigned rest days and holidays. This rule shall not apply in cases of reduction of forces nor where traffic is interrupted or suspended by conditions not within the control of the Carrier."

This provision was negotiated by the parties for this particular Agreement. There is no showing that such language is included in the Rules referred to in other Awards sustaining similar claims.

Rule 37(c) must be given meaning. It cannot be assumed that the parties merely intended it as a redundancy to Rule 37(a). Here, the Rule states which employees ("regularly assigned") shall receive one day's pay "if required on duty less than eight (8) hours," with certain exceptions not applicable here.

The Board concludes that, under this modifying provision, the parties clearly intended to define the conditions under which an employee receives a full day's pay for working fewer than eight hours. This logically leads to the conclusion that others (such as furloughed employees recalled to other than a regular assignment) are outside the one day's pay benefit provision.

Any ambiguity between the general Rule 37(a) and the specific Rule 37(c) may be at least partly resolved by examination of past practice in identical situations on the property. The Organization has been unable to demonstrate either payment or claims settlement in the manner here proposed.

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 28th day of February 1990.

LABOR MEMBER'S DISSENT TO

AWARD 28272, DOCKET CL-28501

(REFEREE MARX)

The Majority Opinion has erred in the case at bar and has issued a decision which is contrary to the weighted authority on the subject within the industry including Third Division Award 25504 written by the same Neutral.

The issue in dispute is not something new and has been adjudicated many times in the past sustaining the Organization's position. The Board has repeatedly ruled that the Agreement does not allow for making any distinguishable difference between furloughed employes and regularly assigned employes being called for extra work. In either instance the employe is entitled to eight (8) hours pay. The same logic and reasoning applied in this instance and should have been followed.

Unfortunately the Majority Opinion latched on to Rule 37 (c) which has been recopied within the Award and misapplied it's language to this argument. They decided that because it talked only about regular employes it somehow meant that furloughed employes were excluded The trouble with that logic is that paragraph (c) of Rule 37, Day's Work did not exclude furloughed employe from being guaranteed eight (8) hours pay for being called for extra work, instead it guaranteed that regular assignments will have no more than one eight (8) hour shift within any twenty four (24) hour period. The Majority found an exception within the rule that does not exist.

Award 28272 carries no precedential value and it is palably wrong and requires strenuous dissent.

William R. Miller

William R. Miller

March 6, 1990

DATE